JR-2023-LON-002272

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
Layes Ahmed

Applicant

and

Secretary of State for the Home Department

Respondent

ORDER

BEFORE Upper Tribunal Judge Blundell

HAVING considered all documents lodged and having heard Ms Naik KC, instructed by Zyba Law, for the applicant and Mr Biggs of counsel, instructed by GLD, for the respondent at a hearing on 9 September 2024,

AND UPON the applicant confirming that he does not pursue the application to re-open the hearing,

IT IS ORDERED THAT:

(1) The application for judicial review is dismissed for the reasons in the judgment handed down at 0930 on 5 December 2024.

(2) The applicant is to file and serve written submissions on costs and the respondent's adherence to the duty of candour no later than 4pm on 13 December 2024.

(3) The respondent is to file and serve written submissions in reply and any witness statement or any observations to providing the same no later than 4pm on the 23 December 2024.

(4) Any reply by the applicant is to be filed and served no later than 4pm on the 10 January 2025.

(5) After 10 January 2025, the costs of the application for judicial review and the costs of the application to re-open will be decided by Upper Tribunal Judge Blundell on the papers unless the contrary is ordered.

(6) Permission to appeal is refused. No application was made and the judgment contains no arguable legal error.

Signed: Mark Blundell

Upper Tribunal Judge Blundell

Dated: **5 December 2024**

The date on which this order was sent is given below

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): 05/12/2024

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-2023-LON-002272

IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Field House,
Breams Buildings
London, EC4A 1WR

5 December 2024

Before:

UPPER TRIBUNAL JUDGE BLUNDELL

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

Between:

THE KING
on the application of
LAYES AHMED

Applicant

- and -

SECRETARY OF STATE
FOR THE HOME DEPARTMENT

Respondent

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

Sonali Naik KC
(instructed by Zyba Law), for the applicant

Michael Biggs
(instructed by the Government Legal Department) for the respondent

Hearing date: 9 September 2024

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J U D G M E N T

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Judge Blundell:

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1. This application for judicial review concerns the Secretary of State's decision to refuse the applicant's application for Indefinite Leave to Remain on grounds of long residence. It is common ground that the applicant was unable to meet the requirements of paragraph 276B of the Immigration Rules[i] because there was, in law, a significant gap in his lawful residence. What I am concerned with is whether the respondent gave lawful consideration to her discretion outside the Rules to grant ILR despite that gap, on account of what Ms Naik KC submits are powerful factors which militated in favour of that course.

Background

2. The applicant is a Bangladeshi national. His date of birth is given as 1 January 1985. He arrived in the United Kingdom on 15 March 2011. He held entry clearance as a student which conferred leave to enter until 31 October 2012. He was subsequently granted further leave to remain in the same capacity until 26 January 2015.

3. On 30 March 2014, the applicant underwent an Islamic marriage to a British citizen named Fatema Begum. On 14 July 2014, they married in a civil ceremony. On 21 October 2014, well before the expiry of his leave as a student, the applicant sought leave to remain on the basis of his family life with his wife. The application was expressly stated to be under the Ten-Year Route in Appendix FM of the Immigration Rules and with reference to Article 8 ECHR. That application was pending when the applicant's leave would otherwise have expired in January 2015, as a result of which it was extended by operation of section 3C of the Immigration Act 1971.

4. On 26 June 2015, the respondent made two decisions, although neither was served until 3 August 2015.

5. By the first of those decisions, the respondent refused the application for leave to remain. There were two reasons given for the decision. The respondent did not accept, firstly, that the applicant met the Suitability requirements for leave because the respondent concluded that he had cheated in a TOEIC English test which he had taken on 18 July 2012. She did not accept, secondly, that the applicant was able to show that there were insurmountable obstacles to his relationship with his wife continuing in Bangladesh. This decision stated that the applicant had a right of appeal to the First-tier Tribunal.

6. By the second decision, the respondent stated that she had curtailed the applicant's leave to remain with immediate effect because of his conduct in fraudulently obtaining the TOEIC

certificate. The notice stated that the applicant was liable to removal under section 10 of the Immigration and Asylum Act 1999. This decision was silent as to whether or not the applicant had a right of appeal against it.

7. On 13 August 2015, the applicant lodged a notice of appeal to the First-tier Tribunal with the assistance of his former representatives. The grounds of appeal made reference to the first of the decisions which had been made on 26 June 2015, and submitted that the decision would be in breach of Article 8 ECHR because the applicant's wife was expecting their first child "and it would be unreasonable to expect [her] to relocate to Bangladesh".

8. The papers were placed before First-tier Tribunal Judge Ince on 17 September 2015. He concluded that there was no right of appeal because the applicant had not made a human rights claim. Seemingly with reference to only the curtailment decision, he observed that "the Secretary of State's / Immigration Officer's decision was not made in respect of any application by you and therefore it follows that you have not made any protection or human rights claim." The judge went on to state that the raising of human rights grounds in the notice of appeal was irrelevant as it was "the claim that determines whether a right of appeal exists, not whether you raise them in the appeal."

9. The applicant attempted to appeal against that decision to the Upper Tribunal but was informed, correctly[ii], that it was an excluded decision and that no appeal lay against it. That decision was communicated on 28 September 2015.

10. No judicial review proceedings were issued against Judge Ince's decision. Instead, on 7 December 2015, the applicant made another application for leave to remain in reliance on his family life. Shortly thereafter, on 15 February 2016, the applicant's wife gave birth to their first child.

11. On 3 November 2016, the respondent refused the application, holding (as before) that the applicant failed to meet the requirements of the Immigration Rules on grounds of Suitability and Eligibility and that there were no exceptional circumstances which warranted granting leave to remain on Article 8 ECHR grounds.

