Neutral Citation Number: [2021] EWCA Civ 138

Case No: C8/2019/2618

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)
UPPER TRIBUNAL JUDGE LESLEY SMITH
JR/15940/2014/UTIAC

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/02/2021

Before :

LORD JUSTICE BEAN
and
LADY JUSTICE SIMLER

- -

Between :

THE QUEEN ON THE APPLICATION OF ZUL AFROS MOZUMDER	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

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- -

David Lemer (instructed by **Londonium Solicitors**) for the **Appellant**
Zane Malik (instructed by **Government Legal Department**) for the **Respondent**

Hearing date (on Microsoft Teams): 28 January 2021

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Approved Judgment

Lord Justice Bean :

1. This appeal on costs arises in one of many cases concerning an English language test taken by applicants for leave to remain in the UK. I gratefully adopt the description of the background in the judgment of Underhill LJ in *Ahsan v Secretary of State for the Home Department* [2017] EWCA Civ 2009:

> "1. … The Immigration Rules require applicants for leave to remain in some circumstances to pass a test of proficiency in written and spoken English. The principal form of approved test is the "Test of English for International Communication" ("TOEIC") provided by a US business called Educational Testing Service ("ETS"). ETS's TOEIC tests have been available at a large number of test centres in Britain. The spoken English part of the test involves the candidate being recorded reading a text, with the recording then being sent to an ETS assessor for marking. In February 2014 the BBC *Panorama* programme revealed that there was widespread cheating at a number of centres, in particular – though not only – by the use of proxies to take the spoken English part of the test. In response to the scandal, ETS at the request of the Home Office employed voice recognition software to go back over the recordings at the centres in question and try to identify cases in which it appeared that the same person had spoken in multiple tests and could thus be assumed to be a professional proxy. In reliance on ETS's findings the Secretary of State in 2014 and 2015 made decisions in over 40,000 cases cancelling or refusing leave to remain for persons who were said to have obtained leave on the basis of cheating in the TOEIC test. "
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> 2. Although it seems clear that cheating took place on a huge scale, it does not follow that every person who took the TOEIC test in any centre was guilty of it. Large numbers of claims have been brought, either in the First-tier or Upper Tribunals ("FTT" and "UT") or in the High Court, by individuals who say that the Home Office's decision in their case was wrong: this has become known as the TOEIC litigation."

2. The Appellant is a citizen of Bangladesh and was born on 1 March 1980. He arrived in the United Kingdom on 29 September 2009, with entry clearance as a student valid until 29 March 2011. He was subsequently granted further leave to remain as a student from 30 January 2012 until 31 May 2014. However, this leave to remain was curtailed on 5 July 2013 so to expire on 3 September 2013. He was granted further leave to remain as a student on 1 October 2013 until 13 July 2015.

3. On 22 July 2014 the Home Office made a decision to remove the Appellant from the United Kingdom under section 10 of the Immigration and Asylum Act 1999 on the basis that the TOEIC submitted with his application for leave to remain as a student was fraudulent. Revised removal notices were issued on 30 September 2014.

4. Mr Mozumder issued a claim for judicial review on 29 December 2014; amended grounds were filed on 29 August 2015. Permission to apply for judicial review was refused on the basis that there was an alternative remedy in the form of an out-of-country appeal against the decision to remove.

5. On 29 August 2017 Mr Mozumder made a claim in writing to the Home Office arguing that the decision giving directions for his removal violated his human rights.

6. On 5 December 2017 this court gave judgment in *Ahsan*, holding that in a TOEIC case where the decision to remove was made under s 10 of the 1999 Act, an out-of-country appeal is not an effective remedy where it would be necessary for the appellant to give oral evidence on such an appeal and facilities for him to do so by videolink from the country to which he would be removed are not realistically available (see paragraph 158 of the judgment).

7. The Appellant had by then sought to appeal to this court from the decision to refuse permission to apply for judicial review. It is unnecessary to list every procedural step that was taken. On 3 December 2018, by consent, Master Meacher made an order by which this court allowed the appeal, granted permission to apply for judicial review and remitted the matter to the Upper Tribunal for a substantive hearing. The consent order also provided that the Secretary of State was to pay the Appellant's costs of the appeal to this court and directed that the issue of costs in respect of the underlying judicial review claim was to be determined by the UT at the conclusion of the proceedings.

