



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/02153/2019 (V)
HU/02149/2019 (V)

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre
Remotely by Microsoft Teams
On 22 July 2021

Decision & Reasons Promulgated
On 19 August 2021

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

TAJIN BINTE NURUL
MD SABIR HOSSIN

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr E Fripp, instructed by Duncan Lewis & Co Solicitors
For the Respondent: Mr C Bates, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellants, who are citizens of Bangladesh, are a married couple. The first appellant was born on 15 July 1982 and the second appellant, her husband, was born on 25 July 1988.

2. The first appellant entered the United Kingdom on 12 February 2010 with a student visa valid until 31 December 2011. That leave was extended, initially to 29 April 2012 and then subsequently to 25 July 2015.
3. On 7 October 2014, the first appellant applied for leave to remain as a Tier 4 Dependent Spouse of the second appellant. The application was refused on 26 August 2015 and a subsequent appeal was dismissed by the First-tier Tribunal on 16 May 2017 (Judge Talbot). The first appellant became appeal rights exhausted on 11 August 2017.
4. The second appellant entered the United Kingdom on 5 October 2010 on a student visa valid until 30 June 2014. On 25 April 2012, his leave was curtailed to expire on 24 June 2012. On 6 August 2012, he applied for leave to remain as a Tier 4 Student which was granted on 3 October 2012 until 24 April 2014.
5. On 27 February 2013, the second appellant applied for leave to remain as a Tier 4 Student which was granted on 19 April 2013 until 23 June 2015. He made a further application for leave to remain as a Tier 4 Student on 7 October 2014 but this was refused on 26 August 2015. His subsequent appeal was dismissed by the First-tier Tribunal on 16 May 2017 (Judge Talbot) and he became appeal rights exhausted on 11 August 2017.
6. On 23 August 2017, the first and second appellants made applications for leave to remain based upon their private and family life under Art 8 of the ECHR.
7. On 29 January 2019, the Secretary of State refused each of those applications. The Secretary of State concluded that the appellants could not succeed under the Immigration Rules (HC 395 as amended) based upon their family or private life under para 276ADE(1)(vi) and under Art 8 outside the Rules.
8. In reaching her decision, the Secretary of State concluded that the second appellant had submitted a fraudulently obtained TOEIC English language certificate with his application for leave in 2012 as he had used a proxy test-taker for one part of the examination process, namely the speaking test. That was also the conclusion of Judge Talbot in the second appellant's appeal in 2017.

The Appeal to the First-tier Tribunal

9. The appellants appealed to the First-tier Tribunal. In a decision sent on 25 January 2021, Judge Shore dismissed each of the appellants' appeals on all grounds.
10. First, having considered the evidence, and having taken Judge Talbot's previous appeal findings as a 'starting point', Judge Shore found that the second appellant had, indeed, submitted a fraudulently obtained TOEIC with his 2012 application for leave. The second appellant's appeal, therefore, failed under the Rules because he could not satisfy the 'suitability' test under para S-LTR.4.2 of Appendix FM (read with para 276ADE(1)(i)).

11. Second, Judge Shore found that neither appellant could succeed under para 276ADE(1)(vi) on the basis that it was not established that there were “very significant obstacles” to their integration on return to Bangladesh.
12. Third, the judge found that neither appellant’s removal breached Art 8 as it had not been established that there would be “unjustifiably harsh consequences” such as to outweigh the public interest either in relation to the first appellant or the second appellant.

