JR-2020-LON-001530

In the Upper Tribunal (Immigration and Asylum Chamber) Judicial Review

In the matter of an application for Judicial Review

The King on the application of
(1) Kamaledin Ibrahim KH Sherif
(2) Samira Mohamed Younes
(3) Amel K I Sherif
(4) Mohamed K I Sherif
(5) Ibrahim K I Sherif
(6) Mawadh K I Sherif

Applicants

and

Secretary of State for the Home Department

Respondent

ORDER AND REASONS

BEFORE Upper Tribunal Judge O'Callaghan

HAVING considered all the documents lodged on behalf of the parties, and having heard from Sonali Naik KC and Shivani Jegarajah, instructed by AMZ Law, for the applicants and Zane Malik KC, instructed by Government Legal Department, for the respondent

AND UPON the handing down of judgment on 29 October 2024

IT IS ORDERED THAT:

1. The application for Judicial Review is dismissed.

2. As the parties are not agreed as to the issue of costs:

   i. The applicants are to file and serve written costs submissions, running to no more than four pages, **no later than 12 noon on Monday 11 November 2024**

   ii. The respondent is to file and serve written costs submissions, running to no more than four pages, **no later than 12 noon on Monday 18 November 2024**.

3. The applicants' application for permission to appeal to the Court of Appeal is refused.

Reasons for refusing permission to appeal

(1) The applicants advance five grounds of appeal.

(2) At the core of this claim is the respondent's conclusion that the first applicant exercised fraud in respect of a TOEIC test taken in February 2012. The first applicant wishes for the respondent to re-examine her position and either (1) conclude that he

did not exercise fraud, or in the alternative (2) permit him the opportunity to 'clear his name' by means of a statutory appeal before the First-tier Tribunal (Immigration and Asylum Chamber). The alternative wish is adversely impacted by the judgment of the Court of Appeal in *Mujahid v First-tier Tribunal (IAC)* [2021] EWCA Civ 449; [2021] 1 WLR 3404, at [18]-[21], from which permission to appeal was refused by the Supreme Court (27 May 2022) and addressed at [50], [68] and [75] of the Upper Tribunal judgment. The identification of the law in *Mujahid* is, ultimately, the answer to the Applicants' case as to fairness in the decision-making processes and the denial of a statutory appeal "so that the Principal [or first] Applicant could have a proper and fair opportunity to clear his name".

(3) *Ground 1*: The reasoning of a judge when granting permission to apply for judicial review is not determinative of the issues arising. Upper Tribunal Judge Kebede granted permission on 15 December 2020 reasoning, *inter alia*, that it was arguable that issues of fairness arose in the first applicant not being given an opportunity to have his challenge to the allegation of deception considered by the respondent. Judge Kebede did not have the benefit of the identification of the law provided in *Mujahid*. It is unarguable that the aspirational agreement reached between the parties when filing a draft consent order, subsequently approved by the Upper Tribunal 19 March 2019, was that the issue as to TOEIC fraud would only be considered if the first applicant succeeded in any appeal on the basis that he had not committed such fraud. The identification of the law in *Mujahid* addresses fairness. It was Parliament's intention that the first applicant did not enjoy a statutory appeal right in the circumstances arising in this matter.

(4) *Ground 2*: This challenge amounts to a disagreement with the Upper Tribunal's conclusion. The human rights claim remained outstanding until it is concluded, either by a grant of leave, an unchallenged refusal of leave, a successful appeal, or an unsuccessful appeal. As noted by the Upper Tribunal at [56] and [57] the parties have differing perceptions as to the mutual – aspirational – commitments identified by the recital to the 2019 consent order. The Upper Tribunal concluded that there was no requirement for the respondent to reconsider her October 2017 decision refusing the first applicant settlement on TOEIC fraud grounds when she granted the applicants leave to remain in 2020, at [74]

(5) *Ground 3*: The Upper Tribunal was invited by the applicants in oral submission to consider the recital to the consent order as establishing the joint intentions of the parties that the first applicant enjoy a statutory appeal right in respect of the TOEIC fraud allegation. The applicants took time to address this contention, and consequently it has been addressed with care in the judgment. The contention was advanced separately to the concession that the terms of the recital were not a constituent part of the consent order. As addressed in the judgment, the respondent reasonably considered the human rights application and granted leave to remain. She was not required at that time to revisit her refusal to grant the first applicant settlement.

(6) *Ground 4*: It is understood that this ground is concerned with the application for disclosure made after the conclusion of the hearing, as no complaint was made as to disclosure during the hearing itself, save for whether certain documents accompanying an initial application had been returned to the applicants. This is addressed by the Upper Tribunal at [85]-[89]. It is correct that the applicants did not advance a bad faith submission. It is not said in the judgment that they did. The Upper Tribunal considered the bad faith requirement of its own motion when considering whether the respondent was accurate in referencing in her decision of 28

April 2023 that she had considered documents before her. It is appropriate to observe [89] of the judgment.

(7) *Ground 5*: The respondent's reasoning was cogent, adequate and lawful in a public law context.

(8) The Upper Tribunal appreciates the care taken by counsel in drafting the grounds of appeal on behalf of the applicants. However, the grounds do not establish that there is any properly arguable point of law, nor do they raise an important point of principle or practice.