8. The Appellant's judicial review claim was listed before the UT for a substantive hearing on 8 May 2019. We were told that he would have given oral evidence and been cross-examined. The parties, however, signed a consent order on 7 May 2019, the day before the hearing, which was duly approved by the UT. The recitals to the order noted that the Appellant had made a human rights claim on 29 August 2017 and referred to his proposal to reiterate that claim by providing further representations and evidence. The Secretary of State, it was agreed, would respond to those representations and, in the event of a refusal, would issue a decision attracting an in-country right of appeal. On that basis, the consent order provided that the judicial review claim would be dismissed and the issue of costs in respect of that claim would be decided by the UT on paper having regard to written submissions made by the parties.

9. Written submissions as to costs were then made. The Appellant sought an order that the Secretary of State pay his costs in the UT. The Respondent submitted that the UT should order him to pay her costs or alternatively make no order as to costs. UT Judge Lesley Smith, after considering the case on the papers, wrote:-

> "3. The Applicant says that he should obtain his costs because he would have succeeded if the application had been heard substantively. However, as the Respondent points out, the Applicant sought the quashing of the Decision. The Respondent has not agreed to the quashing or even withdrawal of the Decision. He has agreed to revisit it but only in recognition of the fact that, following *Ahsan*, if the human rights claim is refused, he will be obliged to give an in-country right of appeal in which the Applicant will be able to challenge the Decision in relation to the deception. He therefore has an alternative remedy.

> 4. As regards the *M* categorisation, this is not a category (i) case as the Applicant has not obtained all that he sought by this application. It is not even a category (ii) case, as the Applicant did not seek a right of appeal in-country in his application and therefore it cannot be said that he has achieved even some part of the relief sought. The settlement has arisen subsequently as a result of the Applicant making a human rights claim some 3 years after the Decision. I therefore agree with the Respondent that this is a category (iii) case where the compromise does not reflect the Applicant's claim.
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> 5. As the Respondent appears to accept at [14] of his costs submissions, the default position in such cases should be no order as to costs. I have considered whether there should be an order in the Respondent's favour, but I have concluded that there should not. ETS cases have succeeded and failed in this Tribunal base on expert evidence at various times and the evidence in individual cases as is recognised in the Court of Appeal's judgment in *Ahsan.* They are highly fact specific as recognised in that judgment. It would therefore be extremely difficult to form a view on the likely outcome of this application had it proceeded without going through all the evidence. The issue of who would have succeeded is made even more difficult where I have not had the opportunity to hear oral evidence. For that reason, this is a case where the default position should apply. The appropriate order is no order as to costs."

10. The judge was asked to grant permission to appeal to this court. In refusing it on 9 October 2019 she said:-

> "2. The Applicant says that he is entitled to the costs of the application and that I erred in refusing to award those as he says that the "central point of the remedy sought" was that the Respondent's decision was unreasonable due to her failure to give the Applicant an in-country right of appeal. That assertion is unarguable on consideration of the documents. In the claim form there is no request for a remedy of any right of appeal and the grounds raise this as a subsidiary point to the main focus of the challenge which is the insufficiency of the Respondent's evidence. I accept that an in-country right of appeal is one of the remedies sought in the amended grounds of claim but, once again, the grounds focus on the evidence supporting the Respondent's decision. The reference to appeal provisions on the basis that, due to the lack of an in-country right of appeal the Tribunal has to consider for itself whether the Applicant exercised deception as a matter of precedent fact. Likewise, the application for permission to appeal Judge Blum's refusal of permission to apply for judicial review focuses on the substance of the Respondent's decision (although I accept does refer to a declaration sought in relation to an in-country right of appeal).

> 3. Although I accept that my reference to the Applicant not seeking an in-country right of appeal in his application at [4] of the Decision does not take into account the Applicant's subsequent amendments to the remedies sought in his amended grounds, nonetheless it is not arguable that the applicant put this argument at the forefront of his grounds. Those grounds challenged the substance of the Respondent's decision as I have explained. As I explain in the Decision, the Respondent has not agreed to withdraw or even reconsider the decision which was under challenge in this judicial review. Her agreement to give an in-country right of appeal does not stem from any acceptance that her earlier decision was irrational but rather a pragmatic recognition that the Applicant would be given an in-country right of appeal as a result of the human rights claim made three years after the Respondent's decision under challenge (see [4] of the decision)."