12. The applicant appealed against this decision. The FtT accepted jurisdiction and the appeal was heard by Judge Atkinson on 4 January 2018. In his reserved decision of 22 January 2018, Judge Atkinson allowed the appeal on Article 8 ECHR grounds. He found that the respondent had not discharged the burden upon her of showing that the applicant had used a proxy for his TOEIC test and

that he had not, in any event, relied upon the score in question in his latest application for leave to remain: [17]-[22]. The judge went on to conclude that it would not be reasonable to expect the applicant's son to leave the United Kingdom, as a result of which he allowed the appeal "on human rights grounds as framed under the immigration rules": [24]-[29].

13. The respondent did not seek to appeal against Judge Atkinson's decision and the applicant was accordingly granted leave to remain which was valid from 22 February 2018 to 21 August 2020. On 13 August 2020, the applicant made a further application for leave to remain in reliance on his family life. Leave to remain was granted until 13 July 2023.

The Application for Indefinite Leave to Remain

14. On 14 January 2023, the applicant applied for leave to remain on grounds of long residence. The application was accompanied by a letter from the applicant's former solicitors. It is necessary to set out the contents of that letter in some detail.

15. The letter states at the start and in capitalised bold type that it is an

> "APPLICATION FOR INDEFINITE LEAVE TO REMAIN IN THE UNITED KINGDOM ON THE BASIS OF 10 YEARS CONTINUOUS LAWFUL RESIDENCE IN THE UK."

16. A number of supporting documents were listed on the first page of the letter. On the second page, there were submissions about the applicant's length of residence. Those submissions were as follows:

> "Our client has instructed us that he arrived in the United Kingdom on 11 March 2011. Since his arrival our client has been continuously living in the UK. It has been over than [sic] 12 years of our client's continuous presence in the United Kingdom. As our client has been living in the United Kingdom for more than 12 years, our client is entitled to get indefinite leave to remain under 10 years continuous lawful residence. Therefore, he would like to regularise his stay in the United Kingdom based on long residence (ten years of continuous residence) in the UK.
>
> Our client has tried his best possible [sic] to gather a series of different type of documents covering different period showing/ confirming his continuous residence/ presence in the United Kingdom. We enclose herewith the documents and evidence he has managed to gather."

17. The letter then continued to make submissions concerning maintenance. It stated that the applicant was employed as a

warehouse operative and it gave his annual salary. Submissions were made about accommodation. The letter stated that the applicant was living with his wife and three young children at an address in Lancashire. There were then submissions concerning the applicant's rights under Article 8 ECHR, including significant and apparently boilerplate references to a raft of authorities from the domestic and Strasbourg courts.

18. On the final page, under the sub-heading "Conclusion", the applicant's solicitors made the following submission:

> "We would be grateful if the Secretary of State would consider our client's application and grant him indefinite leave to remain in the United Kingdom having considered under the long residence (10 Years') rule."

The Decision(s) Under Challenge

19. The respondent sent an email to the applicant's former solicitors on 24 July 2023. She stated that a decision had not been made on the application, but she had concluded that the applicant did not meet the requirements for Indefinite Leave to Remain. Her conclusion under the Immigration Rules was explained in the following section of the email:

> "You entered the UK on 15 March 2011, and held valid permission to stay as a Tier 4 migrant and with section 3C leave until 15 July 2015; on that date, your section 3C leave pending appeal expired, following the refusal of leave to remain with a right of appeal on 26 June 2015, which right you chose not to exercise. As such, I am satisfied that you had a period of continuous lawful residence from 15 March 2011 to 15 July 2015, being 4 years and 4 months.
>
> Following the expiration of your section 3C leave on 15 July 2015, you next submitted an application for leave to remain on 08 December 2015; as this was over 28 days following the expiration of your leave, I am satisfied that this period of overstaying cannot be disregarded in line with paragraph 276B(v).
>
> You were next granted leave to remain on 22 February 2018, and you have held valid permission to stay since that date. I am satisfied that you currently have a period of continuous leave to remain from 22 February 2018 to date, being 5 years and 5 months.
>
> As you have held no lawful leave to enter or remain in the UK, as defined in paragraph 276A(b), between 16 July 2015 and 21 February 2018 (inclusive), it is considered that you have two completed discrete periods of continuous lawful leave, neither

> of which can be combined due to the above-described break in continuous lawful residence, and neither of which have been for a period of at least ten years. Therefore, as you have not completed 10 years continuous lawful leave in the UK, you are unable to meet paragraph 276B(i)(a) of these Rules.
>
> The Secretary of State hereby refuses your application for indefinite leave to remain under paragraph 276D of the Immigration Rules with reference to paragraph 276B(i)(a)."

20. The respondent then considered whether she should grant ILR outside the Immigration Rules. She directed herself to Home Office guidance on Leave Outside the Rules before stating as follows:

> "This guidance states that applicants seeking indefinite leave to remain outside the Immigration Rules should provide details as to why they should be granted indefinite leave to remain rather than limited leave. Indefinite leave to remain is a privilege, not an automatic entitlement. Unless there are truly exceptional reasons, the expectation is that applicants should start a route to indefinite leave to remain and serve a probationary period of limited leave before being eligible to apply for indefinite leave to remain. However, there may be exceptional cases where indefinite leave to remain is the only viable option, where a short period of leave is not appropriate because of, for example, particularly compelling compassionate circumstances. There must be sufficient evidence to demonstrate the individual circumstances are not just unusual but can be distinguished to a high degree from other cases to the extent that it is necessary to deviate from a standard grant of 30 months' leave to remain.
>
> On 26 June 2015 and 02 November 2016, you were refused leave to remain in the United Kingdom. The reasons for these refusals have been carefully considered. I note that on both, you were refused as you did not meet the Eligibility or Suitability requirements of the route.
>
> In the decision of 26 June 2015, it was stated that you did not meet the Eligibility requirements as the partner of a British citizen, and you did not meet the Suitability requirements due to deception with regards your English language test for a previous application.
>
> In the decision of 02 November 2016, it was stated that you did not meet the Eligibility requirements as the partner or parent of a British citizen, and you did not meet the Suitability requirements due to deception with regards your English language test for a previous application.
>
> Following the refusal of 02 November 2016, you lodged an appeal, which was heard and subsequently allowed by an Immigration Judge (IJ) on 22 January 2018. The IJ determination