D O'Callaghan
Upper Tribunal Judge
Immigration and Asylum Chamber
29 October 2024

The date on which this order was sent is given <u>below</u>

For completion by the Upper Tribunal Immigration and Asylum Chamber

Sent / Handed to the applicant, respondent and any interested party / the applicant's, respondent's and any interested party's solicitors on (date): 30/10/2024

Solicitors:
Ref No.
Home Office Ref:

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a point of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3).

Case No: JR-2020-LON-001530

IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Field House,
Breams Buildings
London, EC4A 1WR

Tuesday 29 October 2024

Before:

UPPER TRIBUNAL JUDGE O'CALLAGHAN

- - - - - - - - - - - - - - - - - - -

Between:

THE KING
on the application of
(1) KAMALEDIN IBRAHIM KH SHERIF
(2) SAMIRA MOHAMED YOUNES
(3) AMEL K I SHERIF
(4) MOHAMED K I SHERIF
(5) IBRAHIM K I SHERIF
(6) MAWADH K I SHERIF

Applicant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- - - - - - - - - - - - - - - - - - -

Ms S Naik KC
Ms S Jegarajah
(instructed by AMZ Law), for the applicants

Mr Z Malik KC
(instructed by the Government Legal Department) for the respondent

Hearing date: 14 November 2023

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J U D G M E N T

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Judge O'Callaghan:

A. Introduction

1. The substantive issue raised in this claim is whether the respondent acted lawfully in granting the applicants' limited, as opposed to indefinite, leave to remain by a decision dated 17 July 2020. Consideration of this issue is primarily focused on the circumstances of the first applicant, Mr Kamaledin Ibrahim Sherif, hereinafter referred to as Mr Sherif.

2. Additionally, the Upper Tribunal is required to consider a decision dated 28 April 2023, identified by the respondent as "supplemental" to her July 2020 decision.

3. At the outset I express my gratitude to the legal representatives, both solicitors and counsel, for the high quality of the oral and written submissions, as well as the presentation of various bundles of documents and authorities, which has greatly assisted the Tribunal. There has been delay in this judgment. An explanation has been provided to the parties and their representatives.

B. The claim in outline

4. At various times the applicants were granted permission to amend their grounds.

5. The claim now before the Upper Tribunal is a public law challenge to the July 2020 decision granting the applicants limited leave instead of indefinite leave to remain and an attendant challenge founded upon a failure to give proper and lawful consideration of the same.

6. The applicants were granted permission to challenge the "supplementary" April 2023 decision, sent to four of the applicants. The respondent decided not to rescind an earlier decision dated 31 October 2017 refusing Mr Sherif settlement on the grounds of fraud perpetrated by him when he undertook his Test of English for International Communication ("TOEIC") on 22 February 2012. The respondent did not oppose the grant of permission.

7. By amended grounds dated 9 May 2023 the applicants advance two public law challenges. The grounds as advanced at the hearing can properly be summarised as follows:

    i. The decision to only grant leave to remain under the ten-year route to settlement was conveyed by the July 2020 decision and maintained by a pre-action protocol response dated 23 October 2020:

a. There was a failure to lawfully consider representations and accompanying documents submitted to the respondent on 25 March 2019 consequent to an agreed consent order arising in earlier judicial review proceedings;

b. The purpose of the consent order was to permit Mr Sherif to be afforded an in-country right of appeal where he could address an allegation of fraud in securing a TOEIC certificate; and

c. Consequent to enjoying no opportunity to "clear his name" in respect of the allegation of fraud, Mr Sherif may be adversely affected when applying for naturalisation:

ii. The supplementary decision letter is unlawful:

a. The respondent adopted an inadequate and unlawful consideration of the evidence provided by Mr Sherif demonstrating his command of the English language and his bona fides in respect of the TOEIC test he undertook in February 2012;

b. An unlawful approach was taken to the expert report of Christopher Stanbury, dated 12 April 2023.

8. At the hearing, the applicants submitted that the supplementary decision unlawfully failed to abide by relevant policy and there was an accompanying failure to exercise discretion.

C. Relevant facts

9. The applicants are nationals of Libya. They are a family comprising two parents and four adult children.

10. The personal and educational history of Mr Sherif is relied upon by the applicants in these proceedings. He was born in Libya and thereafter resided in the United States of America as a child for approximately six years whilst his father attended university. Early elementary school years fall within this period. He returned to Libya with his family when aged approximately nine years old and enrolled in a private English-language school. He moved to Switzerland when aged twenty-one and studied at the European University, where the medium of instruction was the English language. Upon graduating he returned to Libya and worked as an accountant for a United States-based company. English was the primary language of the company, and much of the company's written and oral work was conducted in English. Mr Sherif subsequently set up companies in Malta on whose behalf he conducted trade deals and undertook contract negotiations in English.

11. Mr Sherif visited the United Kingdom on several occasions between 2001 and 2005. He then secured a business visitor's visa and again visited this country. Whilst here on a visit he was awarded a TOEIC certificate from Educational Testing Service

("ETS") having attended a test centre at the European College for Higher Education in February 2012.

12. He was granted entry clearance as a Tier 1 (Entrepreneur) Migrant and entered the United Kingdom on 22 April 2012 with leave valid until 20 August 2015. He was subsequently granted leave to remain as a Tier 1 (Entrepreneur) Migrant until 6 October 2017.

13. An in-time application for indefinite leave to remain as a Tier 1 (Entrepreneur) Migrant was made by Mr Sherif under paragraph 245DF of the Immigration Rules, which was recorded by the respondent as being received on 2 August 2017.