The Appeal to the Upper Tribunal

13. The appellants sought permission to appeal to the Upper Tribunal. They did so on three grounds.
14. First, in relation to the finding that the second appellant had submitted a fraudulently obtained TOEIC certificate, it was contended that the judge had wrongly excluded consideration of two documents relevant to the ETS and TOEIC language certificate issue: (1) the National Audit Office Report by the Comptroller and Auditor General on the TOEIC scandal, “Investigation into the response to cheating in English language tests” (24 May 2019) (the “NAO report”); and (2) the report of the All-Party Parliamentary Group on TOEIC (18 July 2019) (the “APPG report”). (Ground 1)
15. Second, it was contended that the judge had erred in law in his approach to para 276ADE(1)(vi) and Art 8 outside the Rules by failing properly to have regard to the impact of the COVID-19 pandemic on the appellants’ circumstances in Bangladesh on return. (Ground 2)
16. Third, again in relation to para 276ADE(1)(vi) and Art 8 outside the Rules, it was contended that the judge had failed properly to consider all the evidence when he found that the appellants would not be estranged from their families on return to Bangladesh. (Ground 3)
17. On 12 February 2021, the First-tier Tribunal (Judge Andrew) granted the appellants permission to appeal. In doing so, Judge Andrew found that ground 3 was arguable but that grounds 1 and 2 were not. She, nevertheless, did not limit the grant of permission.
18. The appellants renewed their applications for permission to the Upper Tribunal on grounds 1 and 2. However, on 7 May 2021 UTJ Jackson issued directions indicating that the effect of Judge Andrew’s permission decision was that permission to appeal had not been limited to ground 1 and was, following Safi and others (permission to appeal decisions) [2018] UKUT 388 (IAC), to be taken to be a grant of permission on all three grounds.
19. However, in addition, in relation to ground 1, UTJ Jackson indicated that the appellants would need to address, in claiming that the NAO and APPG reports should have been considered by the judge, the parties views on the reasoning of the

UT in DK and RK (Parliamentary privilege; evidence) [2021] UKUT 00061 (IAC) were invited.

20. The appeal was listed for a remote hearing at the Cardiff Civil Justice Centre on 22 July 2021. I was based in court and Mr Fripp, who represented the appellants, and Mr Bates, who represented the Secretary of State, joined the hearing (as did the appellants) remotely by Microsoft Teams.
21. Prior to the hearing, Mr Fripp filed a skeleton argument dealing specifically with ground 1 in accordance with the direction of UTJ Jackson. Mr Fripp relied upon that skeleton argument and the three grounds of appeal which he developed in his oral submissions. I also heard submissions from Mr Bates on behalf of the Secretary of State.
22. I will take each of the grounds in turn.

Ground 1

23. In his decision, Judge Shore, having heard evidence from the appellants, found that the second appellant had submitted a fraudulently obtained TOEIC English language certificate with his application for leave in 2012 and that, therefore, he could not meet the suitability requirement under the Rules. In reaching that finding, the judge took Judge Talbot's earlier finding as a 'starting point' applying Devaseelan [2002] UKIAT 702 which he set out at para 40 of his decision. The judge made the following findings at para 50 of his decision:

"50. Applying the tests in Devaseelan, I make the following findings:

- 50.1 The first decision is always the starting point and in the second appellant's case, he was found not to be credible on his claims of being innocent of cheating in his TOEIC test;
- 50.2 The only 'facts' since the events were put forward to be considered that related to his TOEIC test was the alleged change in the way the Tribunal should view this type of appeal;
- 50.3 The only fact before them put forward for consideration was the fact that he had chosen the test venue because it was close to his home;
- 50.4 I should treat with circumspection relevant facts that have not been brought to the First Appeal's attention. The issue of his reasoning for choosing the test centre was not put to the First Appeal but would have been known to the second appellant at the time of the First Appeal;
- 50.5 The issues in evidence on the First and current appeals relating to the Appellants' account are materially the same, so I should treat the issues as settled by the First Appeal rather than allowing the matter to be relitigated;
- 50.6 In the light of my findings about the law relating to TOEIC tests, I find that this is not one of the occasions where the circumstances surrounding the First Appeal were such that it would be right for me

to look at the matter as if the first determination had never been made, and;

50.7 The findings of F-tTJ Talbot should be treated as settled and the determination that the second appellant had not met the standard of proof to switch the burden of proof back to the respondent should be preserved.”

24. Although the judge went on to find that the second appellant had discharged the evidential burden of proving an ‘innocent explanation’ on the basis that his account of how he travelled to the test centre “satisfies the minimum level of plausibility”, the judge found that the respondent had discharged the burden of proof of establishing that the innocent explanation was to be rejected (see para 55 of the decision).
25. So far as that reasoning goes neither the grounds nor Mr Fripp in his submissions challenged the judge’s reasoning. Instead, Mr Fripp submitted that the judge had erred in law in para 49 when he had rejected consideration of the NAO report of 24 May 2019 and the APPG report of 18 July 2019 both of which were critical of the ETS assessment of the reliability of test results, particularly in relation to the issue of proxy test-taking for the speaking part of the tests.
26. In respect of NAO report, para 8 of the grounds states that:

“The NAO ‘key findings’ included that ‘ETS identified virtually every test in the UK as suspicious. It identified that 97% of all UK tests were invalid or questionable.’ (Key findings, §2) that ‘it is difficult to establish accurately how many people may have been wrongly identified’ by ETS (Key finding, §6), and that as to the respondent, ‘For two years the [respondent] revoked the visas of anyone with an invalid test, without expert assurance of validity of voice recognition evidence’ (Key findings, §3), and ‘we saw no evidence that the Department considered whether ETS had misclassified individuals or looked for anomalies.’ (Key findings, §8), and ‘it was not possible for the Department to check the accuracy of ETS classifications’ (Key findings, §9).”
27. At [49], Judge Shore said this:

“Mr Fripp did not raise the issue of the National Audit Office Report published 24 May 2019 titled ‘Investigation into the response to cheating in English language tests’, which raises some questions about the TOEIC proxy issue, but I find that it does not carry the weight of legal precedent. Same is true with the report of the All-Party Parliamentary Group (APPG) on TOEIC dated 18 July 2019, which was critical of ETS.”
28. It does not appear that either the APPG report or the NAO report were placed before Judge Shore or, indeed, relied upon by the appellants at the hearing. It would appear, from what the judge says at para 9 of his decision, that the judge raised in his decision the relevance of both reports himself. It would appear, therefore, that it is only as a result of that that the appellants now seek to rely upon these reports and challenge the judge’s decision not to take them into account.
29. In his written and oral submissions, Mr Fripp acknowledged that he was in some difficulty in relation to his contention that the judge should have considered the APPG report as the UT in DK and RK had excluded consideration of that in a

TOEIC/ETS case. However, he submitted that the UT in DK and RK had not excluded consideration of the NAO report which was critical not only of ETS but also of the respondent. Mr Fripp submitted that, although the publishers of the NAO report were protected from legal liability by the Parliamentary Papers Act 1840 and it relates to Parliamentary procedure, to admit it would not call into question the Parliamentary procedure. In relation to the NAO report (and, I apprehend, in relation to the APPG report also), Mr Fripp submitted that the appellants were not calling any of the contents into question but were relying upon it. Mr Fripp submitted that that approach was the proper understanding of the Court of Appeal's decision in Warsama and Gannon v Foreign & Commonwealth Office [2020] EWCA Civ 142 referred to by the UT at [18] of its decision.

30. Mr Fripp further submitted in relation to both reports that the proper approach was to determine its relevance factually and in relation to the opinions expressed on a case by case basis following R (Cartref Care Home Ltd & Others) v Commissioners for HM Revenue and Customs [2019] EWHC 3382 (Admin) also referred to by the UT at [20] of its decision.
31. On behalf of the respondent, Mr Bates relied upon DK and RK and submitted that both the APPG report and also the NAO report were not admissible. He submitted that the UT had, in effect, concluded that both reports were not admissible as to do so would infringe Parliamentary privilege because the Secretary of State would either be in the position of challenging their contents (which she could not do) or, and unfairly, being required to accept their contents because their contents could not be called into question in proceedings before the Tribunal.
32. In DK and RK, the UT, in a preliminary decision within appeals pending before it, determined whether the APPG report should be admitted into evidence, in effect to be relied upon by the appellants in that appeal, to call into question the TOEIC/ETS process for determining whether fraud or deception had been practised on the basis that English language certificates had been obtained using a proxy test-taker. The UT clearly decided that the APPG report should not be admitted in evidence. There appear to be two reasons for that conclusion.
33. First, to admit that evidence would violate Parliamentary privilege. The UT accepted that the report of the APPG was not covered by Art 9 of the Bill of Rights 1689 as it was not concerned with "proceedings in Parliament" and therefore the prohibition on such proceedings "not [being] impeached or questioned in any court or place out of Parliament" did not apply. So, at [20] the UT said:

"It is common ground that the APPG Report is not within the scope of Art 9. Its report is not a proceeding in Parliament."
34. At [13] the UT noted the contents of the APPG Report as follows:

"13. The APPG report, however, makes reference to proceedings before the Home Affairs Select Committee and the Public Accounts Committee. Paragraph 1.1 of the report expresses a view about the findings of the Home Affairs Select Committee and the National Audit Office (to which we shall turn in due course). At paragraph 2.1 and its footnote, further reference is made to evidence provided

by the respondent to the Home Affairs Select Committee. At paragraph 2.3, under the heading "Misuse of expert evidence" reference is made in the footnote to what was said at the Public Accounts Committee hearing on 10 July 2019. At paragraph 2.5, under the heading "'Questionable' students unjustly targeted", doubt is thrown over evidence given by the respondent to the Public Accounts Committee. By contrast, evidence given to the Home Affairs Select Committee by an individual who runs a college is referred to in approbatory terms."