> has been carefully considered, and I note that, whilst the Suitability (deception) reason for refusal has been dismissed, the Eligibility requirements as a partner or parent of a British citizen have not been addressed, with the appeal being allowed outside of the Immigration Rules on HR grounds only, and I am therefore satisfied that the decisions to refuse leave to remain were correct on Eligibility grounds.
>
> Therefore, were the Suitability reasons for refusal to be removed from each decision, I am satisfied that both decisions would continue to be to refuse leave to remain for the Eligibility reasons listed in the respective notices. I am therefore not satisfied that it would be appropriate to exercise any discretion to disregard time spent in the UK without lawful leave during that period.
>
> You have stated that you have formed various friendships during your residence in the UK and that your social ties are here. However, you have provided no evidence of this. Therefore, it is not accepted that your social ties in the UK are significant [sic] exceptional enough to justify granting indefinite leave to remain outside the Rules.
>
> You state that you have integrated well into British society and have never relied on public funding, throughout your stay. Whilst these submissions are not disputed, these behaviours are what would be expected of any person living in the UK and do not amount to exceptional reasons, which warrant granting your [sic] indefinite leave to remain.
>
> You also state that you wish to be granted indefinite leave to remain in order to remain with your family and to continue in employment. As this decision does not prevent you from doing so, it is considered that a grant of 30 months leave to remain is appropriate.
>
> Your application for indefinite leave to remain is hereby refused. The Secretary of State is not satisfied yours is a case which can be considered for discretion."

21. The email ended by accepting that the applicant was eligible for limited leave to remain as a partner. He was invited to pay the Immigration Health Surcharge ("IHS") so that he could be granted limited leave in that capacity.

22. The applicant then paid the IHS and his application for ILR was refused for the reasons given above. He was however granted limited leave to remain as a partner until 17 February 2026.

23. The applicant then instructed his current solicitors. On 28 September 2023, they issued a Letter Before Action, contending that the refusal of ILR was unlawful. He submitted that he should

have had an in-country right of appeal against the human rights refusal in 2015 and that Ahsan & Ors v SSHD [2017] EWCA Civ 2009; [2018] HRLR 5 required that he should, on winning his appeal before Judge Atkinson, have been ‘put in his original position’. The applicant had wanted to pursue a claim for judicial review against Judge Ince’s decision but his previous representatives had not done so and were no longer in practice. The past events amounted to a historical injustice which rendered the refusal of ILR irrational.

24. The respondent replied on 13 October 2023, maintaining her decision, and this claim was issued on 20 October 2023. The original grounds were settled by the applicant’s solicitors. There were three grounds:

    (i) The respondent had misdirected herself on the facts. The applicant had not “chosen” not to exercise his right of appeal against the 2015 decision; the FtT had refused jurisdiction.

    (ii) The respondent’s decision was contrary to Ahsan & Ors v SSHD, in that she had failed to rescind the human rights refusal dated 26 June 2015 and had failed to deal with the applicant thereafter as if the unfounded TOEIC allegation had never been made.

    (iii) In the alternative, the respondent had erred in law in failing to take account of the historical injustice which occurred in 2015.

25. Permission was refused on the papers by Upper Tribunal Judge Gleeson. The applicant renewed his application to an oral hearing, which was listed to be heard before Upper Tribunal Judge Perkins on 3 May 2024.

26. On 5 April 2024, the applicant’s solicitors made an application to file replacement grounds, settled by Ms Naik KC and junior counsel, Ms Fathers. The single amended ground (which was to replace those previously pleaded) was that the respondent had acted unlawfully in failing to exercise her discretion to grant ILR and that the respondent’s failure to return the applicant to his original position was also unlawful. It was submitted that the respondent had misunderstood the findings of Judge Atkinson, who had allowed the appeal on the basis that the Immigration Rules were met. It was also submitted that the respondent had erred in concluding that the applicant had ‘chosen’ not to appeal against the 2015 human rights refusal. It was said that the respondent had failed to adhere to the position she had adopted in Ahsan & Ors v SSHD and Khan & Ors v SSHD [2018] EWCA Civ 1684; [2019] Imm AR 54 and that, had she directed herself correctly as to the law and the facts, she would have recognised that the applicant was the victim of a significant

historical injustice. As it was put at [24] of the replacement grounds, “The loss of his continuity of leave is a direct consequence of that decision and remains unremedied.”

27. By an order dated 2 May 2024, Judge Perkins permitted the amendment of the grounds. At the hearing on 3 May 2024, he granted the applicant permission to proceed on the basis of the amended grounds. Judge Perkins also noted that it had been submitted by the respondent’s counsel (not Mr Biggs) that Ms Naik had advanced a further additional point: “but for the erroneous TOEIC decision in 2015 the applicant would have had a right of appeal against [the refusal of] his human rights claim.” Judge Perkins ordered that any further refinement of the grounds so as to include that argument was to be filed and served within 10 days, after which time for the Detailed Grounds of Defence would start to run.

28. A further amendment to the grounds was duly made in accordance with that order, and the respondent’s Detailed Grounds of Defence (“DGD”) accordingly responded to all of the arguments which Ms Naik wished to advance.