14. By a decision dated 31 October 2017 the respondent refused the settlement application, concluding that Mr Sherif failed to meet the requirements of paragraph 245DF(c) of the Rules with reference to Appendix A and paragraph 245DF(b) with reference to paragraph 322(2), the latter being concerned with general grounds of refusal. Two reasons were given for refusal:

    i. Mr Sherif submitted a TOEIC certificate when applying for entry clearance in 2012. ETS subsequently informed the respondent to the effect that the TOEIC certificate relied upon was fraudulently obtained, and so the respondent considered Mr Sherif to have used fraud when making his original application to enter the United Kingdom; and

    ii. Mr Sherif had not obtained sufficient points under the Points-Based system by which Tier 1 (Entrepreneur) Migrant applications were assessed. The respondent concluded that Mr Sherif had not demonstrated that he had spent the specified continuous period lawfully in the United Kingdom as he had secured entry clearance by use of a fraudulently obtained TOEIC certificate.

15. The respondent's decision did not give rise to a statutory right of appeal to the First-tier Tribunal.

16. On 1 December 2017, the respondent maintained her decision following administrative review.

17. Mr Sherif challenged the respondent's October 2017 decision by judicial review proceedings (JR/499/2018). The primary challenge was directed at the failure by the respondent to provide an in-country right of appeal with reliance placed upon the judgment of the Court of Appeal in *Ahsan & Others v Secretary of State for the Home Department* [2017] EWCA Civ 2009; [2018] Imm AR 531.

18. Later, the parties agreed a draft consent order which the Upper Tribunal sealed with approval on 19 March 2019. There was no order as to costs. It is appropriate that I observe that at this time the applicants were represented by different legal representatives to those engaged on their behalf in these proceedings.

19. The recital to the order:

> "UPON the Respondent accepting that the Applicant has made a human rights claim which, if refused, will attract an in-country right of appeal to the First-tier Tribunal, subject to the exercise of certification powers under section 94 of the Nationality, Immigration and Asylum Act 2002;
>
> AND UPON the Applicant undertaking to submit full particulars relating to his claim that removal would breach his human rights within 28 calendar days from the date of this sealed consent order;
>
> AND UPON the Respondent agreeing to issue a new decision within 3 months from the date any representations are received from the Applicant or if no submissions are received from the Applicant, within 4 months from the date this order is sealed by the Tribunal, absent special circumstances;
>
> AND UPON the Respondent agreeing that if the Appellant [sic] succeeds in any appeal on the basis that he did not commit a TOEIC fraud then, in the absence of some new factor justifying a different course, the Respondent will rescind his decision of the 31 October 2017 and Administrative Review decision of 1 December 2017;
>
> AND
>
> (i) Treat the Applicant as being an in time applicant since 31 October 2017 and 1 December 2017 (and any earlier period as may be established) as if he had [section] 3C [Immigration Act 1971] leave, subject to there being no other periods where the Applicant was an overstayer;
>
> (ii) Grant the applicant as reasonable opportunity, being not less than 60 days, to submit an application for further leave;
>
> (iii) Waive any fee or charge (including health surcharge) that might be payable for making such an application."

20. Mr Sherif submitted further evidence to the respondent on 25 March 2019. Included within this evidence was a witness statement from Mr Sherif detailing, *inter alia*, the circumstances of his attending the test centre in February 2012. Witness statements were provided by Mr Sherif's wife and two of their children. Correspondence with ETS was provided confirming that Mr Sherif sought a recording of the English language speaking test. By a letter sent to Mr Sherif's former legal representatives on 25 January 2018, ETS Global GV confirmed that a protocol was agreed with the respondent and upon Mr Sherif confirming his agreement the company would provide voice recordings to him and to the respondent.

21. In the meantime, on 5 October 2017 Mr Sherif's wife and two of the children, who were minors at the time, applied for leave to remain on human rights (article 8

ECHR) grounds. The respondent refused the application by a decision dated 26 February 2019.

22. Whilst Mr Sherif pursued his judicial review challenge, he applied along with his wife and three of their children for leave to remain on human rights (article 8) grounds. The application was dated 14 December 2017 and refused by a decision dated 20 February 2019.

23. On 19 January 2018, the eldest child, Ibrahim, applied as an adult for leave to remain on human rights (article 8) grounds. The application was refused by a decision dated 20 February 2019.

24. All members of the family appealed their respective decisions on human rights grounds to the First-tier Tribunal (Immigration and Asylum Chamber). The appeals of all bar Ibrahim came before First-tier Tribunal Judge Lucas sitting at Taylor House on 30 April 2019. By a decision dated 4 June 2019, Judge Lucas allowed the appeals to the extent that the human rights claims be reconsidered by the respondent and new decisions issued, consequent to the challenged decisions not being in accordance with the law. The respondent did not appeal the decision of Judge Lucas. For completeness, I observe Ms Naik KC's acceptance before me that the First-tier Tribunal had no jurisdiction to allow the appeal on "not in accordance with the law" grounds consequent to the substitution from 20 October 2014 of section 84 of the Nationality, Immigration and Asylum Act 2002 by section 15 of the Immigration Act 2014.