35. At [15]-[21], the UT rejected the submissions made on behalf of the appellants that the APPG report was based upon evidence and it was legitimate to have regard to the report's conclusions emanating from that evidence.

36. At [15]-[18], the UT concluded that the report was subject to Parliamentary privilege and it could not be called into question in the FtT or UTIAC. The UT said this:

"15. Although the Upper Tribunal is not bound by formal rules of evidence, it cannot act in such a way as to violate Parliamentary privilege, whether that be to interfere with free speech in Parliament or by reference to the separation of powers doctrine. The Tribunal cannot interfere with or criticise proceedings of the legislature.

16. Were the APPG report to be admitted, we are in no doubt that the Tribunal would be drawn into this forbidden area. The views of the APPG about the accuracy or otherwise of what was said to the Home Affairs Select Committee and the Public Accounts Committee is an integral aspect of the APPG report. They serve to inform the overall conclusions of the Group.

17. The APPG report also makes reference to the National Audit Office report on TOEIC. The reports of the National Audit Office are documents that attract the protection of the Parliamentary Papers Act 1840. This protects the publisher of any document ordered to be printed by either House of Parliament from any legal action that may result from it. 18. In Warsama & Gannon v Foreign & Commonwealth Office [2020] EWCA Civ 142, the Court of Appeal was concerned with the application of privilege to an unopposed return; that is to say, a paper ordered by the House of Commons to be printed following a motion on the floor of the House. In a letter of 15 December 2020 to the respondent in regard to the present appeals, Counsel to the Speaker of the House of Commons considers the factual position in Warsama to be analogous with that of documents covered by the Parliamentary Papers Act 1840. In both cases, the House of Commons has an interest in the reporting in question being full and frank. Thus, as is the case with evidence provided to a Select Committee, the protection of privilege extends to a person who is not a Member of Parliament, in order to protect that person's ability to report fully and honestly to the House. That, we find, is the position with the National Audit Office report."

37. Although the UT at [23]-[24] accepted that the expert evidence that had been submitted to the APPG could, albeit in the form of a transcript, be admitted into evidence before the Tribunal without infringing Parliamentary privilege, that was not the basis on which Mr Fripp now relied upon either the APPG report or the NAO report.

38. With respect to Mr Fripp's spirited attempt to contend that DK and RK did not prohibit admission of the APPG report, the UT's reasoning and conclusion provide a clear path to the answer that it is not admissible.
39. Mr Fripp, however, also contended that the UT had not excluded consideration of the NAO report. Of course, the admissibility of the NAO report was not directly in contention before the UT. It was a report that was referred to in the APPG but the issue of its admissibility as such did not arise.
40. It seems to me that the only proper understanding of what the UT said in [18] by reference to Warsama, the submission made by Counsel to the Speaker of the House of Commons and the assimilation in the final two sentences of [18] between material subject to the protection of Parliamentary privilege and that the statement that that "we find ... is the position with the National Audit Office report", can only mean that the UT took the view that the NAO report was also not admissible. As the UT pointed out in [17] the NAO report attracted the protection of the Parliamentary Papers Act 1840 and the UT found an analogy should be drawn with documents covered by that legislation which extended Parliamentary privilege to papers made available outside the Houses of Parliament to members of the public and so reversing the well-known decision in Stockdale v Hansard (1839) 112 ER 1112).
41. Warsama was a case in which one issue was whether Parliamentary privilege applied to prevent an action being based upon a report of an inquiry ordered to be published by the House of Commons following a Motion for an Unopposed return led by a criminal barrister specialising in child sex abuse cases. The Court of Appeal concluded that Parliamentary privilege did extend to that report because Art 9 of the Bill of Rights applied as the report was properly to be seen as "proceedings in Parliament" and could not be called into question in any court or outside of Parliament.
42. Whilst the UT referred to Warsama and to the analogy drawn by Counsel to the Speaker of the House of Commons in relation to it to documents covered by the Parliamentary Papers Act 1840, the analogy is not that Art 9 applied either to the APPG or to the NAO reports. It was specifically recognised by the UT, as I have already noted, that the APPG report was not within the scope of Art 9. Nevertheless, the broader principle of Parliamentary privilege was relied upon by the Parliamentary authorities and on whose view the court should "pay careful regard" in reaching its view as to the scope of Parliamentary privilege (see R v Chaytor [2010] UKSC 52 at [14]-[15] per Lord Phillips).
43. In my judgment, that is precisely the approach taken by the UT in [18] in concluding that Parliamentary privilege extended to the APPG report and, although not directly raised before it, the NAO report by analogy of reasoning. That is a conclusion with which I agree and, it follows, that the judge was not wrong to refuse to admit, and consider, both reports even though his reasons for doing so may not have reflected the Parliamentary privilege argument.