Submissions

29. Before I heard submissions, I invited counsel to consider two authorities: R (Friends of the Earth Ltd & Anor) v Secretary of State for Transport [2020] UKSC 52; [2021] PTSR 190 and Vasa & Hasanaj v SSHD [2024] EWCA Civ 777. I provided copies of those decisions and rose to give counsel time to consider them.

30. The submissions advanced orally and in writing were as follows.

31. For the applicant, Ms Naik submitted that the respondent had overlooked the real impact of the unfounded TOEIC allegation which was made in 2015. Any reasonable decision maker acting lawfully would have recognised that the consequences of that error were more wide-ranging than the SSHD had thought. That unfounded allegation was maladministration which amounted to illegality and the respondent was required by conventional proportionality principles to take that illegality, and all of its consequences, into account: R (Moussaoui[iii]) v SSHD [2016] EWCA Civ 50, Bank Mellat v HM Treasury [2013] UKSC 39; [2014] AC 700, Pham v SSHD [2015] UKSC 19; [2015] 1 WLR 1591. The position was comparable to the paradigm example of historical unfairness given in Patel (historic injustice; NIAA Part 5A) [2020] UKUT 351(IAC); [2021] Imm AR 355: “where the Secretary of State has failed to give an individual the benefit of a relevant immigration policy”, as in AA (Afghanistan) v SSHD [2007] EWCA Civ 12.

32. It was immaterial that nothing had been said in the covering letter; it was for the respondent to take account of the consequences of her errors, and she had failed to do so. The gap in the applicant's lawful residence was wholly attributable to those errors. The respondent had refused the in-time application and had curtailed the applicant's leave as a result of the TOEIC allegation. It was the latter decision which had caused Judge Ince to err as to the jurisdiction of the FtT. The respondent submitted that the applicant could have sought judicial review of his decision, but this was nothing more than 'victim blaming' on the part of the Secretary of State.

33. The corrective relief principles which lay behind the decisions in Khan v SSHD and Ahsan & Ors v SSHD were necessarily relevant. For reasons which were unclear, the decision maker had seemingly proceeded on the basis that all that was required was to excise the earlier TOEIC allegation from the decision-making process but that was a gross oversimplification. The applicant had been the victim of a very serious injustice. The Secretary of State was wrong to suggest that the applicant had chosen not to appeal against the 2015 decision. Had a right of appeal been found to lie against that decision, it was quite plain that the applicant might have succeeded before the FtT. That was evident from Judge Atkinson's subsequent decision to allow the appeal under the Immigration Rules, although the respondent had failed to come to grips with that decision either. The FtT's failure to permit the 2015 appeal to proceed had therefore resulted in a significant loss of opportunity for the applicant.

34. For the respondent, Mr Biggs relied on the skeleton argument which had been settled by Hafsah Masood of counsel but he structured his oral submissions in the following way.

35. Mr Biggs submitted, *firstly*, that the respondent had not excluded from her consideration matters which she was bound to consider, and therefore that there was no proper complaint under the procedural limb of the Wednesbury test: Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223, at p228-229. There had been no reference to any of the matters on which Ms Naik relied in the application to the respondent. The application had been presented as one in which the applicant positively met the requirements of the Immigration Rules, whereas it was now accepted that he had no case under the Rules. There had been no request for Leave Outside the Rules, and certainly no submissions of the kind now advanced.

36. It was clear from the Friends of the Earth decision that a decision maker had to consider three categories of relevant matter. Here,

the matters to which Ms Naik referred could conceivably fall within only the third of those categories but it could not properly be said that it had been Wednesbury unreasonable for the Secretary of State not to identify and consider the "exotic" arguments now relied upon by Ms Naik.

37. Mr Biggs submitted that it was necessary to consider the reasoning in the October 2014 decision with care. That decision was not based solely on the TOEIC allegation; there was also a conclusion that the applicant was unable to meet the requirements of paragraph EX1 of Appendix FM of the Immigration Rules. Nothing said by Judge Atkinson cast any doubt on the latter conclusion, based as it was on the different circumstances which then obtained. The Secretary of State had come to grips with that point in the decision under challenge and it was of no moment that she had wrongly thought that Judge Atkinson had allowed the appeal for reasons outside the Immigration Rules. The consequence of this was that the respondent had been entitled to conclude that the gap in the applicant's residence was not wholly caused by the unfounded TOEIC allegation. Given the respondent's policy, as cited in the decision, it was proportionate to grant only limited leave. Pham v SSHD was of no assistance to Ms Naik.

38. Mr Biggs submitted, *secondly*, that the restitutionary duty in Ahsan & Ors v SSHD did not apply to this case in any event. Those cases were applications for judicial review of "old style" decisions taken under section 10 of the Immigration and Asylum Act 1999. There was a precedent fact in issue, and if the deception had not occurred then there was no power to remove. In cases such as the present, however, the finding made by Judge Atkinson did not mean that the Secretary of State's decision fell away, or should be treated as if it had fallen away. The Secretary of State's policy required her to deal with the applicant on the basis that the allegation had not been made but that had no purchase in a case such as the present, where there was a standalone basis for the decision which was untouched by the FtT's later finding.

39. The applicant had been told that he had a right of appeal against the June 2015 decision. It was not clear why the curtailment decision had been taken but it was clear that it was of no legal effect. The refusal of the human rights claim was valid and continued to have legal effect until it was set aside by a court of competent jurisdiction: Vasa & Hasanaj v SSHD, at [69], citing Smith v East Elloe RDC [1956] AC 736. It was not clear why Judge Ince had refused jurisdiction; it might have been because the applicant only supplied the curtailment decision. The applicant recognised in his witness statement there was a right of appeal and that he had failed to take action when confronted with Judge Ince's decision.

There had been no wrongful operation by the Secretary of State of her immigration functions; the error was that of Judge Ince or the applicant, or both.