25. Ibrahim's appeal came before First-tier Tribunal Judge Brewer (as she then was) sitting at Taylor House on 4 December 2019. By a decision promulgated the next day, Judge Brewer allowed Ibrahim's appeal on article 8 grounds, observing that he had been lawfully present in the country for a significant period and his family were awaiting a fresh decision from the respondent. Consequently, she concluded "there is no proportionality" in seeking to remove him from this country.

26. Upon considering the December 2017 human rights claim, the respondent granted Mr Sherif, his wife and three of their children leave to remain under paragraph GEN.3.2 of Appendix FM to the Rules by a decision dated 17 July 2020. They were informed that this decision was the commencement of a ten-year route to settlement. On the same day, Ibrahim was granted leave to remain on article 8 private life grounds. He was also informed that he was subject to the ten-year route to settlement.

27. The family served a pre-action protocol letter on 30 September 2020. The letter focused upon the contention that the respondent was in breach of the consent order sealed on 19 March 2019 and had failed to give effect to the decisions of Judge Lucas and Judge Brewer.

28. On 28 April 2023 the respondent served the applicants with a decision letter identified as "supplemental" to the decision letter of 17 July 2020 and the pre-action response dated 23 October 2020. The letter was addressed to Mr Sherif and his wife, as well as to Mohamed and Mawadh.

D. Procedural history

29. This claim was filed with the Upper Tribunal on 16 October 2020. The respondent filed her acknowledgment of service and summary grounds of defence on 6 November 2020.

30. By a decision sent to the parties on 18 November 2020, Upper Tribunal Judge Perkins refused the applicants permission to apply for judicial review following a paper consideration. The applicants filed a notice of renewal on 27 November 2020.

31. Upper Tribunal Judge Kebede granted the applicants permission to apply for judicial review at an oral renewal hearing held on 11 December 2020.

32. The applicants filed and served several documents, including witness statements from Mr Sherif and his brother, Mr Abdu-Hakim Ibrahim El Sherif, on 19 January 2021.

33. The respondent filed detailed grounds of defence on 22 February 2021, accompanied by various documents including the revised ETS TOEIC Lookup Tool.

34. The parties agreed to stay proceedings pending the substantive hearing in *DK and RK*. The Upper Tribunal agreed by a sealed order dated 18 March 2021 to the stay of proceedings pending the expected decision in *DK and RK (ETS: SSHD evidence, proof) India* [2022] UKUT 112 (IAC) which was promulgated on 25 March 2022.

35. The applicants applied for the stay of proceedings to be lifted by an application filed on 1 November 2022. The stay was lifted by an order sent to the parties on 4 November 2022.

36. The applicants filed a paid application on 12 April 2023 seeking permission to amend the grounds of claim to rely upon an expert report of Mr Christopher Stanbury. I granted permission for the applicants to amend their grounds of claim, save for the omission of certain identified words, by an order sent to the parties on 18 April 2023. The applicants subsequently filed amended grounds of claim dated 19 April 2023 in accordance with directions.

37. The applicants filed further amended grounds of claim on 9 May 2023, with the claim being amended to challenge the respondent's decision of 28 April 2023. Permission to rely upon the further amended grounds was granted by an order of 4 August 2023.

E. The case for the applicants

38. Ms Naik and Ms Jegarajah submit that the respondent's decision to grant Mr Sherif limited leave, instead of settlement, on 17 July 2020 was unlawful, unreasonable and unfair considering the intended consequences of:

(i) the consent order dated 19 March 2019 arising in a challenge to the refusal of indefinite leave to remain dated 31 October 2017;

(ii) the acknowledgment that Mr Sherif's children cannot be removed and are on a path to settlement under the Immigration Rules; and

(iii) The recognition that refusal of limited leave to remain and indefinite leave to remain on grounds of suitability is discretionary and not mandatory in any event.

39. Ms Naik acknowledged that Mr Sherif sought leave to remain under the Appendix FM family life route by his application of December 2017. However, he had previously made an application for indefinite leave to remain which was refused on 31 October 2017 and the order of March 2019 concerned the public law challenge to these decisions. Accordingly, consideration as to a grant of settlement should have been undertaken by the respondent especially as six years had passed from the application being made and there having been three years of judicial review proceedings.

40. The applicants contend that upon considering disclosed documents, no consideration was given to granting indefinite leave at the time of the July 2020 decision, nor was the relevance of the terms of the March 2019 order identified and considered.

41. In this context, it was submitted that no reasons were given as to why the respondent took the decision to only grant limited leave. Before the decision-maker was significant evidence presented by Mr Sherif addressing the allegations of TOEIC fraud.

42. Ms Naik submitted that the respondent's decision of April 2023 was a substantive further decision to refuse to grant Mr Sherif indefinite leave to remain, and so was not a "supplementary" decision. Its purpose was solely to seek to provide reasons for the otherwise unreasoned decision in 2020 to grant limited leave. Reliance was placed upon *Caroopen v Secretary of State for the Home Department* [2016] EWCA Civ 1307; [2017] 1 WLR 2339 where the Court of Appeal gave guidance as to the respondent's practice of issuing supplementary decision letters to clarify, provide further detail about, or deal with new material concerning, a previous decision under challenge.

43. She contended that the April 2023 decision conflicts with the July 2020 decision where the respondent no longer relied on the reasons raised in the previous rejection of the same human rights claim in February 2019. In the July 2020 decision, reliance on R-LTRP 1.1(d)(i) of the Rules as to suitability was found to be outweighed by the article 8 respect for private and family life, the provisions of GEN 3.2 of the Rules concerned with proportionality and exceptional circumstances. Consequently, it was unreasonable to again rely upon the TOEIC fraud as the basis of refusing leave.