11. Permission to appeal to this court was granted by the Vice-President, Underhill LJ, who concluded:

> "I think it is arguable that UTJ Smith erred in law. It appears from para. 4 of [her] reasons that the principal reason for [her] decision was that the Appellant was in his judicial review claim seeking to have the substantive decision quashed and not, as such, the making of an appealable decision, which is all that the Respondent has now conceded. But arguably that overlooks the fact that the Appellant was obliged to bring judicial review proceedings because the only appeal that the Respondent was prepared to allow him was out-of-country. In such proceedings he would, necessarily, be seeking a determination of the substantive question of whether he cheated but the prior question of whether he had a right to such a determination (in-country) was a disputed issue of fundamental importance to him. It was only because the Respondent has now undertaken to make an (in-country) appealable decision that it has become inappropriate to pursue the JR route."

12. Unlike UTJ Smith, who had to decide the matter on paper, we have had the advantage of oral advocacy of high quality from David Lemer for the Appellant and Zane Malik for the Respondent.

Appeals and decisions on costs: the relevant law

13. Quite apart from the fact that section 13(1) of the Tribunals, Courts and Enforcement Act 2007 restricts appeals from the UT to cases of errors of law, it is well established that, as Lord Neuberger MR said in *M v Croydon London Borough Council* [2012] EWCA Civ 595, [2012] 1 WLR 607:-

> "44… Permission relating to costs is primarily a matter for the discretion of the trial judge which means that an appellate court

> should normally be very slow indeed to interfere with any decision on costs."

14. I am content to adopt the helpful summary of the general principles in Mr Malik's skeleton argument:

    a) before an appellate court can interfere with a costs order made below, it must be shown that the judge has either erred in principle in their approach, or has left out of account, or taken into account, some feature that he or she should, or should not, have considered, or that the decision is wholly wrong because the court is forced to the conclusion that the judge has not balanced the various factors fairly in the scale;

    b) the court has a discretion as to whether or not costs are payable by one party to another, the amount of the costs, and when they are to be paid;

    c) if an order for costs is to be made, the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, but this does not preclude the court from making a different order;

    d) in deciding what order to make on costs, the court will have regard to all the circumstances, including the conduct of the parties and whether a party has succeeded in its pleaded case in whole or in part.

15. Lord Neuberger went on in *M v Croydon LBC* to consider the position where cases settle in the Administrative Court. It was common ground between Mr Lemer and Mr Malik that these principles are applicable in the Upper Tribunal when dealing with judicial review applications. This judgment is not to be read as though it were a statute, and Lord Neuberger repeatedly emphasises the fact-sensitive nature of costs decisions; but it is nevertheless useful guidance. He said:

> "60. …In Administrative Court cases, just as in other civil litigation, particularly where a claim has been settled, there is, in my view, a sharp difference between (i) a case where a claimant has been wholly successful whether following a contested hearing or pursuant to a settlement, and (ii) a case where he has only succeeded in part following a contested hearing, or pursuant to a settlement, and (iii) a case where there has been some compromise which does not actually reflect the claimant's claims. While in every case the allocation of costs will depend on the specific facts, there are some points which can be made about these different types of case.
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> 61. In case (i), it is hard to see why the claimant should not recover all his costs, unless there is some good reason to the contrary. Whether pursuant to judgment following a contested hearing, or by virtue of a settlement, the claimant can, at least absent special circumstances, say that he has been vindicated, and, as the successful party, that he should recover his costs. In the latter case, the defendants can no doubt say that they were realistic in settling, and should not be penalised in costs, but the

answer to that point is that the defendants should, on that basis, have settled before the proceedings were issued: that is one of the main points of the pre-action protocols. Ultimately, it seems to me that *Bahta* was decided on this basis.

62. In case (ii), when deciding how to allocate liability for costs after a trial, the court will normally determine questions such as how reasonable the claimant was in pursuing the unsuccessful claim, how important it was compared with the successful claim, and how much the costs were increased as a result of the claimant pursuing the unsuccessful claim. Given that there will have been a hearing, the court will be in a reasonably good position to make findings on such questions. However, where there has been a settlement, the court will, at least normally, be in a significantly worse position to make findings on such issues than where the case has been fought out. In many such cases, the court will be able to form a view as to the appropriate costs order based on such issues; in other cases, it will be much more difficult. I would accept the argument that, where the parties have settled the claimant's substantive claims on the basis that he succeeds in part, but only in part, there is often much to be said for concluding that there is no order for costs. That I think was the approach adopted in *Scott*. However, where there is not a clear winner, so much would depend on the particular facts. In some such cases, it may help to consider who would have won if the matter had proceeded to trial, as, if it is tolerably clear, it may, for instance support or undermine the contention that one of the two claims was stronger than the other. *Boxall* appears to have been such case.