40. Mr Biggs submitted, *thirdly*, that there was no historical injustice, whether at common law or in Article 8 ECHR terms. The decision made by the Secretary of State in June 2015 had never been challenged and bore no brand of invalidity on its forehead (Smith v East Elloe refers). What the applicant sought to do, impermissibly, was to mount a collateral challenge to that decision. Moussaoui v SSHD, on which Ms Naik relied, was of no assistance to her; there was no past illegality in that case, as here. What was required was illegality in respect of the past decision, not merely a limb of it. The Secretary of State had clearly been cognisant of the error into which she had fallen but that error had not removed the applicant's right of appeal or his leave under section 3C of the Immigration Act 1971. In relation to Article 8 ECHR, there was now an attempt to blame the applicant's previous representatives but it was unusual that such a claim would succeed and it could not do so in this case. The claimed failings of the advisers and the FtT had not been set out for the respondent. There could be no Article 8 ECHR case here in any event, as the applicant had been granted limited leave.

41. *Fourthly*, although it was accepted that the respondent had fallen into two errors (that the applicant had chosen not to appeal the June 2015 decision and that Judge Atkinson had allowed the appeal outside the Immigration Rules), neither of those errors was material. Relief should therefore be refused under s31(2A) of the Senior Courts Act 1981, applying the approach set out by the Deputy Judge in R (Cava Bien Ltd) v Milton Keynes Council [2021] EWHC 3003 (Admin). In the event that the applicant prevailed, however, Mr Biggs submitted that the relief sought in the claim form was wrong; no quashing order had been sought and it would be difficult to formulate the terms of any such order.

42. In reply, Ms Naik submitted that the relief sought was appropriate and would require the Secretary of State to reconsider the decision.

43. Ms Naik submitted that it was clear that the respondent had erred in issuing a curtailment decision in 2015. It was that decision which had wrongfooted Judge Ince into refusing jurisdiction and which had ended the applicant's leave under s3C. The prejudice he had suffered therefore flowed from a wrongful operation of the respondent's immigration function. There was no evidence from the Secretary of State as to why the curtailment decision had been taken.

44. The respondent still suggested that the gap in the applicant's leave was the applicant's fault but Judge Ince's decision had been sent to both parties and the respondent had done nothing to correct his error. The respondent had failed to give any adequate consideration to the injustice caused by this sequence of errors. It was notable that the respondent had stated that the applicant had no leave to remain and required him to report to an Immigration Officer in July 2015.

45. The applicant had relied on a twelve year period in his application. The respondent was aware that there was a gap and she was required to consider that gap lawfully and with an accurate account of the history. If the decision was to be reconsidered, there would undoubtedly be a detailed letter setting out the submissions now made but the absence of such a letter did not absolve the respondent of the obligation to consider the circumstances lawfully in the first place.

46. The respondent was unable to meet the high standard of immateriality set out in R (Cava Bien) v Milton Keynes Council.

47. Mr Biggs expressed concern at the end of Ms Naik's reply that he might have been misunderstood. I permitted him to make a short submission in the circumstances. He suggested that there were two separate questions: (i) whether the conclusion that the applicant had not cheated in his TOEIC test established that there had been a historical injustice and (ii) whether the curtailment decision had given rise to an injustice.

48. In final reply to those points, Ms Naik observed that the applicant's case was pleaded in that way, as was clear from [57] of her skeleton argument.

49. I reserved my judgment at the conclusion of the submissions.

Analysis

50. Whilst it will be necessary to explain the reasons for my conclusions in some detail, the conclusions themselves may be summarised quite shortly. For the reasons which follow, I have concluded that: (i) the respondent considered that which she was obliged to consider and did not leave material matters out of account; (ii) in any event, the matters which were said to have been left out of account would have made no difference to the outcome; and (iii) the mistakes which were made by the respondent in the decision under challenge were immaterial to the outcome.

Relevant Principles

51. It is submitted by the applicant that the respondent erred in failing to take relevant considerations into account when deciding that he should not be granted Indefinite Leave to Remain outside the Immigration Rules. In assessing any such submission, it is necessary to find some legal principle which compelled (not merely empowered) the decision maker to have regard to the matter or matters in question: R (Samuel Smith Old Brewery & Anor) v North Yorks CC [2020] UKSC 3; [2020] PTSR 221, at [30].

52. The law on relevant and irrelevant considerations was considered in R (Friends of the Earth) v Transport Secretary. At [116], Lord Hodge and Lord Sales (with whom the other Justices agreed) adopted as a 'useful summation of the law' what had been said by Simon Brown LJ in R v Somerset CC, ex parte Fewings [1995] 1 WLR 1037. Simon Brown LJ (as he then was) stated that there were three categories of consideration:

> First, those clearly (whether expressly or impliedly) identified by the statute as considerations to which regard must be had. Second, those clearly identified by the statute as considerations to which regard must not be had. Third, those to which the decision-maker may have regard if in his judgment and discretion he thinks it right to do so.

53. As Lord Hodge and Lord Sales went on to explain, the third category of consideration also includes matters which are 'so obviously material' to a decision that they must be taken into account: [117]-[118]. In deciding whether a consideration is so obviously material that it must be taken into account, the test is the familiar Wednesbury irrationality test: [119]. At [120], they emphasised that there is "no obligation on a decision-maker to work through every consideration which might conceivably be regarded as potentially relevant to the decision they have to take".