44. There was a failure by the respondent to apply her guidance in "*Educational Testing Service (ETS): casework instructions*" version 4.0 (18 November 2020) confirming that the use of an invalid TOEIC certificate in a previous application is a relevant consideration, but it is not a mandatory ground of refusal.

45. In addition, the April 2023 decision failed to address the intended remedy set out in the March 2019 order or to consider Judge Brewer's decision.

F. The case for the respondent

46. Mr Malik KC addressed the respondent's defence. He observed that matters set out in the recital of a consent order are not strictly contractual in nature. Consequently, the only order made by the Upper Tribunal on 19 March 2019 was to allow Mr Sherif to withdraw his judicial review claim with no attendant costs.

47. Neither Judge Lucas nor Judge Brewer considered or found that Mr Sherif did not commit a TOEIC fraud. Accordingly, no question of rescinding the decisions made on 31 October 2017 and 1 December 2017 arise because of those judicial decisions.

48. Neither the terms of the consent order nor public law require the respondent to reconsider Mr Sherif's application for indefinite leave to remain as a Tier 1 (General) Migrant or to grant him settlement generally. That the respondent has granted him and members of his family leave on human rights grounds does not mean that the respondent accepts there was no TOEIC fraud.

49. Whilst it was accepted that the recitals of the consent order did not exclude the possibility that the respondent may grant Mr Sherif leave to remain, it was open to her to grant him limited leave to remain.

50. The fact that there is no right of appeal from the decision to the First-tier Tribunal is a consequence of primary legislation, as explained by the Court of Appeal in *Mujahid v First-tier Tribunal (IAC)* [2021] EWCA Civ 449; [2021] 1 WLR 3404, at [18]-[21].

51. Mr Malik submitted that the respondent's decision is reasonable. She has evidence from ETS confirming that it had cancelled Mr Sherif's TOEIC test. His speaking and writing scores had been invalidated. Using voice verification software, ETS can detect when a single person is undertaking multiple tests. ETS undertook a check of Mr Sherif's test via the use of computerised voice recognition software and a further human review by anti-fraud staff. ETS confirmed to the respondent that there was significant evidence to conclude that his certificate was fraudulently obtained using a proxy test taker. Additionally, the respondent has access to a Revised Lookup Tool, specifically developed within the Home Office using the same information provided by ETS, which can identify the number of other tests taken at any college on any given date. The results show that at the European College of Higher Education on 22 February 2012 a total of one hundred speaking and writing tests were taken. The data confirms that eighty-four (84%) of those results were deemed "invalid", i.e. obtained using proxy, and sixteen (16%) were "questionable", i.e. that the score could not be relied upon due to the general

practice of fraud. None of the results were "released", meaning that ETS considered none of them to have been legitimately obtained and therefore reliable.

52. The supplementary decision letter was issued on Mr Sherif's request, though there was no need for the respondent to issue it to defend the claim. The respondent gave express and detailed consideration to the evidence provided by Mr Sherif and to the representations made on his behalf. After considering all the evidence, she maintained her position that Mr Sherif had relied on a fraudulently obtained TOEIC certificate.

53. The question as to whether the letter is supplementary, as considered by the respondent, or a fresh decision, as contended by the applicants, is arid and academic because, as explained by the Upper Tribunal in *Ellis v Secretary of State for the Home Department (discretionary leave policy; supplementary reasons)* [2020] UKUT 82 (IAC); [2020] Imm AR 812, section 31(2A) of the Senior Courts Act 1981 is now in force. Section 31(2A) requires the refusal of relief "if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred", unless it is appropriate to disregard this requirement "for reasons of exceptional public interest" pursuant to s. 31(2B).

54. As for the failure to exercise discretion in accordance with policy, this was not a ground of claim upon which permission had been granted.

G. Decision

55. I am grateful to Ms Naik and Ms Jegarajah for their helpful efforts to reduce the scope of the original grounds of claim, resulting in a clearly focused challenge to the two decisions.

Decision of 17 July 2020

56. Consideration of the applicants first ground requires initial engagement with the intended consequence(s) of the March 2019 order. Both parties have relied upon the recital to the order but possess differing perceptions as to its scope and substance.

57. This claim provides a salutary reminder as to the professional care required in writing and agreeing a draft consent order in judicial review proceedings.

58. The agreement to compromise the earlier judicial review claim was reached following the judgment of the Court of Appeal in *Khan & Others v Secretary of State for the Home Department* [2018] EWCA Civ 1684; [2019] Imm AR 54 behind which Mr Sherif's matter was stood out whilst judgment was awaited. In *Khan* the Court approved the basis on which three appeals against the refusal of leave to remain on the ground of obtaining an English language certificate using fraud had been compromised. These appeals arose from a large number of cases, including Mr Sherif's, pending in the Upper Tribunal and the Court of Appeal where persons were accused of TOEIC fraud and enjoyed no right of appeal against adverse decisions. The only available challenge was by means of judicial review. The

approved compromise was that the respondent would issue a decision on the basis of an applicant's article 8 rights which, if not certified under section 94 of the 2002 Act, would carry an in-country rights of appeal. The consent order provided that, in any human rights appeal where language certificate fraud was raised, the respondent would instruct its presenting officers to request a finding on the fraud to be made by the First-tier Tribunal as part of its fact-finding on the human rights claim.