44. I do not accept Mr Fripp's submission that simply because the appellant was seeking to rely on either report, there would be no breach of Parliamentary privilege because it would not be calling into question its contents. That submission overlooks the fact that the respondent would, as Mr Bates submitted, either be placed in the position where she would wish to challenge the contents of the report (to some greater or lesser extent) but could not do so or would have to simply accept its contents which would be unfair. As I pointed out to Mr Fripp in the course of his submissions, parties generally seek to admit evidence that supports their case but which may well be challenged by the other side. It is that challenge which raises the conflict with Parliamentary privilege identified by the UT in DK and RK. The point was made by Stanley Burnton J in Office of Government Commerce v Information Commissioner and HM Attorney General [2008] EWHC 737 (Admin) at [57]-[58] considering whether Parliamentary privilege extended to opinions expressed by Parliamentary Select Committees:

"57. ... It was the duty of the Tribunal to determine the issues before it judicially, on the basis of the evidence and arguments before the Tribunal. ... The Select Committee had arrived at its view on the evidence before it, and not on the evidence that was before the Tribunal. Indirectly, in relying on the opinion of the Select Committee, the Tribunal relied on evidence that was not before it, and failed to make its decision only on the basis of the evidence and submissions before it.

58. ... If a party to proceedings before a court (or the Information Tribunal) seeks to rely on an opinion expressed by a Select Committee, the other party, if it wishes to contend for a different result, must either contend that the opinion of the Committee was wrong (and give reasons why), thereby at the very least risking a breach of Parliamentary privilege, if not committing an actual breach, or, because of the risk of that breach, accept that opinion notwithstanding that it would not otherwise wish to do so. This would be unfair to that party."

45. In addition, the UT in DK and RK gave an additional reason why the APPG report should not be admitted into evidence as the opinions of the group, were, in essence, not relevant to the Tribunal's task as those opinions were based upon the evidence considered by each group and not the evidence before the Tribunal. At [19]-[22] the UT said this:

"19. There is, however, a broader point, which emerges from the caselaw and which we respectfully consider was articulated well by Cockerill J in [R(Cartref Care Home Ltd & Others) v Commissioners for HM Revenue and Customs [2019] EWHC 3382 (Admin)]. This is the principle that courts and tribunals determine cases by reference to the evidence before them and not by reference to the views of others, expressed in a non-judicial setting, on evidence which is not the same as that before the court or tribunal. Indeed, even if the evidence were the same, the court or tribunal must reach its own views, applying the relevant burden and standard of proof.

20. Considerations of this kind informed why Cockerill J not only rejected the opinions in the APPG report before her as admissible opinion evidence but also voiced concerns about the factual statements in that report:-

“170. I conclude therefore that while I am not barred from looking at such material by reason of any issue as to breach of Parliamentary privilege, I do need to ask myself serious questions about the nature of the evidence, and its admissibility as relevant factual or opinion evidence.

171. As for the APPG Report I conclude that, following the authorities set out above, I cannot properly regard it as providing me with admissible factual evidence. It does not fall within any of the recognised categories where the contents of such documents can be adduced. It is not a witness statement, provided under the safeguards of the witness statement process. It was not written for the purpose of being relied on as a statement of facts; it is plainly written, although carefully and I am sure with much consideration, as a call to action. The sources for the factual statements are not given and are not capable of being checked. The process was not one where HMRC gave a response to the factual assertions; and it was apparent from the submissions made on the main conclusions that HMRC does indeed take issue with significant parts of what is said in the report.

