Neutral Citation Number: [2018] EWCA Civ 1684

Case No: C8/2017/3287
C8/2017/1385
C8/2016/3560

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/07/2018

Before :

LORD JUSTICE McFARLANE
LORD JUSTICE UNDERHILL
and
LORD JUSTICE SINGH

- -

Between :

(1) Md Ashif Khan	**1st Appellant**
(2) Md Monirul Islam	**2nd Appellant**
(3) Md Safayet Hossain	**3rd Appellant**
- and -	
Secretary of State for the Home Department	**Respondent**

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Stephen Knafler QC and Nick Armstrong (instructed by **Bindmans LLP**) for the **1st Appellant**
Shahadoth Karim (instructed by **Hamlet Solicitors LLP**) for the **2nd Appellant**
Michael Biggs (instructed by **JKR Solicitors) for the 3rd Appellant**
Lisa Giovannetti QC and Rob Harland (instructed by the **Government Legal Department**) for the **Respondent**

Hearing dates: 26-27 June 2018

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Approved Judgment

Lord Justice Singh :

Introduction

1. These three appeals were listed to be heard together in order to enable this Court to address common issues that arise where a person has been accused of obtaining an English language certificate known as the Test of English for International Communication ("TOEIC") certificate through the use of deception, in particular by using a proxy test-taker. The result of that test is then submitted in support of an application for leave to remain.

2. The factual background includes the revelations as to widespread fraud which were uncovered by the BBC in a *Panorama* programme. Consequently the Secretary of State decided to curtail leave to remain in a large number of cases and refused subsequent applications for leave to remain on the basis that a person had used deception. These have become known as the "ETS" cases after the name of the institution which provided the language certificates: Educational Testing Services.

3. The legal background includes the recent decision of this Court in *Ahsan v Secretary of State for the Home Department* [2017] EWCA Civ 2009; [2018] INLR 207. However, there is one potentially significant legal difference between these cases and that of *Ahsan*. This arises from the legislative changes made by the Immigration Act 2014 ("the 2014 Act"). In particular there will not usually be a statutory right of appeal (either from within or from outside the United Kingdom). Section 10 of the Immigration and Asylum Act 1999 was amended by the 2014 Act. The legislation that was considered in *Ahsan* included section 10 in its earlier pre-2014 form.

4. On 14 August 2017 Sir Stephen Silber (sitting as a Judge of the Court of Appeal) granted permission to appeal in the case of *Hossain*. Subsequently, on 1 November 2017, Hickinbottom LJ granted permission to appeal in the case of *Islam* and linked that case with *Hossain* to be test cases to address the questions of law which arise where (1) there is no right of appeal as a result of the 2014 Act and there is at most available an administrative review by the Secretary of State; and (2) the only way of challenging a decision of the Secretary of State that a person has used deception is by way of judicial review. On 14 May 2018 Hickinbottom LJ granted permission to appeal in the case of *Khan* and linked that to be heard with the other two cases.

5. A large number of other cases are pending both in this Court and in the Upper Tribunal (Immigration and Asylum Chamber) awaiting the outcome of these appeals. We are informed that there at least 86 applications in this Court for permission to appeal against decisions of the Upper Tribunal in similar cases; and that there are at least 49 such cases which have been stayed by the Upper Tribunal pending judgment in these appeals.

6. A few weeks before the hearing was due to take place the Secretary of State proposed that the appeals should be resolved by way of compromise. Although a hearing was still necessary the parties have been able to agree consent orders in each of these three appeals, save for the question of costs in the case of *Hossain*, to which I will return later. Nevertheless, the parties were also agreed that, to the extent that the Court saw fit, it would be desirable for this Court to give a short judgment setting out the basis upon which these appeals have been compromised, as this should assist in the conduct of other cases.

Factual background

Md Ashif Khan

7. Mr Khan was born on 14 December 1989 and is a national of Bangladesh. He entered the UK on 19 September 2009 with leave to enter as a student. This was subsequently extended as he went on to take a BSc degree in Business Management and an MSc in International Business Management. In order to make those applications Mr Khan took an English language test in two parts on 19 June 2012 and 12 July 2012. The Respondent disputes whether he took that test himself.

8. The Respondent interviewed Mr Khan on 2 July 2014 and 1 April 2015 and found him to be credible. However, the Secretary of State was later informed by ETS that the voice files assigned to the applicant did not match his voice and decided to curtail his leave to remain on the basis of that information on 15 March 2016. A replacement decision letter, which changed the immigration rule relied upon by the Respondent as the basis for the decision, was sent on 20 July 2016.

