



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: UI-2021-000835
HU/02399/2021

THE IMMIGRATION ACTS

**Heard at Field House
On 1 September 2022**

**Decision & Reasons Promulgated
On 7 October 2022**

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

JAHIDUL ISLAM

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Respondent: Mr Lewis, Counsel

For the Appellant: Mr Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. In this determination I remake the decision on the appellant's appeal against the respondent's decision dated 21 March 2021, refusing his human rights application.
2. The appellant is a citizen of Bangladesh who entered the United Kingdom as a student on 10 November 2009 with leave valid until 31 July 2013. On 19 June 2013 he took an English language test ('TOEIC')

at Eden College. This appeal focuses on whether, as contended by the SSHD, he used a proxy and therefore deception, when taking that test.

Background

3. The appellant's immigration history is set out in his witness statement and the respondent's decision under appeal. It is not necessary to repeat the entirety of that history here. It is sufficient to say this: the appellant applied for further student leave on 31 July 2013, in which he relied upon the TOEIC certificate from the Educational Testing Service ('ETS') dated 19 June 2013; this was refused but his appeal against that decision was allowed by the FTT in a decision dated 14 July 2014; instead of granting leave following the FTT decision, the respondent made a decision to remove him based upon the contention that he had exercised TOEIC fraud in a decision dated 15 September 2014; his application for judicial review was struck out; he appealed against a decision to refuse his human rights claim dated 22 March 2019; in a decision dated 25 July 2019 the FTT found that he had exercised deception on the basis that he had failed to request the audio files to prove he was the test taker and there were no 'valid' results in the relevant college; permission to appeal against the 2019 FTT decision was refused; the appellant made fresh submissions in support of a human rights claim relying upon evidence unavailable to the 2019 FTT; this led to the decision under challenge.
4. In a decision dated 22 July 2022 Upper Tribunal ('UT') Judge Rintoul allowed the appellant's appeal against the decision of FTT Judge Courtney dated 1 September 2021, dismissing his appeal, and the matter now comes before me to remake the decision. The UT set aside the decision of the 2021 FTT and indicated that fresh findings of fact must be made. Neither party invited me to preserve any of the findings reached by Judge Courtney and the hearing before me proceeded *de novo*.

Issues in dispute

5. At the beginning of the hearing and before the commencement of evidence, Mr Lewis and Mr Tufan agreed the following approach:
 - 5.1 I must remake the decision on all the evidence available to me but in accordance with the guidance in Devaseelan v SSHD [2002] UKIAT 702, the 2019 FTT's findings must be my starting point. The 2019 FTT did not identify any specific matters that undermined the appellant's credibility save for these two: (i) he had not attempted to contact Eden College to obtain the audio files; (ii) there were no valid results at Eden College.
 - 5.2 The appellant has since provided evidence in support of his explanation that he made all reasonable efforts to obtain the audio files as follows: he requested disclosure of the evidence relied upon

by the respondent in his pre-action protocol and judicial review claim form but this was refused; he was not advised to request this evidence by his legal representatives at the time of the 2019 FTT; he pressed for this evidence prior to the 2021 FTT, and received the requisite audio file, which he accepts does not contain his voice.

- 5.3 It is clear from the Project Façade report, as summarised by the 2019 FTT, that between 20 March 2012 and 5 February 2014, the ETS identified 77% of the tests at Eden College as invalid with the remainder deemed 'questionable'. The definition of 'questionable' is set out at [14] of DK. Eden College was a test centre where numerous tests had been invalidated, and as such the remainder of the not 'invalid' tests were described as 'questionable'. The BBC Panorama programme also filmed widespread fraud at Eden College, which led to criminal charges and at least one conviction.
- 5.4 It follows that the facts relied upon regarding the appellant's attempts to obtain the audio files before me are materially different to the evidence before the 2019 FTT. There is also a very good reason why this should not be held against him – he and his legal representatives were unaware of the importance of the audio files at the time, and the legal representatives have confirmed that advice to obtain these was not provided. Applying the guidance in Devaseelan, as clarified in later authorities, I must consider all the evidence now available in the round.
6. The parties also agreed that the overarching issue in dispute is whether the respondent had displaced the burden of establishing deception on the part of the appellant. They agreed that the relevant legal framework applicable to this issue is set out in DK and RK (ETS: SSHD evidence; proof) India [2022] UKUT 00112 (IAC), albeit Mr Lewis contended that this failed to consider statistical information set out in a National Audit Office report ('the NAO report'). Nonetheless, the parties agreed that the assessment of whether the respondent has discharged the burden of proof in an individual case falls to be determined on the individual facts of the case, albeit within the context of the general evidence that there was widespread fraud – see [4], [35], [75] and [131] of DK.
7. I clarified with the representatives whether it was correct to state that the appellant was lawfully resident up until the decision to remove him dated 15 September 2014. Mr Tufan noted that the respondent's file indicated that a curtailment decision dated 24 October 2012 with leave to expire on 23 December 2012, was not served upon the appellant and that would explain why it was not referred to in the 2013 decision refusing leave, in relation to which the appellant was given a statutory right of appeal. Mr Tufan was content to proceed on the basis that the decision was not served and did not attract any adverse consequences as a result. The 2019 FTT noted at [50] that the reference to the appellant's leave having been curtailed in late 2012 was mistaken.