172. So far as the opinions relied on are concerned I may properly take into account the fact that concerned Parliamentarians expressed these views based on the material available to them; however, those opinions again must be taken with a rider as to the purposes for which they were given and the absence of the safeguards which would be expected of opinion evidence admitted in court in the usual way. I do not therefore regard the opinions expressed as admissible opinion evidence.”

21. The same is true of the APPG report on TOEIC. The opinions of the Group are clearly and forcefully expressed in the report. They are not, however, opinions to which we can have any material regard in reaching conclusions about the evidence which will be placed before us in these remitted appeals.

22. Furthermore, much of the evidence given to the APPG is not relevant to the task we face in determining these appeals.”

46. I agree with this reasoning which has equal application to both the APPG report and the NAO report. For this additional reason also, the judge did not err in law in declining to consider the APPG report and NAO report in relation to the opinions they expressed concerning the TOEIC/ETS process and assessment of the English language tests.
47. As I have already indicated, no other challenge is raised in the grounds (or in Mr Fripp’s submissions) to the judge’s finding that the second appellant had fraudulently obtained a TOEIC English language certificate. For the reasons I have given, I reject the sole ground of challenge to that finding. The judge did not err in law by failing to admit and take into account the APPG and NAO reports.

Ground 2

48. Mr Fripp submitted that in finding under para 276ADE(1)(vi) that there were not “very significant obstacles” to the appellants’ integration in Bangladesh and that their removal would not be disproportionate, the judge fell into error in para 57.15 by

failing to take into account the circumstances in Bangladesh during the COVID-19 pandemic.

49. Mr Fripp submitted that the judge should have taken judicial notice that Bangladesh was a poorer country and the appellants would not have access to a vaccination programme which, at the time of the judge's decision, had recently begun in the UK, it was the first country to do so.
50. At para 57.15 Judge Shore said this:

“The issue of the COVID pandemic is a non-issue. I make this finding because there was no evidence before me that the appellants were at any more risk in Bangladesh than they are in the United Kingdom. There may be restrictions on travel between the United Kingdom and Bangladesh from time to time, but the respondent would not remove appellants if there was a risk to them because of a pandemic”.
51. Mr Fripp accepted that there was no evidence before the judge as to the actual position in Bangladesh during the COVID-19 pandemic at the time of the hearing.
52. Mr Bates submitted that without that evidence, including evidence of the comparative position in the UK and Bangladesh for example in relation to the R rate, the judge could not be criticised for failing to make any finding on this issue and had correctly concluded that there was “no evidence” about the risk to the appellants in Bangladesh as a result of COVID-19.
53. I agree with Mr Bates' submission. It was for the appellants to establish their case including the circumstances in which they would find themselves in Bangladesh during the COVID-19 pandemic. Whilst it may have been difficult to provide supporting evidence, that was their obligation: the burden of proof was upon them to establish their case under para 276ADE(1)(vi). The judge could only reach his findings on the basis of the evidence made available to him.
54. I do not accept Mr Fripp's submission that the doctrine of 'judicial notice' applied. Judicial notice - as it might pertain in this appeal - permits a judge to take into account, subject to the requirements of fairness and disclosure to the parties, matters not put into evidence because the facts are notorious, common knowledge (or arise from specialised knowledge of the judge), and are not reasonably to be disputed. In Dosoruth v Mauritius [2004] UKPC 51, Lord Hope declined to apply judicial notice to the issue of whether a bank or District Council's offices in Mauritius were open on a Saturday (at [17]):

“... it was not open to the appellate court to deal with the appeal on the basis that it was within judicial knowledge that the Bank and the District Council's offices were not open that afternoon. This was because, as the Supreme Court has explained, such a fact is neither notorious nor beyond serious dispute nor of common knowledge in Mauritius.”
55. It would not have been enough, in any event, to assume Bangladesh is a poorer country and had not yet begun a vaccination programme, without also having evidence (without which it would have been pure speculation) what risk that created

for the appellants and relevant to the “very significant obstacles” issue. I am satisfied that the test for taking judicial notice cannot apply to evidence concerning the circumstances pertaining in Bangladesh during the COVID-19 pandemic at the time of the hearing which, as Mr Fripp effectively recognised in his submissions, was a matter on which there were difficulties in obtaining evidence at the time.