54. The Secretary of State retains a discretion under s3 of the Immigration Act to grant leave to enter or remain in circumstances not provided for in the Immigration Rules: R (Munir & Anor) v SSHD [2012] UKSC 32; [2012] 1 WLR 2192, at [44]. Consideration of Leave Outside the Rules ("LOTR") is the subject of formal Home Office guidance: *Leave outside the Immigration Rules*. Version 3.0 of that Guidance was issued on 29 August 2023 but version 2.0, which was published on 9 March 2022, was materially identical for present purposes. The Guidance states that applicants who seek ILR outside the Rules should provide details of why they should be granted ILR rather than limited leave. It states that ILR is a privilege, not an automatic entitlement.

55. In Siddiqa v ECO [2024] EWCA Civ 248, Dingemans LJ (with whom Elisabeth Laing and Baker LJJ agreed) stated that applicants were expected to make proper applications, and it was not for the Secretary of State to 'chase shadows' to see if the applicant intended to make a different application. That statement was supported by reference to the decision of the Court of Appeal in R (Behary & Ullah) v SSHD [2016] EWCA Civ 702. At [39] of his judgment in the latter case, Burnett LJ (as he then was) summarised the extent of the Secretary of State's obligation to consider LOTR in the following way:

> There is an obligation to consider such a grant when expressly asked to do so and, if but briefly, deal with any material relied upon by an applicant in support. Outside cases where there has been a request there may exist, at least in theory, cases where the facts are so striking that it would be irrational in a public law sense not to consider the grant of leave outside the Rules or at least seek clarification from the applicant whether he was seeking such leave.

56. The reference to facts which are 'so striking' that it would be irrational in a public law sense not to grant LOTR is evidently a reference to the established principles considered at [116]-[120] of the Friends of the Earth case.

(i) The respondent did not leave material matters out of account

57. The application of those principles to the facts of the applicant's case presents him with a serious difficulty. Ms Naik accepts, as she must, that there was no reference whatsoever in the application for ILR to leave outside the Rules, or to there being gaps in the applicant's residence, or to the bases upon which she now submits that it was nevertheless necessary for the Secretary of State to turn her mind to those matters. She notes, correctly, that the respondent was aware that there was a gap in the applicant's lawful residence, and the reasons for that gap, and that the respondent proceeded to consider for herself whether there were exceptional circumstances which warranted granting ILR outside the Rules. In any event, she submits that the respondent was obliged to consider these matters as a result of what was said in Ahsan & Ors v SSHD, at [120]:

> "The starting-point is that it seems to me clear that if on a human rights appeal an appellant were found not to have cheated, which inevitably means that the section 10 decision had been wrong, the Secretary of State would be obliged to deal with him or her thereafter so far as possible as if that error had not been made, i.e. as if their leave to remain had not been invalidated. In a straightforward case, for example, she could and should make a fresh grant of leave to remain

> equivalent to that which had been invalidated. She could also, and other things being equal should, exercise any relevant future discretion, if necessary "outside the Rules", on the basis that the appellant had in fact had leave to remain in the relevant period notwithstanding that formally that leave remained invalidated."

58. Ms Naik also refers to [37] of Khan v SSHD, in which Singh LJ recorded that respondent's position statement in that appeal included the following:

> "(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."

59. Ms Naik relies on Judge Atkinson's finding that the applicant did not cheat in his TOEIC test. She submits that the Secretary of State was obviously aware of Judge Atkinson's finding, despite the lack of reference to it in the covering letter, and that the Secretary of State was 'obliged to deal with him thereafter so far as possible as if that error had not been made.'

60. In my judgment, however, that is precisely what the respondent did. She analysed the position in which the applicant would have found himself if the unfounded TOEIC allegation had not been made. She noted that his application for leave to remain had not been refused on only that basis, and that the refusal of leave to remain had also been based on a conclusion that the applicant could not show that there were insurmountable obstacles to the continuation of family life abroad. The respondent noted that nothing said subsequently had disturbed the latter conclusion. She therefore proceeded on the basis that the applicant's continuous lawful residence would have been derailed by the Eligibility ground of refusal, even if the Suitability ground of refusal had not been raised.

61. Ms Naik submits that the respondent should have gone further, and that she should have taken into account the “full ramifications” of the unfounded TOEIC allegation. Ms Naik submits that the respondent was wrong to issue the curtailment notice alongside the human rights refusal in 2015, and that it was the curtailment notice which wrongfooted Judge Ince when he refused jurisdiction. She submits that Judge Ince was wrong to refuse jurisdiction and that his decision resulted in the applicant losing a chance to contest what might well have been a successful appeal. Ms Naik submits that these were all “mandatory relevant considerations” when the Secretary of State was deciding to exercise her discretion to grant ILR outside the Immigration Rules, and that the failure to take these matters into account vitiated that assessment.

62. Mr Biggs accepts that the respondent erred in issuing the curtailment notice at the same time as the refusal of the human rights claim in the summer of 2015, as there was no power in law to curtail the applicant’s leave at that time. He also accepts that Judge Ince was in error when he decided that the FtT had no jurisdiction to consider the applicant’s appeal, as he sought to appeal against the refusal of a human rights claim and not (as the judge thought) against the curtailment decision. Mr Biggs submits, however, that nothing had been said about these matters in the applicant’s application for ILR and that they were not obvious considerations which fell into the third category described in the Friends of the Earth case.

63. I struggle to find any principled basis upon which those matters were relevant considerations which the Secretary of State was *required* to take into account. The Immigration Act 1971 lists no relevant considerations. None of these submissions were made to the Secretary of State. In the event that Ms Naik is to succeed, therefore, she must establish that these matters fell within the third category in the Friends of the Earth case: matters which were so obviously material that it was *Wednesbury* unreasonable for the Secretary of State not to take them into account. Whilst I might not go so far as Mr Biggs, who at one point described these points as ‘exotic’, I accept his submission that these matters cannot possibly satisfy that test.