Whilst that is not wholly accurate, both parties accepted that nothing turned on the 2012 unserved curtailment decision.

8. Both parties agreed that it was necessary to hear oral evidence from the appellant.

Evidence

9. The appellant relied upon a 186-page bundle. That did not distinguish between the material before the 2019 FTT and the material post-dating that decision, but Mr Lewis was able to explain this. He also relied upon an updated skeleton argument dated 31 August 2022, which had not been received by Mr Tufan. I therefore gave Mr Tufan further time to consider these materials before he began cross-examination.
10. The appellant relied upon a comprehensive witness statement, which had been prepared for the 2021 FTT. The appellant was then cross-examined by Mr Tufan.

Submissions

11. Mr Tufan invited me to apply the reasoning in DK. As to the appellant's explanation, he asked me to note that little weight should be given to his English language ability, pursuant to the observations in MA (ETS - TOEIC testing) [2016] UKUT 00450 (IAC). He submitted that the general background evidence in support of the appellant cheating was strong and there were two additional matters that emerged from cross-examination that render his account that there was no cheating on the day in question incredible: he was unable to state whether there were 10 or 20 students in the room with him and claimed not to notice any type of cheating at all, when the general evidence described widespread cheating at Eden College. He submitted that the respondent had displaced the burden of establishing that this appellant used a proxy, and I should dismiss his appeal.
12. Mr Lewis relied upon his comprehensive updated skeleton argument. This made the point that DK should not be followed because it did not address relevant statistical evidence relevant to maladministration of test scores. In his oral submissions Mr Lewis submitted that even if DK is correct, I could still find that the appellant gave consistent and credible evidence over the course of cross-examination. He acknowledged the weight of the general evidence in DK but invited me to find that the proper assessment of this particular appellant's evidence did not support a finding of deception, even when the general evidence was factored in.
13. I clarified with both representatives what they invited me to do in the event that I found deception was not established in this case. They both accepted that if I found that the respondent had displaced the onus of establishing deception the appeal fell to be dismissed. They

both also accepted that the end result for the opposite finding demanded the respondent top act in accordance with her own policy by granting a period of leave – see *ETS Casework instructions* dated 18 November 2020. This states, *inter alia*:

“If the appeal is dismissed on human rights grounds but a finding is made by the Tribunal that the appellant did not obtain the TOEIC certificate by deception, you will need to give effect to that finding by granting six months leave outside the rules.

This is to enable the appellant to make any application they want to make or to leave the UK.”

14. Mr Lewis submitted that the correct course would be to allow the appeal on Article 8 grounds because to not do so would constitute a disproportionate breach of the appellant’s private life. It would then be a matter for the respondent to determine the type and duration of any leave. Mr Tufan accepted that a finding that the appellant did not use a proxy would inevitably mean that he would be granted at the very least a short period of leave to enable him to make an in-time application for further leave.
15. After hearing from both representatives, I reserved my decision, which I now give with reasons.

Discussion

Approach to the DK analysis

16. I entirely accept that an individual allegation should be assessed in the context of all of the background evidence - the individual evidence must be viewed against the more general background evidence of widespread, overwhelming TOEIC fraud – see [67-70] and [75] of DK. It is undisputed that Eden College was a venue where fraud has been found to be particularly significant and widespread – see the 2019 FTT at [20-22].
17. I also accept that the general evidence overwhelmingly supports the likelihood of fraud on the part of an individual who: (i) accepts that the voice linked to his file is not his and; (ii) has been identified by the ‘lookup tool’ as being linked to that voice. Both of these apply to this appellant. In these circumstances, the evidence relied upon by the respondent against this appellant is prima facie highly reliable – see [72], [84-86] and [117-118] of DK. In particular, I accept the reasoning at [104-106], [114] and [120-125] regarding the general integrity of the ‘continuity of records’ and ‘chain of custody’. It follows that I also accept the general conclusions reached at [126-129] as follows.