9. Mr Khan filed an application for permission to bring a claim for judicial review in the Upper Tribunal on 30 August 2016. UTJ Gleeson refused permission to bring that claim on 18 January 2017. However, on 30 August 2017 UTJ Blum granted permission to amend the grounds for judicial review. The grounds included a request that the Upper Tribunal should hear oral evidence when reviewing the factual matters underpinning the curtailment decision.

10. UTJ Perkins refused permission following a renewed application at a hearing on 27 November 2017.

11. Mr Khan then applied to this Court for permission to appeal against that refusal. As I have mentioned, on 14 May 2018, Hickinbottom LJ granted permission to appeal.

Md Monirul Islam

12. Mr Islam was born on 6 January 1984 and is also a national of Bangladesh. He entered the UK on 29 September 2009 with leave as a student, which was subsequently extended. On 16 September 2015 the Respondent curtailed his leave to remain with immediate effect on the basis that he had fraudulently obtained a TOEIC certificate used to support an application for leave to remain made on 19 October 2012.

13. Mr Islam applied for permission to bring a claim for judicial review in the Upper Tribunal on 8 December 2015.

14. Permission to bring that claim was refused on the papers by UTJ Warr on 3 February 2016. Permission was subsequently granted on 7 March 2016 by UTJ Kekic following a renewed application at an oral hearing.

15. However, the substantive claim for judicial review was dismissed by UTJ McWilliam following a hearing on 22 March 2017.

16. As I have mentioned, permission to appeal to this Court was granted by Hickinbottom LJ on 1 November 2017.

Md Safayet Hossain

17. Mr Hossain was born on 1 April 1989 and is also a national of Bangladesh. He entered the UK on 10 September 2009 with leave as a student, which was extended twice until September 2015. A third application to extend leave to remain in order to undertake an MBA course was refused by the Respondent on 25 September 2015 on the basis that Mr Hossain had cheated in an English language test in 2013. The Respondent maintained that decision following an administrative review on 18 November 2015.

18. Mr Hossain filed an application for permission to bring a claim for judicial review in the Upper Tribunal on 15 February 2016.

19. UTJ Gill refused permission to bring that claim on 9 May 2016 because the application was in reality a challenge to the decision made on 25 September 2015 and, in her view, was two months out of time.

20. After a renewed application UTJ Kekic refused permission on 15 August 2016.

21. As I have mentioned Sir Stephen Silber granted permission to appeal to this Court on 14 August 2017.

The compromise reached by the parties

22. On 30 January 2018 Mr Stephen Knafler QC (leading Mr Nick Armstrong) filed a skeleton argument on behalf of Mr Khan with a proposed directions order. In that skeleton argument, at para. 11, it was suggested that, as this Court had indicated in *Ahsan*, it might be appropriate for cases of this type to proceed through the human rights appellate route, providing the Respondent was willing to give the appropriate assurance of the kind referred to in *Ahsan*.

23. Accordingly, it was suggested on Mr Khan's behalf that the preferable way forward would be for the Respondent to agree to, and for the Court to approve, a directions order whereby permission to appeal and permission to apply for judicial review would be granted; but that these proceedings would then be withdrawn with no order for costs (for the avoidance of doubt, negating any earlier adverse costs orders) on the basis that (by way of a preamble):

    (i) the Appellant would submit full particulars of why it would be incompatible with Article 8 for him to be required to leave the UK, within 28 days;

    (ii) the Respondent would either rescind her decision of 20 July 2016, refuse the human rights claim or certify it within a further 28 days;

(iii) both parties are of the understanding that, in any human rights appeal, the FTT would be able to determine whether or not the Appellant committed a TOEIC fraud;

(iv) if the Appellant succeeds on his appeal, on the basis that he did not commit such a fraud, then in the absence of some new factor justifying a different course, the Secretary of State would rescind her decision of 20 July 2016 and afford the Appellant a reasonable opportunity of securing further leave to remain.

24. At para. 13 an alternative proposal was made, which it is not necessary to set out here.

25. On 11 June 2018 the Respondent proposed a draft consent order and provided a statement of reasons in support of that proposal. The Respondent (at para. 2) noted the proposals set out at para. 12 of Mr Khan's skeleton argument of 30 January 2018.