59. A decision to compromise a judicial review claim is properly to be made on the facts of an individual claim. Decisions made in related claims are not automatically to be taken as the reasons for compromise in an individual claim.

60. I observe the appellants in *Khan* challenged decisions of the respondent to either curtail leave or to refuse to grant further leave to remain. Mr Sherif's challenge was directed to a refusal to grant indefinite leave to remain under a provision of the Rules concerned with Tier 1 (Entrepreneur) Migrants. He sought settlement.

61. The applicants have, at times, sought to advance the terms of the recital as a constituent part of the Upper Tribunal's order. This may have been Mr Sherif's understanding when agreeing the order. However, it is well-settled that matters set out in the recital of a consent order are not strictly contractual in nature. As the Upper Tribunal confirmed in *R (MMK) v Secretary of State for the Home Department (consent orders - legal effect - enforcement)* [2017] UKUT 198 (IAC), at [28], recitals are merely a "series of mutual commitments of an aspirational nature". They are not orders of a court or tribunal. The order sealed in March 2019 required neither Mr Sherif nor the respondent to take any step beyond Mr Sherif having leave to withdraw his claim for judicial review. Consequently, I agree with Mr Malik as to the first limb of the respondent's defence; there was no order by the Upper Tribunal for the respondent to reconsider or rescind her decision of October 2017.

62. The claim as advanced requires me to consider the parties' intentions when agreeing to compromise the judicial review claim. On behalf of Mr Sherif and his family, Ms Naik submitted that beyond the terms of the March 2019 order, the respondent agreed to reconsider her October 2017 decision, and this is evidenced by the recital. This is denied by the respondent, whose position is that there was no such agreement, and she was placed under no public law requirement to reconsider Mr Sherif's application for indefinite leave to remain as a Tier 1 (Entrepreneur) Migrant or to grant him settlement generally.

63. The respondent relies upon the first paragraph of the recital as anchoring those that follow to the December 2017 human rights claim alone, and not to the October 2017 decision which was the subject of the judicial review challenge. The applicants accept that this recital is concerned with the human rights claim but contend that it is not determinative of the scope of subsequent recitals.

64. The second paragraph is accepted by the applicants to be concerned with the outstanding human rights claim.

65. The third paragraph is contentious between the parties. The applicants submit that no human rights decision had been issued by this date, and so it can only be that the reference to "new" in this paragraph is directed to the application for indefinite leave to remain. I do not agree. Several of the applicants were successful on appeal before Judge Lucas who required the respondent to reconsider their human rights claim in accordance with the law. A "new" decision was required in respect of their claim, as the initial decision was found to be unlawful on appeal. I conclude that this paragraph of the recital is directed towards the outstanding decision on the human rights claims.

66. Ms Naik submits that the fourth paragraph is concerned with both the outstanding human rights clam and an agreement to reconsider the indefinite leave to remain decision. I conclude that the aspiration of the fourth recital is consistent with the general approach adopted to TOEIC fraud cases post-*Khan*. On its face the fourth paragraph of the recital is clear that the settlement decision of October 2017, and the attendant administrative review decision of December 2017, will be reconsidered only after Mr Sherif has successfully established though the means of a statutory appeal that he did not commit TOEIC fraud. This understanding is supported by the three linked steps that follow.

67. Consequently, the recital does not aid the applicants. It supports the respondent's contention that her agreement was to consider the outstanding human rights claim only.

68. That Mr Sherif expected, by application of the fourth paragraph of the recital, to enjoy a right of appeal to the First-tier Tribunal presupposed that the human rights claim would be refused by the respondent. It may be observed that Mr Sherif, and his then legal advisors, failed to adequately observe the impact a grant of limited leave would have on his ability to pursue a statutory appeal. Whilst the appellants in *Khan* only sought limited leave, and so success could be measured in such terms, the order as agreed did not protect Mr Sherif's desire to secure settlement. Neither he, nor his former legal representatives, enjoyed at the relevant time the identification of the law subsequently provided in *Mujahid*.

69. The applicants' alternate position is that regardless of the terms of the order, the respondent intended to reconsider her October 2017 decision. This relies upon disclosed documents as establishing the respondent's agreement to reconsider her decision to refuse settlement consequent to her then existing ETS policy. This understanding is said to accord with the expeditious act of Mr Sherif serving further evidence addressing the TOEIC allegation days after the Upper Tribunal issued the March 2019 order.

70. Ms Naik relied upon an entry in the disclosed "GCID – case record sheet notes" dated 11 June 2019. This entry post-dates the consent order by three months:

> "Deadline date
> (Must be completed by Lit Ops) 3 months from the date any representation are received from the Applicant. If no representations

> are received within 4 months from the date of the sealing of the consent order (18 March 2019)
>
> ...
>
> Lit Op's recommendation **ETS case that needs reconsideration in line of current ETS guidelines**.
>
> ...
>
> **The Applicant lodges a JR which we conceded in line with our current ETS guidelines and offered a reconsideration**. **It appears this was not carried out**.
>
> In the meantime the Applicant HR claim has been refused with RoA [right of appeal]. The applicant exercised his appeal right and his case was allowed on 4 June 2019.
>
> **We will now need to reconsider the case and consider both the ETS element of the claim together with all other evidence** including the Bundle of further submissions received from reps and sent to PDC inbox ..."
>
> [Emphasis added]

71. I am asked to read this entry as establishing that the respondent compromised the judicial review claim on the basis that she would reconsider the challenged settlement decision in line with her ETS policy, with the human rights claim being a separate matter. Her intention was to consider the additional evidence provided by Mr Sherif in respect of the TOEIC fraud allegation.