63. In case (iii), the court is often unable to gauge whether there is a successful party in any respect, and, if so, who it is. In such cases, therefore, there is an even more powerful argument that the default position should be no order for costs. However, in some such cases, it may well be sensible to look at the underlying claims and inquire whether it was tolerably clear who would have won if the matter had not settled. If it is, then that may well strongly support the contention that the party who would have won did better out of the settlement, and therefore did win.

…

65. Having given such general guidance on costs issues in relation to Administrative Court cases which settle on all issues save costs, it is right to emphasise that, as in most cases involving judicial guidance on costs, each case turns on its own facts. A particular case may have an unusual feature which would, or at least could, justify departing from what would otherwise be the appropriate costs order."

16. The issue of costs in TOEIC cases was considered by Hickinbottom LJ in a group of three cases reported as *R (Rahman) v Secretary of State for the Home Department* [2018] EWCA 1572. The case of Mr Rahman was in many ways similar to the present. He too was alleged to have cheated in a TOEIC test. He brought judicial review proceedings challenging a removal decision under s 10 of the 1999 Act for which permission was initially refused. His appeal to this court against the refusal of permission to proceed was stayed until judgment was given in *Ahsan*. On 22 May 2018 the parties agreed a consent order which (expressly without determining the substantive merits) allowed his appeal, granted permission to proceed with the judicial review, and remitted the substantive judicial review to the Upper Tribunal for determination, as Hickinbottom LJ put it, "notably on the issue relating to deception". Directions were given for written submissions on costs. Hickinbottom LJ said:-

> "25. Ms Naik and Ms Sabic for Mr Rahman submit that Mr Rahman has been "wholly successful" so that, unless there is good reason to the contrary, he should be entitled to his costs to date of both the judicial review and the appeal, or alternatively of the appeal alone. Mr Mitchell for the Secretary of State seeks an order that all costs are reserved to the Upper Tribunal; but submits that this court should direct in some detail how the tribunal should exercise their discretion as to costs dependent upon the eventual finding with regard to deception.
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> 26. In respect of the appeal, in my view there can be no doubt but that Mr Rahman has been wholly successful, in that he has achieved all that he sought to achieve from the appeal, namely that the appeal be allowed, permission to proceed with judicial review be granted and remittal of the substantive judicial review to the Upper Tribunal for determination, as effectively required after *Ahsan*. In my view, in those circumstances, Mr Rahman is entitled to his costs of the appeal in any event. That is so irrespective of what the tribunal might ultimately find in relation to the allegation of deception or otherwise.
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> 27. However, with regard to the costs of the judicial review, the position is different. As yet, Mr Rahman has not succeeded in respect of the issues raised in that claim, notably whether he used deception in respect of the TOEIC test. Those issues will in due course be determined by the Upper Tribunal. In my view, the costs of the judicial review cannot be dealt with now. They should await the outcome of the claim before the tribunal. It is unnecessary for this court to make any order in respect of those costs: other than the costs of the appeal with which I have dealt, the past and future costs of the judicial review claim can be considered and dealt with by the tribunal at the appropriate time in the usual way."

17. Mr Malik emphasises paragraph 27 of the judgment and says that Judge Smith in the present case was faced with the same situation, namely that the Appellant had not succeeded in respect of the deception issue, and that she too was not in a position to make an order for either side to pay the costs of the judicial review.

Discussion

18. I consider that there was a clear error on a point of law in the decision of the Upper Tribunal judge, namely the one identified by the Vice-President in granting permission to appeal. It is not suggested that by the time the judicial review proceedings were compromised by the consent order of 2019 Mr Mozumder had been wholly successful, but he had at the very least been successful in part. The decision challenged by the judicial review was that Mr Mozumder should be removed without having the opportunity to put his case (and challenge the deception finding) at an in-country hearing. If he had not issued proceedings he would have been removed and would no doubt have faced insuperable obstacles in the way of making an effective out-of-country appeal from Bangladesh. The outcome of the judicial review was that he obtained the right, in the event of a further adverse decision by the Home Office, to give evidence and put his case at an oral hearing before a judge.