26. At para. 3 of the statement of reasons, the Respondent acknowledged that cases involving ETS allegations have proliferated before both this Court and the Upper Tribunal and that the proceedings that have ensued have been "protracted". At para. 4, the Respondent further noted that, following *Ahsan*, those cases which predated commencement of the material provisions of the Immigration Act 2014 in relation to amended appeal rights are to be reviewed and, in circumstances where a human rights claim has been made or intimated, the Respondent will take a human rights decision which (if not certified under section 94 of the 2002 Act) will therefore carry an in-country right of appeal. At para. 5 the Respondent acknowledged the practicality of the suggestion that (in the unique circumstances of the ETS litigation) those cases which postdate the changes to appeal rights should be approached in a similar way. At para. 6 it was said that, for the reasons set out in *Ahsan*, the above approach would, on the face of it, provide the Appellant with a suitable alternative remedy, obviating the justification for a challenge to be brought by way of judicial review.

27. At para. 7, the Respondent noted that, while the parties cannot bind the FTT:

> "In any human rights appeal where TOEIC fraud is relied upon the Respondent will instruct its Presenting Officers to request a finding on the fraud to be made by the FTT as part of its fact finding on the human rights claim."

28. At para. 8 it was said:

> "The Respondent further proposes to take the same approach to the other two Appellants in these proceedings, since each has raised matters in these proceedings capable of effectively amounting to a human rights claim. It is noted also that both individuals were the subject of earlier decisions which would have brought them within the cohort of cases being reviewed post-*Ahsan*. Indeed, it has been the Respondent's case throughout these proceedings that Mr Hossain has a right of appeal, and that would necessarily be affected by the Court's ruling in *Ahsan*."

29. Importantly for other cases, at para. 9, the Respondent said this:

> "The Respondent will further extend a similar offer as that in *Ahsan* to other appellants in cases before this Court and the Upper Tribunal. It is anticipated that the vast majority of the cases currently before the Court and the Upper Tribunal would be disposed of by the provision of an alternative remedy in this way. The Respondent will need to review the cases and contact the relevant appellants/applicants. He proposes to update the Court in relation to these arrangements in line with the approach adopted in *Ahsan*."

30. On 15 June 2018 counsel acting for all three Appellants filed a "provisional" response to the Respondent's proposed consent order, in a position statement. They considered that the Respondent's proposals were helpful but that not all issues had necessarily been resolved.

31. On 18 June 2018 the Respondent filed a skeleton argument in these appeals. He observed, at para. 1, that in each case there had been a decision to curtail the Appellant's leave to remain in the UK and/or refusing further leave to remain; and notification of his liability for removal under section 10 of the Immigration and Asylum Act 1999 (as amended). It was noted that, because of the legislative changes in 2014, the Appellants have no right of appeal, whether in-country or out of country against the refusal, curtailment or a section 10 decision *per se*. However, even under the new legislative scheme, there is a right of appeal against a decision to refuse a human rights claim and indeed that is a right of appeal which can be exercised in-country, subject to certification (e.g. under section 94 of the Immigration, Nationality and Asylum Act 2002).

32. The Respondent noted the proposal which had been made on behalf of Mr Khan in the skeleton argument dated 30 January 2018 and stated that the Secretary of State had considered that proposal with care by reference to the facts of all three cases. At para. 6 the Respondent agreed (for the reasons set out in the statement of reasons in support of the draft consent order of 11 June 2018) "that it would be just, fair and appropriate to deal with these three cases in the manner suggested." It was also recorded that:

> "As further set out in the statement of reasons, the SSHD also proposes to adopt a broadly similar approach to other analogous 'ETS' cases that fall within the new statutory scheme."

At para. 7, the Respondent said that the above course had the following merits:

> "(i) It is similar to the approach taken to the '*Ahsan* cohort' of cases. The Respondent acknowledges in his statement of reasons that the 'ETS litigation' has been unique in a number of respects. These Appellants, like many others accused of ETS deception, have now been in-country for a significant period; there have been protracted debates about the evidence on both sides and the law relating to appeal rights has also changed in the meantime.

> (ii) It will allow disputes of fact to be put before the First-tier Tribunal in this country, which is a specialist Tribunal, experienced and expert in determining such disputes in the context of the relevant legislation and the immigration rules. The proposed course will allow the FTT to consider the issues for itself whilst even on the Appellants' case, the role of the Upper Tribunal in judicial review proceedings is primarily a supervisory one."[1]

33. There continued to be, as the Respondent's skeleton argument pointed out, a number of differences between the parties on issues of law, in particular the scope of any fact finding that the Upper Tribunal may be able to embark upon in judicial review proceedings. In particular, at para. 24, it was pointed out that, under the new statutory scheme, the question of deception is no longer a matter of "precedent fact". In this respect the Respondent submitted that there is a crucial difference from the legal position which was considered by this Court in *Ahsan*.