72. However, the GCID - case record sheets illuminate the process of decision-making undertaken by the respondent. An entry record on 11 April 2019 – less than a month after the March 2019 order was issued - records the receipt of the applicant's further submissions and accompanying evidence, dated 25 March 2019. The contents of the documents are noted. The request to rescind the October 2017 decision is rejected, with "no further requests to be considered". The documents were returned by recorded delivery to Mr Sherif's former representatives. The records identify difficulty in returning the documents relating to the rejected reconsideration request consequent to their being returned after attempts at delivery: 13 May 2019 and 18 June 2019.

73. On 14 July 2020 an entry confirms that Mr Sherif's human rights application was considered by the respondent's Post Decision Casework 4 (PDC4) unit. Mr Sherif is identified as a dependant spouse. A previous entry on 10 July 2020 identifies that his application as linked to that of his wife and he "will be considered as part of the family unit". The entry on 14 July 2020 records that the applicant was granted

limited leave in line with the rest of his family upon consideration of GEN.3.2 to Appendix FM which is concerned with article 8 and exceptional circumstances.

74. The records and internal decision-making process, when read in the round, are consistent with the recital to the March 2019 order. They establish the respondent's intention was to consider the outstanding human rights claim alone. Consequently, there was no requirement either by means of the order or under public law for the respondent to reconsider the October 2017 decision when considering the outstanding human rights claim.

75. That the grant of limited leave on human rights grounds denied Mr Sherif the opportunity to ventilate his challenge to the respondent's conclusion as to his engagement in TOEIC fraud does not aid him in this challenge. As explained by the Court of Appeal in *Mujahid*, at [19], the right to appeal under section 82(1)(b) of the 2002 Act against the refusal of a human rights claim only arises where the refusal of an application made on human rights grounds has the effect that the applicant has, either immediately or imminently, no legal right to be in the United Kingdom and is liable to removal. The grant of leave established a lawful impediment to Mr Sherif's removal and consequently the July 2020 decision did not establish a right of appeal to the First-tier Tribunal. The recital to the 2019 order is incapable of establishing a statutory right of appeal.

76. I make one additional observation. I see no force in the applicants' contention that the decisions of Judge Lucas and Judge Brewer are relevant to the respondent's reconsideration of the indefinite leave to remain decision. Neither Judge considered the TOEIC allegation and Judge Brewer's observation as to Mr Sherif command of the English language arose from a hearing undertaken some seven years after he undertook the TOEIC test.

77. Consequently, the applicants' challenge to the decision of 17 July 2020 on public law grounds is properly to be refused.

Decision of 28 April 2023

78. The respondent's position is that the supplemental decision letter dated 28 April 2023 was issued on Mr Sherif's request. There was no requirement for the respondent to issue it to defend the claim.

79. I have found above that there was no requirement for the respondent to reconsider her October 2017 decision. Consequently, the submissions advanced at the hearing concerned with the decision of the Court of Appeal in *Caroopen and* Chamberlain J in *Ellis* are moot as the applicants have not succeeded in respect of their challenge to the July 2020 decision.

80. Turning to the decision, the opinion of ETS is observed, as is the use of the revised Lookup Tool. The applicant's submissions and evidence are confirmed as having been considered, including Mr Sherif's account of his past studies and employment using the English language. The explanation provided by Mr Sherif as to his attendance at the test centre was noted. The respondent observed:

> "The Secretary of State has considered what your client had to gain from being dishonest, what he had to lose, what is known about his character or the cultural environment in which he operated, whether his English language proficiency is commensurate with his TOEIC scores, and whether his academic achievements are such that it was unnecessary or illogical for him to have cheated. However, as the Upper Tribunal held in *MA (ETS – TOEIC testing)* [2016] UKUT 450 (IAC) and *DK and RK (ETS: SSHD evidence, proof) India* [2022] UKUT 112 (IAC), there are numerous reasons why a person who could pass a test because of English proficiency might nevertheless decide to cheat. The Upper Tribunal also held that a person's case must be considered in the context of frequent and widespread fraud. The evidence from ETS and the verification process adopted by it are considered to be clearly and overwhelmingly reliable. Although there may be room for error, there is every reason to believe that the evidence from ETS is likely to be accurate .

81. The respondent confirmed that she remained of the view that Mr Sherif has committed TOEIC fraud. Additionally, she stated that though he had been granted limited leave to remain on human rights grounds this "does not mean that it has been accepted that there was no fraud".

82. She concluded:

> "Accordingly, looking at all the circumstances, the Secretary of State does not rescind her decisions of 31 October 2017 and 1 December 2017 to refuse your client's application for indefinite leave to remain and uphold that refusal at the administrative review. Your client has been granted limited leave to remain in the United Kingdom but the Secretary of State does not consider it appropriate to grant him indefinite leave to remain in the light of his involvement in TOEIC fraud."