64. Ms Naik submitted that these matters necessarily entered the equation for other reasons, however. She submitted that the Secretary of State was required to consider these matters because of authority, or because she was required to do so by Article 8 ECHR, or because she would fail to exercise her discretion on the proper footing without reference to these matters. In my judgment, however, Ms Naik fails to point to anything which *compelled* the Secretary of State to have regard to those matters despite the lack

of reference to them in the letter which accompanied the application for ILR.

65. Ahsan and Khan do not assist Ms Naik. As Mr Biggs submitted, those cases concerned the Secretary of State's obligation where a judicial finding of fact in a human rights appeal had taken away the sole basis upon which the Secretary of State had decided to remove the individual in question. In such a case, the respondent would then be obliged to be obliged "to deal with [an applicant] thereafter so far as possible as if that error had not been made", and to treat them as if they had had leave. They do not assist in a case such as the present, in which the TOEIC allegation was not the only basis for the historical decision. As the respondent submitted, there would still have been a break in the applicant's lawful residence if the TOEIC allegations had not been made.

66. Mr Biggs submitted that the relevance of Bank Mellat and Pham v SSHD was unclear. With respect to Ms Naik, I have also struggled to understand their relevance. No Convention rights are in issue in this case; the applicant was granted leave to remain and the decision to refuse ILR does not engage Article 8 ECHR. The question in this case is whether the Secretary of State took account of relevant considerations in refusing to grant ILR outside the Rules; it is not whether the decision was a proportionate one, or whether a less intrusive measure might have been used without unacceptably compromising the policy objective.

67. Moussaoui v SSHD, to which I will return in due course, is also of no assistance to Ms Naik in connection with her submission that the erroneous curtailment decision and Judge Ince's error as to the jurisdiction of the First-tier Tribunal were mandatory relevant considerations for the respondent even though they had not been brought to her attention. The particular historical error in that case had been drawn squarely to the respondent's attention, and the decision under challenge had taken account of it.

68. In my judgment, the respondent was entitled to consider the application for ILR which had been made. That was expressly an application under paragraph 276B, and it was bound to fail. Because of the policy adopted in the aftermath of Ahsan, the respondent was also obliged to recognise that she had made an erroneous TOEIC allegation in the past, and to consider how to "deal with [the applicant] … so far as possible as if that error had not been made". That was what the respondent did in the decision under challenge. Her obligation did not also extend to the consideration of the additional matters upon which Ms Naik relies. Those matters were not obvious to any rational decision maker and it was not incumbent on the respondent to chase shadows.

(ii) Additional matters would have made no difference to the outcome

69. In any event, I accept Mr Biggs's submission that a wider enquiry on the part of the respondent would inevitably have yielded the same result for the applicant. The gap in the applicant's lawful residence was brought about by the TOEIC allegation which was later shown to be unfounded *and* by the respondent's conclusion that there were no insurmountable obstacles to the applicant and Ms Begum living together in Bangladesh. Whilst Judge Atkinson's decision established that the former allegation was unfounded, it had no such effect on the second limb of the decision, which was based on the facts as they stood in 2015, whereas he considered the facts as they stood in 2018, by which stage the applicant was the father of a British child who was yet to turn two.

70. Ms Naik submits that the curtailment decision was incorrect, and that it brought about the First-tier Tribunal's error as to its jurisdiction. The first part of that submission is clearly right but I am unable to accept the second part.

71. It is apparent from the contemporaneous records that the human rights refusal was provided to the First-tier Tribunal with the notice of appeal. It is clear from the human rights refusal that the Secretary of State accepted that it carried an in-country right of appeal. The Secretary of State made no contrary representations to the First-tier Tribunal when the applicant sought to appeal. Judge Ince erred in seizing upon the curtailment decision and in concluding that this was a case to which R (Nirula) v FtT(IAC) & SSHD [2012] EWCA Civ 1436; [2013] 1 WLR 1090 applied. The applicant was not seeking to raise human rights representations in response to a notice of curtailment; he was seeking to appeal against the refusal of a human rights claim he had already made. The curtailment decision was irrelevant. But this error was Judge Ince's error, not the respondent's, and the applicant took no steps to challenge the FtT's decision by way of an application for judicial review.

72. I note that there is now a statement from the applicant in which he seeks to lay the blame for that failure at the door of his previous advisers but I cannot take account of that statement when it was not before the decision maker. The applicant's leave came to an end when the FtT decided that it had no jurisdiction over his appeal and, as Mr Biggs submitted, the respondent was entitled to approach the case on the basis that the FtT's decision continued to have legal effect because it had never been challenged: R (Majera) v SSHD [2021] UKSC 46; [2022] AC 461, Smith v East Elloe and Vasa & Hysenaj v SSHD refer. This is not 'victim blaming', as Ms Naik

submitted, it is the application of conventional principle to administrative decisions. There was no reason for the respondent to have treated the FtT's decision as anything other than a decision which brought the applicant's statutorily extended leave to an end.

73. Moussaoui v SSHD, on which Ms Naik relied, is supportive of Mr Biggs' submissions. That was a case about the Legacy programme. The Secretary of State had erred in her past treatment of the applicant, by informing him that his case had been fully reviewed under that programme when in fact it had not. That mistake was said to be maladministration which amounted to illegality, which was in turn relevant to the exercise of the Secretary of State's discretion to give or refuse leave to remain under paragraph 353B of the Immigration Rules.

74. Lord Dyson MR gave the only full judgment, with which Sales and Tomlinson LJJ agreed. The Master of the Rolls underlined the "significant distinction between illegality and maladministration": [26]. He also emphasised that it was incumbent on an applicant to establish a causal connection between the illegality and the prejudice caused to the claimant. The respondent's mistake did not amount to illegality and was not, he concluded, "capable of being an exceptional circumstance justifying the grant of leave to remain outside the Rules if the mistake has not adversely affected the Claimant.": [28].