34. In the conclusion, at para. 42, it was said:

> "Nonetheless, the SSHD accepts that in all the circumstances, including the facts of the Appellants' cases, the unique circumstances and lengthy history of the ETS/TOEIC litigation, and the various other factors identified in the statement of reasons, it is fair and appropriate to accept the proposal put forward by Mr Khan for the settlement of his appeal, to offer to compromise the other two appeals in a similar manner, and to put forward a broader proposal for other similar cases."

35. At para. 43 it was said that these proposals would afford the Appellants at least an equal and arguably a better remedy than that which they currently sought.

36. Subsequently, in a document which we understand was served on 22 June 2018 although it is on its face undated, entitled "Response to the Appellants' Position Statement", the Secretary of State further clarified his position in advance of the hearing of these appeals. Paras. 2-4 of the Response explain, in response to points raised in the Appellants' position statement, why it was important in principle that the Secretary of State should not agree to inhibit his right to certify a human rights claim in cases of this kind. But para. 5 goes on to say:

> "Notwithstanding the above, the Respondent is able to agree that in **these** specific cases she will not certify the claims. For the reasons set out above, this cannot and should not bind the SSHD in other cases, the facts of which are not before the Court and are in any event … likely to vary on a case by case basis, including depending

[1] In a footnote it was stated that this was subject to the proviso that a case has not been certified.

on any updated evidence they put before the SSHD, and so not currently within his knowledge." (Bold in original)

37. Further, at para. 8 of the note, it was stated:

"Nonetheless, for the avoidance of doubt, the SSHD confirms that:

(i) For those individuals whose leave was curtailed, and where that leave would still have time to run as at the date of an FTT determination that there was no deception, subject to any further appeal to the UT, the curtailment decision would be withdrawn and the effect … would be that leave would continue and the individuals would not be disadvantaged in any future application they chose to make;

(ii) For those whose leave has been curtailed, and where the leave would in any event have expired without any further application being made, the Respondent will provide a further opportunity for the individuals to obtain leave with the safeguards in paragraph (iii) below.

For those whose leave had expired, and who had made an in time application for further leave to remain which was refused on ETS grounds, the effect of an FTT determination that there was no deception would be that the refusal would be withdrawn. The applicant in question would still have an outstanding application for leave to remain and the Respondent will provide them with a reasonable opportunity to make any further changes to their application which would be considered on the basis of them not having employed any deception in the obtaining of their TOEIC certificate, and they would in no way be disadvantaged in any future application they chose to make.

(iii) In all cases, the Respondent confirms that in making any future decision he will not hold any previous gap in leave caused by any erroneous decision in relation to ETS against the relevant applicant, and will have to take into account all the circumstances of each case.

However, the Respondent does **not** accept that it would be appropriate for the Court now to bind him as to the approach that he would take towards still further applications in the future, for example by stating that each applicant has already accrued a certain period of lawful leave. The potential factual permutations of the cases that may need to be considered are many and various. In some cases, for example, it will be apparent that, whilst on the facts

> as presented at the appeal an appellant's human rights claim is successful, he would not have been able to obtain leave at previous dates. Again, this issue will have to be dealt with on a case by case basis." (Bold in original)

38. At that stage there was still an issue between the parties as to the appropriate order for costs. However, after further discussions which took place both before and on the first day of the hearing of these appeals, the parties were able to agree both consent orders and orders as to costs, save for there remaining an outstanding issue in relation to the appropriate costs order in the case of *Hossain*.

39. In my view, it is appropriate in the circumstances which have arisen for this Court to approve the consent orders which have been agreed by the parties, which I append in final form. It is clear that the vast majority of similar cases will be dealt with in accordance with the approach which the Secretary of State has taken in these three cases and that, if there are individual cases which are not dealt with in that way, they can (if necessary) proceed through the Upper Tribunal or this Court on their own facts.

40. Beyond that it does not seem to me either necessary or appropriate for this Court to say anything on the merits of the points which may remain in dispute between the parties. I would only add that the parties have agreed this course on the basis that the FTT will be encouraged to decide as a matter of fact in the context of the proposed appeals to it whether in each case the Appellant did cheat in their TOEIC test as alleged, even if it might be possible to dispose of the appeal on some different basis (see para. 27 above); and I believe that this Court should endorse that encouragement.

Costs

41. The parties have been able to agree the appropriate costs order in the cases of *Khan* and *Islam*. This is reflected in the draft consent orders which have been presented to this Court for our approval. In those cases the Secretary of State has agreed that there shall be no order as to costs up to 30 January 2018 and that, from 31 January 2018, the Respondent must pay the Appellants' costs, to be the subject of detailed assessment if not agreed.