83. At the outset of my consideration of the April 2023 decision I reject the applicants' contention that the respondent adopted an unlawful approach to the report of Christopher Stanbury. Being mindful that this challenge is brought on public law grounds, I am satisfied that the respondent cogently reasoned that the Presidential panel decision in *DK & RK* was authoritative on the issues addressed by Mr Stanbury, and that his opinion amount to no more than disagreement with that decision. Though post-dating the respondent's decision, I note the reported decision in *Varkey & Joseph (ETS – Hidden rooms)* [2024] UKUT 00142 (IAC). Ms Naik did not pursue this matter in her oral submissions.

84. I further confirm that the applicants secure no benefit from Judge Brewer's decision for the reasons detailed above.

85. At the hearing, Ms Naik focused upon a failure by the respondent to exercise discretion. My attention was drawn to page 7 of the respondent's relevant ETS case

worker guidance as an example as to where discretion may be exercised where a grant of leave to remain has previously been made despite the ETS TOEIC issue. The submission was initially attractive, but upon consideration I agree with Mr Malik that this challenge does not form part of the amended grounds upon which permission has been granted. Consequently, it is not a matter before this Tribunal in respect of this claim. The same applies to the reliance upon the TOEIC fraud not being relied upon when Mr Sherif was granted limited leave to remain, which was advanced as part of the discretion submission.

86. My attention was drawn to whether the respondent had before her all the documents provided with the March 2019 further submissions. Ms Naik took me to the GCID – case reports sheets addressed above where efforts were made to return the original documents to the applicant's former representatives. It is unclear from the documents filed with this Tribunal as to whether they were ever delivered. The documents are identified as:

> "... applicant statement, supporting statements, MP & Co Chartered Accountants letter, certificate of study and copy of certificate, school photograph, CV of father, Solidarity Sports letter, copies of ID and US National Grid bill."

87. Mr Malik directed my attention to an entry on 24 May 2019 confirming that the documents were linked to the file sent to the Presenting Officer's Unit. It is understood that the originals were not placed back on file, but rather they were scanned.

88. Being mindful that a high hurdle is to be crossed in establishing that the respondent acted in bad faith, I am satisfied that the respondent accurately referenced in her decision that she considered the applicant's witness statements, and the statements of his family members. The respondent's knowledge as to the existence of witness statements from family members is wider than the information recorded above, which includes a bare reference to "supporting statements'. This strongly suggests that the statements were considered.

89. The lack of clarity in the decision letter as to what other documents were considered, beyond "the attached evidence", does not aid the applicants. The respondent does not in her decision letter dispute Mr Sherif's personal history in respect of his English language experience. Whether she considered each and every document does not affect that fact. Ultimately, the respondent concluded that there are numerous reasons why a person who could pass a test because of English language proficiency might nevertheless decide to cheat. The potentially missing documents recorded above do not, on their face, negate this conclusion.

90. The primary thrust of the challenge to the supplementary decision is that it constitutes a wholly inadequate response to a wealth of evidence which demonstrates "beyond doubt" that the applicant was educated in the West, that his honesty was vouched for by witnesses and that he had given cogent personal evidence as to his attending the test and the manner in which he took it.

91. This is a public law challenge, and I am not required to undertake a merits assessment.

92. I conclude that the respondent's consideration of the evidence provided over time was reasonable. Mr Sherif may not agree with the conclusion that he committed TOEIC fraud, but it cannot properly be said that the decision was perverse, or that there was inadequate reasoning. I find that there is no basis for Mr Sherif's contention that the respondent came to the matter with a closed mind. She was not required to undertake her reconsideration. She did so voluntarily, which is strongly suggestive of an open mind. She reasonably decided that if the applicant possessed the required English language proficiency, there were numerous reasons why he may have decided to cheat. Having weighed all the evidence, she was permitted to reasonably rely upon Mr Sherif's result being found to be invalid by ETS and to place reliance upon the content of the revised Lookup Tool in respect of tests undertaken at the European College for Higher Education on the relevant date.

93. The applicants' challenge to the supplementary decision of 28 April 2023 is refused.

Application for disclosure

94. Sometime after the conclusion of the hearing, the applicants filed an application notice complaining that the respondent failed to disclose documents to the applicants, despite request. The nature of the documents is not identified, save for a chain of correspondence being annexed.

95. The respondent observed in response that the application is unclear as to what order the applicants request. She states that she complied with the duty of candour with all relevant GCID notes disclosed ahead of time. Further:

> "It appears that the Applicant is asking the Secretary of State to provide the documents (his statements, etc) that his representatives sent to the Secretary of State on 25 March 2019. As explained at the hearing by reference to various GCID entities, those documents were received by the Secretary of State and were considered. Those documents, according to a GCID entry, were returned to the Applicant's former representatives (but were scanned, and – as explained at the hearing – were considered by the Secretary of State) (the Judge was taken to all relevant entities by both sides at the hearing). On receiving the Applicant's request following the conclusion of the Judicial Review hearing, the Secretary of State conducted a search for the requested documents. The Secretary of State has not been able to locate those documents. The Secretary of State cannot return the documents to the Applicant that [she] has not been able to locate."

96. For the reasons detailed above, the documents recorded above that accompanied the March 2019 submissions do not aid the applicants. There was no request at the hearing for an adjournment to permit further disclosure, and counsel were content to proceed. In the circumstances, the application for post-hearing disclosure is properly to be refused.

H. Conclusion and disposal

97. For the reasons I have explained, the applicants' claim for judicial review is dismissed.

98. I invite the parties to submit a draft order that gives effect to the above.

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