19. If the settlement, rather than bringing the 2014 judicial review to an end, had included a provision for remitting the judicial review to the Upper Tribunal for a hearing on the merits, the appropriate order for costs would have been the one made by Hickinbottom LJ in Mr Rahman's case, namely to reserve the costs to the Upper Tribunal. In many types of civil litigation where the trial on the merits will involve a binary choice, especially if that is as to whether or not the claimant (or in some cases the defendant) is telling the truth, that may be a wise form of costs order to make. The procedural course adopted here made this more difficult. It is unusual, though not impossible, to order that the determination of costs in claim A should await the outcome of claim B; and of course if the fresh decision by the Home Office had been in Mr Mozumder's favour there would never have been a claim B. But this is not a good reason for saying that despite the significant degree of success Mr Mozumder achieved in the judicial review he should not recover any costs at all.

20. I would therefore set aside the decision of the Upper Tribunal as to costs; and, if Simler LJ agrees, we should decide ourselves what order for the costs of the judicial review should now be made. No one suggested that that issue should be remitted, and it would be wholly disproportionate to do so.

The subsequent decision of the First-Tier Tribunal

21. At this point, the question arises whether subsequent developments can be taken into account. Mr Lemer, who has only recently been instructed in this matter, was able to tell us that the Home Office rejected Mr Mozumder's further application, and to provide us and Mr Malik with a decision of First Tier Tribunal Judge Andrews given on 21 January 2020 in which Mr Mozumder's evidence was accepted and his appeal against the decision to remove him was allowed. It is extremely unfortunate that this document was not made available, even to Mr Malik, until just before the hearing of this appeal. But it would be wrong for us to refuse to look at it for that reason: and Mr Malik, given his skill and experience in this field of work, was able to make submissions about it without difficulty.

22. The question of principle which Mr Malik raised is as follows. The outcome of the appeal to the FTT was not known when Judge Smith made her decision, and turned on evidence which had not been before her. It should not, he submitted, affect our consideration of whether she was right or wrong on the facts as presented to her.

23. I accept that if Judge Smith's decision had not contained a material error of law, it would be impermissible to take the subsequent progress of the dispute into account: indeed, by virtue of s 13 of TCEA 2007, if the decision had contained no error of law it could not be appealed at all. But where an appellate court or tribunal sets aside a decision as to costs made below and has to remake that decision itself it would be artificial not to take account of what is by then known about the outcome of the substantive claim, at any rate where that is the result of a court or tribunal's decision on the merits rather than a compromise.

24. If Mr Mozumder had been found by the FTT judge to have cheated and thus had his appeal rejected I for my part would have been extremely reluctant to award him any costs at all. Since it has now been held by the appropriate tribunal that he had not cheated, I consider he should be treated as the winner in substance as well as on the procedural issue and should be awarded his costs of the judicial review which led to that result being achieved.

25. It is useful to test this against the other two courses which might have been adopted in May 2019. If the judicial review hearing in the UT had proceeded one should assume that the judge at that hearing would have accepted Mr Mozumder's evidence as FTT Judge Andrews was later to do, and he would therefore have recovered his costs. If the remittal route followed in *Rahman* had been adopted that too would have resulted in Mr Mozumder recovering the costs of the judicial review before the UT. It is a just result that the outcome should be the same in all three cases.

26. That makes it unnecessary to decide what order for costs I would have made if I did not have the advantage of knowing the outcome before the FTT. There would have been much to be said for Mr Malik's submission that, as the Appellant had by then only succeeded in part of his claim, he should be awarded only a proportion of the costs. But as matters have turned out that question does not arise.

27. Mr Malik's fallback submission was that the Appellant should only recover a proportion of his costs, since some of the points made in the original claim for judicial review (for example a claim under Article 5 of the ECHR) were bound to fail. However, this is a case where the two main issues were (a) whether Mr Mozumder had cheated in his test, and (b) whether he should have the right to an in-country hearing. It does not appear that the other issues raised added significantly, if at all, to the costs. I do not consider this a case for a partial award of costs.

Conclusion

28. I would therefore allow the appeal and order the Secretary of State to pay the Appellant's costs before the Upper Tribunal.

Lady Justice Simler:

29. I agree. Having concluded that the UT judge made a material error of law by overlooking the partial success achieved by the Appellant's judicial review, namely a

determination in-country of the deception decision, the costs decision must be considered afresh by this court. That being so, I can see no basis for excluding consideration of the ultimate outcome of the FTT appeal, when considering whether (and to what extent) he was the successful party in the judicial review proceedings which he was obliged to take in order to achieve that result.