42. However, in the case of *Hossain*, the parties have not been able to agree the appropriate costs order. We were informed by counsel for the Secretary of State that an offer had been made (without prejudice save as to the issue of costs) in similar terms to the cases of *Khan* and *Islam* but that this was not acceptable to the Appellant. We therefore conducted a hearing into the Appellant's application for his costs, both in this Court and in the Upper Tribunal. We heard oral submissions by Mr Biggs on behalf of Mr Hossain. We also heard submissions by Ms Giovannetti QC on behalf of the Secretary of State.

43. The starting point for Mr Biggs's application is what I said in giving the main judgment of this Court in *ZN (Afghanistan) and Anr v Secretary of State for the Home Department* [2018] EWCA 1059, at para. 67:

> "The underlying rationale for the normal rule that costs follow the event is that a party has been compelled by the conduct of the other party to come to court in order to vindicate his legal rights. If those legal rights had been respected in the first place by the other party, it should never have been necessary to come to court. Accordingly, there will normally be a causal link between the fact that costs have been incurred and the underlying merits of the legal claim. This underlying rationale also explains why civil procedure normally requires a party to send a pre-action protocol letter to the other party. If the response to that letter had been to accept the merits of the claim in advance, it should never have been necessary to bring that claim to court."

44. However, that passage needs to be read in context. It was addressing the particular issue which was before the Court in that case, which concerned whether there is a need for a causal link between the fact that an appeal has become academic and the underlying legal merits of the case before a costs order should be made in favour of the appellant. The passage should not be regarded as setting out a test for the award of costs in judicial review proceedings or otherwise. I was simply stating that, normally, a causal link between the fact that costs have been incurred and the underlying merits of the legal claim will be required. However, that is a necessary but not always a sufficient basis for the award of costs.

45. The relevant legal framework for costs in judicial review proceedings was set out in my judgment in *ZN (Afghanistan)* at paras. 34-61. The leading authority on this subject was and remains the decision of this Court in *R (on the application of M) v Croydon London Borough Council* [2012] EWCA Civ 599; [2012] 1 WLR 2607: see in particular the judgment of Lord Neuberger of Abbotsbury MR (as he then was), at paras. 60-63.

46. As I summarised at paras. 50-52 of my judgment in *ZN (Afghanistan)*, Lord Neuberger identified three separate categories of claim. The first category consists of cases where a claimant has been wholly successful, whether following a contested hearing or pursuant to a settlement. In those cases the Court could not see why a claimant should not normally be entitled to all of his costs. Secondly, in cases where a claimant has only succeeded in part, whether following a contested hearing or pursuant to a settlement, Lord Neuberger accepted that there would often be much to be said for concluding that there should be no order for costs. Thirdly, in cases where there has been some compromise, and the compromise does not actually reflect the claimant's claims, there is an even stronger case for there to be no order for costs. This is mitigated, he said, by the proviso that there will be some cases in which it may be sensible to consider the underlying claims and consider whether it was "tolerably clear" who would have won if the matter had not settled.

47. One issue which was the subject of discussion in *ZN (Afghanistan)* is the relevance (if any) of the fact that a party is on legal aid: see paras. 71-93 in my judgment; paras. 96-104 in the judgment of Leggatt LJ; and para. 106 in the judgment of Sir Brian Leveson P. That issue does not arise on the facts of the present case because Mr Hossain is not on legal aid.

48. Mr Biggs's primary submission before us is that Mr Hossain should recover his costs in full, both in the Upper Tribunal and in this Court, because (i) he was compelled to come to court in order to vindicate his legal rights because his attempts to secure a review of the Respondent's adverse decision failed, both in the administrative review which resulted in the decision of 18 November 2015 and in the adverse response to his pre-action protocol letter; and (ii) he has in substance achieved what he was seeking, which is a reconsideration of the decision under challenge. In other words, Mr Biggs submits that this case falls into the first category identified by Lord Neuberger in *M*.

49. In the alternative, Mr Biggs submits that Mr Hossain was successful at least in part (Lord Neuberger's second category in *M*) but that, in the circumstances of this case, including having regard to the conduct of the Respondent, he should nevertheless recover his costs.

50. Before I address the application for costs in greater detail, I would wish to stress, as this Court has frequently done in previous cases, that costs applications must not be allowed to become in reality cases in which the underlying merits of a claim have to be determined. I would deprecate such satellite litigation. I would also stress that, inevitably, cases such as this turn on their own facts. I therefore turn to the facts of this case.

51. Mr Biggs is entitled to point out, as he does, that from an early stage the submission was made on behalf of Mr Hossain that his removal would breach his rights under Article 8: see, for example, his application for an administrative review dated 2 November 2015, at para. 13.