75. In the applicant's case, the respondent undoubtedly erred in making the curtailment decision but the applicant is unable to demonstrate prejudice which is attributable to that error. Judge Ince erred in refusing jurisdiction and the applicant then failed to take action to challenge his decision. The respondent plainly intended the applicant to have a right of appeal against the refusal of his human rights claim but the jurisdictional decision of the First-tier Tribunal operated as a *novus actus interveniens* to break the chain of causation, and the applicant did nothing to address that. If he lost the chance to address the TOEIC allegation and the respondent's conclusion that there were no insurmountable obstacles, that loss of a chance was not the fault of the respondent and it provided no proper basis for the respondent to exercise her discretion in the applicant's favour.

(iii) The mistakes in the decision under challenge were immaterial – s31(2A) SCA 1981

76. It is clear that mistakes were made by the respondent in the decision under challenge, but I accept Mr Biggs' submission that it is highly likely that the respondent's decision would have been the same even if those mistakes had not been made. The respondent erred in stating that the applicant had "chosen" not to appeal against the 2015 decision and in stating that Judge Atkinson had allowed the 2018 appeal outside the Rules. It is clear that the applicant sought to appeal against the 2015 decision, and that Judge Atkinson found for the applicant on the basis that it would be unreasonable for the applicant's son to relocate to Bangladesh. Judge Atkinson clearly stated at [29] of his decision that he allowed the appeal "on human rights grounds as framed under the immigration rules", thereby adopting essentially the approach which was subsequently confirmed by the Court of Appeal at [34] of TZ (Pakistan) & Anor v SSHD [2018] EWCA Civ 1109; [2018] Imm AR 1301.

77. Adopting the approach set out by Deputy High Court Judge Kate Grange KC at [52] of R (Cava Bien) v Milton Keynes Council [2021] EWHC 3003 (Admin), I consider that the respondent's mistakes were immaterial to the outcome. Had the respondent appreciated that the applicant had failed to issue judicial review proceedings against Judge Ince's decision, rather than thinking that he had 'chosen' not to appeal, the outcome would necessarily have been the same. Either way, the applicant had failed to pursue an effective challenge to the two-pronged decision which was made in 2015. And even if the respondent had understood that Judge Atkinson had allowed the appeal on the basis that the Immigration Rules were met, the fact remains that nothing said by Judge Atkinson in 2018 served to undermine (or, more accurately, to render unlawful) the respondent's conclusion in 2015 that there were no insurmountable obstacles to the relationship continuing in Bangladesh at that point.

Conclusion

78. In sum, I do not accept that the respondent's decision was flawed by public law errors which were material to the outcome. The claim will be dismissed accordingly.

79. I invite counsel to agree the appropriate form of order.

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Postscript

80. The judgment above was circulated to the parties in draft, in the usual way, on 7 November 2024. Typographical and other corrections were sought in advance of the judgment being handed down at a hearing on 13 November 2024. The parties were invited
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to agree the form of the order and to make any applications for orders consequential on the judgment in writing no later than 4pm on 11 November 2024.

81. Both parties provided typographical amendments, for which I am grateful, and which have been reflected in this final version of the judgment.

82. On 11 November 2024, however, the applicant's solicitors also made a formal application for the hearing to be re-opened as a result of material which had been disclosed to them by the respondent pursuant to a Subject Access Request which had been made many months previously. I need not set out the minutiae of that material, or of the submissions made upon it. It suffices, in light of the applicant's eventual stance, to note that there was material which suggested that the applicant had been granted leave to remain under the Five Year Route in 2018. Ms Naik and Ms Fathers submitted in writing, for reasons which I need not detail, that this changed the complexion of the case and that the hearing should be re-opened.

83. I gave the respondent an opportunity to respond to those submissions in writing and, on 14 November 2024, there was a response which had been settled by Mr Biggs. I intend him no discourtesy by summarising his response in this overly simplistic way: the additional material makes no difference, and the judgment should be handed down without further ado. The GLD provided additional evidence in support of Mr Biggs' submissions.

84. I gave the applicant an opportunity to respond to the respondent's submissions. In a further note which was settled on 25 November 2024, Ms Naik and Ms Fathers confirmed that the application to re-open the hearing was not pursued. The applicant intended instead to 'pursue other avenues of resolution outside of these proceedings by way of further application to the respondent'. The respondent had been invited to settle the proceedings by consent, with the claim being dismissed (on the grounds pleaded on the material then available to the applicant) but with each party bearing their own costs. I was invited to afford the parties until 4pm on 26 November 2024 to consider that option. In the event that they were unable to agree, I was invited to hand down judgment and to make appropriate directions regarding costs and other unagreed consequential matters.

85. Given the history of the matter, I have given the parties longer than the time suggested by Ms Naik. Today (28 November 2024) I have asked the Upper Tribunal's staff to send this amended version of the judgment in draft. I record that it is currently my intention to hand down judgment on a date to be fixed in the week

commencing 2 December 2024. I invite the parties to agree a form of order which reflects the judgment above and to make any applications, whether for permission to appeal or consequential orders, in writing. I intend to order that written submissions on costs (to include any submissions about candour) should be filed and served thereafter. I will consider any contrary submissions and any suggested timeframes before handing down judgment and finalising the order.

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[i] Paragraph 276B was deleted from the Immigration Rules on 11 April 2024, and replaced by Appendix Long Residence but that is irrelevant for the purposes of this case.

[ii] Abiyat & Ors (rights of appeal) Iran [2011] UKUT 00314 (IAC); [2011] Imm AR 822 refers

[iii] This is the spelling of the name as it appears on Westlaw. The approved version of the judgment has a different spelling: “Mousasoui” but I suspect that it is in error, differing as it does from the spelling used by the Deputy Judge at first instance.