56. The final point referred to by the judge in para 57.15 of his determination relates to his statement that the respondent would not remove the appellants if there was a risk to them because of the pandemic. It may be that the judge should not have assumed that the appellants would only be removed to Bangladesh by the respondent when no risk existed rather than focussing on the risk to the appellants if returned now (see, e.g. Jl v SSHD [2013] EWCA Civ 279 at [97] and HF(Iraq) v SSHD [2013] EWCA Civ 1276 at [97]). The point, however, had no impact on the judge’s reasoning since there was no evidence as to what, if any, risk there would be to the appellants on removal now. This was not a case, therefore, where the judge found that there would be a risk to the appellants on removal but that that risk would not eventuate because the respondent would not remove them to Bangladesh until any such risk was obviated. The finding by the judge in para 57.15 is legally unassailable that there was no evidence to establish what, if any, risk there was to the appellants on return to Bangladesh as a result of the COVID-19 crisis.
57. I, therefore, reject ground 2.

Ground 3

58. Mr Fripp submitted that the judge had erred in law in his assessment of the evidence when finding that it was not established that the appellants were estranged from their families in Bangladesh which was relevant to both para 276ADE(1)(vi) and to the proportionality of their removals under Art 8 outside the Rules.
59. At para 57.16, the judge said this:
- “I find that the second appellant’s assertion that they have nothing or no-one to return to in Bangladesh because his family will not support them because they disapprove of the marriage due to the first appellant’s age and disability has not met the standard of proof required. He produced an affidavit from his father about the situation [A42 - A43], but did not mention the situation when he appeared before F-tJ Talbot in 2017. His father’s affidavit was dated a couple of months after that refusal.”
60. Mr Fripp submitted that the affidavit of the second appellant’s father did not state when the estrangement had occurred. It was wrong, therefore, for the judge to take into account that it had not been mentioned at the hearing before Judge Talbot on 3 April 2017.
61. That argument is simply not sustainable. The document is, in fact, at pages 35 – 36 of the appellants’ bundle. Whilst the affidavit does not refer to when the estrangement occurred, it was dated 27 July 2017, shortly after the hearing before Judge Talbot. Whilst it is true that no date is referred to, the affidavit relates historical events beginning with the appellants’ marriage which took place on 31 July 2014. The

affidavit refers to the second appellant's family becoming aware of the marriage, that marriage was not accepted "due to above stated age and physical discrepancies". It was, in my judgment, entirely reasonable for Judge Shore to approach this evidence on the basis that these events had not occurred within three months following the hearing before Judge Talbot in April 2017. Judge Shore was reasonably and rationally entitled to take into account that, although these events predated the hearing before Judge Talbot, the appellants had not raised them at that hearing.

62. It is also noteworthy that at para 60 of his decision, Judge Shore, referring to the evidence in the affidavit from the first appellant's mother (at pages 37 - 38 of the bundle) noted that she did not suggest that the second appellant's family had abandoned them, or that she had done so or that she could not accommodate them on return.
63. In my judgment, the judge was entitled to find, on the evidence before him, that the appellants had not established that their families had abandoned them or would not support them on return to Bangladesh.
64. One final point raised in ground 3, but on which Mr Fripp did not directly address me in his oral submissions, is that the judge failed to apply the structured approach to assessing the credibility of the evidence set out in KB & AH (credibility-structured approach: Pakistan) [2017] UKUT 491 (IAC). The suggestion made in para 16 of the grounds is that the judge failed to take into account the plausibility, consistent with well-known features of social attitudes in South-Asian culture, of the second appellant's family's response when he married a woman six years his senior with serious health difficulties was plausible. The grounds do not identify what evidence the judge failed to take into account in this regard which was consistent with the claim that the second appellant's family were estranged from him because of his choice of wife. In the absence of any such evidence, the judge cannot be said to have fallen into error in failing to take it into account or assess, by reference to it, the plausibility of the appellants' account on this issue.
65. For these reasons, I also reject ground 3.

Decision

66. For the above reasons, the decision of the First-tier Tribunal to dismiss the appellants' appeals under Art 8 of the ECHR did not involve the making of an error of law. The FtT's decision, therefore, stands.
67. Accordingly, the appellants' appeals to the Upper Tribunal are dismissed.

Signed

Andrew Grubb

Judge of the Upper Tribunal
29 July 2021

TO THE RESPONDENT
FEE AWARD

Judge Shore, in dismissing the appeals, made no fee award and that decision, given that the appellants' appeals to the Upper Tribunal have been dismissed, stands.

Signed

Andrew Grubb

Judge of the Upper Tribunal
29 July 2021