52. I turn next to the pre-action protocol letter and the Respondent's reply to it. In the pre-action protocol letter dated 16 December 2015, the lawyer acting on behalf of Mr Hossain said, at para. 16:

> "Our client's rights under Article 8 of ECHR will be breached as his future career will be seriously jeopardised by the removal decision. He lawfully entered and intends to obtain the qualifications. He needs to complete the current course in order to get a good job in the market and to enhance his career prospects. He will be socially embarrassed by the removal. He will not be allowed to return to the UK within 5 years if removed. On this ground he should have in-country right of appeal but the SSHD has denied this right."

53. That was a repetition of the same passage as had appeared in para. 13 of the application for an administrative review.

54. I do not think those points assist Mr Biggs. As is tolerably clear from both the application of 2 November 2015, at para. 13, and the pre-action protocol letter, at para. 16, reliance was then being placed by the lawyer acting on behalf of Mr Hossain on the *substantive* rights in Article 8. The argument was being made that those substantive rights would be breached by his removal from the UK "as his future career will be seriously jeopardised".

55. It is true that the passages ended in the final sentence with a reference to the assertion that Mr Hossain should have had but had been denied an in-country right of appeal. However, no such appeal was ever lodged: if the assertion was a good one, there is no reason why it could not have been lodged and then the point as to whether the FTT had jurisdiction to consider it could have been tested as a matter of law. In fact, the last sentence was not further developed nor was it explained on what legal basis the Appellant should be given any right of appeal, still less an in-country one.

56. The Respondent's decision refusing the administrative review was dated 18 November 2015. In relevant part it said:

> "… You further state that your rights under Article 8 ECHR would be breached, however Article 8 claims are not eligible decisions for administrative review as defined in Appendix AR of the Immigration Rules – specifically AR 2.6."

That is undoubtedly correct and it has not been suggested on behalf of the Appellant that it is wrong.

57. The Respondent's reply to the pre-action protocol letter was dated 5 January 2016. Mr Biggs points out that there was no specific response made to the reliance on Article 8 at all, although it was noted in a bullet point at para. 4 that Mr Hossain was relying upon Article 8.

58. However, it should be noted that it is common ground before this Court that the letter of 5 January 2016 did not constitute a refusal of a human rights claim. This is because it was not in the correct form for such a refusal and, importantly, it would have had to notify the Appellant of his right to appeal against such a refusal. Whether or not such an appeal had to be made from out of the country would depend on whether there was certification but that would not affect the existence of a right of appeal in human rights cases. But the reality is that neither side appreciated at that time that there was the possibility in cases such as this of an appeal on human rights grounds. That was clarified by this Court in *Ahsan*, which was decided only in December 2017. Although, with hindsight, it might be said that the Secretary of State is in some way at fault for not having appreciated what the nature of the pre-action protocol letter was, equally it might be said that the Appellant had the benefit of legal advice at all material times and that nobody then acting on his behalf appreciated the point either.

59. I turn next, and importantly, to the grounds on which judicial review was brought in the Upper Tribunal. They were set out in a document entitled 'Grounds upon which Relief is Sought'. At para. 30 the same passage that had appeared earlier in the application for an administrative review, at para. 13, and in the pre-action protocol letter, at para. 16, was repeated. However, once again the point about the possibility of a right of appeal was not developed. Nor, as I have already mentioned, was such an appeal ever launched.

60. The burden of the grounds for judicial review, when read fairly and as a whole, was essentially to focus upon an allegation of an unfair procedure having been adopted by the Secretary of State *before* the adverse finding of deception in taking the language test was made: see in particular para. 28. Furthermore the allegation was that the finding of fact that the Appellant had engaged in deception was wrong and *Wednesbury*

unreasonable. Mr Biggs fairly conceded at the hearing before us that the grounds at that stage were not pleaded as well as they might have been. The fact remains, however, that the grounds were formulated as they were. It was on the basis of those grounds that the Upper Tribunal had to consider the application for permission to bring the claim for judicial review.

61. This Court has seen both the written reasons given by UTJ Kekic, dated 11 August 2016, and a transcript of the hearing before her on the same date, in which she explained why she refused permission. It is true that the first reason given was that the operative decision was dated 25 September 2015 and not 18 November 2015 (the date of the decision on the administrative review); and that therefore the application was out of time on 15 February 2016. Nevertheless, the second reason given by the Judge was that:

> "The evidential burden on the Respondent was discharged by the documentary evidence adduced in support of her decision so the application could not have succeeded even if it had been made in time."

I would observe also that she made no order for costs in the proceedings before the Upper Tribunal. Mr Biggs now applies for costs not only in the Court of Appeal but also in the Upper Tribunal.

62. Finally, in considering the factual chronology, I turn to the grounds of appeal in this Court. Both those grounds and the skeleton argument filed in support of them focussed again on the arguments that there had been procedural unfairness before the decision was taken by the Secretary of State and that the decision could not be sustained on the facts. It is true that the first ground of appeal was that the Judge was wrong to hold that the application had been made out of time. It is also true that that point was conceded in the Respondent's skeleton argument dated 28 September 2017, at para. 2. However, the Respondent did not concede the appeal at that stage. Far from it. The skeleton argument went on to dispute the substantive arguments which were then being advanced on behalf of this Appellant.

63. The crucial event, as it seems to me, occurred in December 2017, when this Court decided *Ahsan*. At some point after that decision both sides came to appreciate that there may be an alternative route which is preferable in cases of this kind. Furthermore, the Secretary of State responded fairly in response to the skeleton argument by Mr Knafler on behalf of Mr Khan dated 30 January 2018. As I have explained earlier in this judgment, in the following months the Secretary of State took the view that the same approach should be taken in cases such as *Hossain* and indeed in all cases that fall into the same category, which are being reviewed. That seems to me to be both fair and responsible on the part of a public authority. It ensures consistency of treatment.

64. I am not persuaded by Mr Biggs's submissions, attractively though they were made, that Mr Hossain should be regarded as having been successful in substance in this case. The case certainly does not, in my view, fall into the first category identified by Lord Neuberger in *M*. If it falls into his second category (partial success), then it will often be the case that the appropriate order is no order as to costs. I see no reason in the circumstances of this case to take a different view up to the point from which the Secretary of State is willing to pay Mr Hossain's costs, that is 31 January 2018.

65. It seems to me that the way in which the grounds were formulated at all material stages was different from the reason why the appeal has now become unnecessary. In substance the reason why all of these three cases have settled is that, as the result of this Court's decision in *Ahsan*, both the Secretary of State and the Appellants' representatives have now come to appreciate the possibility of a human rights appeal to the FTT in cases such as this, which would obviate the need for a claim for judicial review of the Secretary of State's decision that there has been deception. Although the Appellants' representatives do not accept all of the Secretary of State's thinking as to the steps which have led to that outcome, the cases have all settled for sensible and pragmatic reasons.

66. I also bear in mind that it would be desirable for there to be a consistency between the order as to costs made in this case and those made (by consent) in the cases of *Khan* and *Islam*. All three cases have been treated in the same way by the Secretary of State and all three, it seems to me, have settled for essentially the same reasons, not because of anything specific to the grounds that were advanced in any of them in particular.

67. For all the reasons I have given, in my view, the just and appropriate order for costs in this case is that there should be no order as to costs until 30 January 2018 but the Respondent shall pay the Appellant's costs from 31 January 2018, to be the subject of detailed assessment if not agreed.

Lord Justice Underhill:

68. I agree.

Lord Justice McFarlane:

69. I also agree with the judgment of Singh LJ. In doing so, I would particularly wish to associate myself with what is said at para. 50 concerning the need to avoid satellite litigation under the umbrella of a costs application.

APPENDIX

CONSENT ORDER – KHAN

HAVING REGARD to the requirements of paragraph 6 of the Practice Direction 52A to Part 52 of the Civil Procedure rules.

AND UPON the parties confirming that none of the parties to these proceedings is a child or a protected party

AND UPON the Respondent accepting that the Appellant has made a human rights claim which, if refused, will attract an in-country right of appeal to the First-Tier Tribunal;

AND UPON the Appellant undertaking to submit full particulars relating to his claim that removal would breach his human rights within 28 days; and the Respondent undertaking to respond to those submissions with a further decision within 28 days of receipt;

AND UPON the Respondent agreeing that (although in principle his decision would be subject to certification under s94 of the Nationality, Immigration and Asylum Act 2002) having considered the information available in this case, that it would not be appropriate to certify the decision

AND UPON the Respondent agreeing that if the Appellant succeeds on that 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 her decision of 20 July 2016 and:

(i) Grant the Appellant a reasonable opportunity, being not less than 60 days, to submit an application for further leave.

(ii) Waive any fee or charge (including health surcharge) that might be payable for making such an application.

(iii) Should that application be for leave to repeat all or part of the MSc course that the Appellant was studying when his leave was curtailed (or undertake a similar course at a different institution), and should that additional time raise any possible issue with regard to academic progression, or a cap (whether five years or otherwise), the Respondent will take into account all the circumstances of the case, and in particular in deciding his application will act reasonably to ensure that, so far as is practicable, the Appellant is not disadvantaged by an earlier wrong finding of deception.

(iv) Treat the claimant as having had continuous leave to remain since 20 July 2016 (and any earlier period as may be established).

AND UPON the Appellant accordingly applying to withdraw the underlying judicial review proceedings

BY CONSENT IT IS ORDERED:

1. The Appellant is granted permission to appeal;

2. The Appellant is granted permission to move for judicial review.

3. The Appellant is granted permission to withdraw that claim for judicial review.

4. The Respondent shall pay the Appellant's reasonable costs, from 31st January 2018, to be subject to detailed assessment if not agreed.

5. There shall be a detailed assessment of the Appellant's publicly funded costs.

CONSENT ORDER – ISLAM

HAVING REGARD to the requirements of paragraph 6 of the Practice Direction 52A to Part 52 of the Civil Procedure rules.

AND UPON all parties hereto requesting that the Court dismiss the appeal by consent without determining the merits.

AND UPON the parties confirming that none of the parties to these proceedings is a child or a protected party

AND UPON the Respondent accepting that the Appellant has made a human rights claim and that steps (i)-(iv) will follow as set out in the Statement of Reasons attached;

AND UPON the Appellant undertaking to submit full particulars relating to his claim that removal would breach his human rights within 28 days;

AND UPON the Respondent undertaking to respond to those submissions with a further decision within 28 days of receipt;

AND UPON the Respondent agreeing that (although in principle his decision would be subject to certification under s94 of the Nationality, Immigration and Asylum Act 2002) having considered the information available in this case, that it would not be appropriate to certify the decision;

AND UPON the Respondent agreeing that if the Appellant succeeds on that 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 her decision of 16th September 2015 and:

a. Treat the claimant as having had continuous leave to remain since 16 September 2015 (and any earlier period as may be established).

b. Grant the Appellant a reasonable opportunity (being not less than 60 days) to submit an application for further leave if by the time the First Tier Tribunal appeal is determined the appellant's original leave, valid until 15th June 2019, has expired;

c. Waive any fee or charge (including health surcharge) that might be payable for making such an application

AND UPON the Appellant accordingly applying to withdraw the underlying judicial review proceedings on the basis that the parties agree that the matter is academic in light of the foregoing:

BY CONSENT IT IS ORDERED:

1. The Appeal is dismissed;

2. The Appellant is granted permission to withdraw his claim for judicial review;

3. The respondent to pay the appellant's reasonable costs from 31 January 2018 onward, and there is otherwise no order as to costs. This costs order to replace all other orders in these proceedings.

CONSENT ORDER – HOSSAIN

HAVING REGARD to the requirements of paragraph 6 of the Practice Direction 52A to Part 52 of the Civil Procedure rules.

AND UPON all parties hereto requesting that the Court dismiss the appeal by consent without determining the merits.

AND UPON the parties confirming that none of the parties to these proceedings is a child or a protected party.

AND UPON the Respondent accepting that the Appellant has made a human rights claim and that steps (i)-(iv) will follow as set out in the Statement of Reasons attached (amended to reflect the fact that if the Appellant is successful in establishing before the First Tier Tribunal that he did not use deception in obtaining his ETS certificate, then the decisions of 25th September 2015 and 18th November 2015 will be rescinded);

AND UPON the Respondent agreeing that (although in principle his decision would be subject to certification under s94 of the Nationality, Immigration and Asylum Act 2002) having considered the information available in this case, it would not be appropriate to certify the decision;

AND UPON the Respondent agreeing that if the Appellant succeeds on that 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 decisions of 25th September 2015 and 18th November 2015 and:

(i) Grant the Appellant a reasonable opportunity, being not less than 60 days, to vary his application for leave to remain made on 13th July 2015.

(ii) Treat the Appellant as having continuous leave to remain by virtue of s.3C of the Immigration Act 1971 as a result of his in-time application for further leave to remain made on 13th July 2015.

(iii) In the specific circumstances of this case, the period from 30th July 2015 to the further decision is not to be counted towards the cap on post-graduate study.

AND UPON the parties agreeing that the matter is academic in light of the foregoing.

BY CONSENT
IT IS ORDERED THAT:-

1. The Appeal is dismissed.

UPON HEARING SUBMISSIONS FROM COUNSEL FOR THE APPELLANT AND COUNSEL FOR THE RESPONDENT
IT IS ORDERED THAT:-

1. The issue of costs is to be the subject of reserved judgment and further order.