"126. The two strands, therefore, amount respectively to the virtual exclusion of suspicion of relevant error by ETS, and the virtual exclusion

of motive or opportunity for anybody to arrange for proxy entries to be submitted except the test centres and the candidates working in collusion.

127. Where the evidence derived from ETS points to a particular test result having been obtained by the input of a person who had undertaken other tests, and if that evidence is uncontradicted by credible evidence, unexplained, and not the subject of any material undermining its effect in the individual case, it is in our judgment amply sufficient to prove that fact on the balance of probabilities.

128. In using the phrase "amply sufficient" we differ from the conclusion of this Tribunal on different evidence, explored in a less detailed way, in *SM* and *Qadir v SSHD*. We do not consider that the evidential burden on the respondent in these cases was discharged by only a narrow margin. It is clear beyond a peradventure that the appellants had a case to answer.

129. In these circumstances the real position is that mere assertions of ignorance or honesty by those whose results are identified as obtained by a proxy are very unlikely to prevent the Secretary of State from showing that, on the balance of probabilities, the story shown by the documents is the true one. It will be and remain not merely the probable fact, but the highly probable fact. Any determination of an appeal of this sort must take that into account in assessing whether the respondent has proved the dishonesty on the balance of probabilities."

18. I have no hesitation in rejecting Mr Lewis's written submissions in his skeleton argument (which were not amplified orally) that the overall conclusions in DK do not survive contact with the statistical evidence in the NAO report to the effect that the test centres were not run efficiently and there were many mistakes in the way that test results and candidates were recorded.
19. The appellant has accepted that the voice recording linked to his name and identifiable details is not his. The concerns in his case are therefore not predicated upon 'voice recognition' but rather the 'chain of custody' issue. Even assuming in the appellant's favour that the statistics relied upon in the NAO report are uncontentious, they do not either individually or cumulatively, support a revisiting of the DK analysis on the 'chain of custody' issue. Mr Lewis submitted that of all the statistics relied upon the incorrect categorisation of 6000 as UK nationals on the part of ETS is "particularly significant" and "clearly casts significant doubt" on the chain of custody issue. As Mr Lewis identified this as his strongest point I deal with it directly - I simply cannot see any clear link between wrongly categorising citizenship and infection of the 'chain of custody'.
20. Mr Lewis further submitted that given the statistical inaccuracies it was *possible* that test centre staff misattributed recordings to the wrong candidates. That adds nothing to the overall conclusions in DK. The panel did not conclude that such a thing might not be possible, but rather that in general that was not happening and moreover there

would have been no incentive or motive to do so, and efforts would have been made not to do so. The panel in DK undertook a comprehensive and forensic analysis of all the relevant evidence, and I agree with it. Whilst much of the conclusions are based upon the panel's own analysis of the facts, there is no good reason to revisit this analysis – see [29] of SSHD v Akter [2022] EWCA Civ 741.

21. In any event, the panel in DK acknowledged at [107-108] that there may be “room for error” and possible corroboration may be relevant. Notwithstanding the robust analysis of the general ‘chain of custody’ systemic safeguards, the panel observed at [131]: *“if credible and sufficiently comprehensive, such assertions might perhaps in an individual case, suffice to prevent the Secretary of State establishing dishonesty on the balance of probabilities.”*

Appellant's case

22. This appellant's case is that there must have been a ‘chain of custody’ error and he relies upon his own evidence about the test he undertook, to which I now turn.
23. I note by way of background (see the 2019 FTT's findings at [27-28]) that the appellant had already gained attainments in English by the date of the relevant TOEIC, but this is in general of little assistance – see [108] of DK and [57] of MA. Whilst there may be numerous reasons why a person who could pass a test would nevertheless decide to cheat, in this particular case it is difficult to conceive of a plausible or rational reason why this appellant would do so. As Mr Lewis submitted, he had already passed examinations in English that were at a far higher level than TOEIC (A level equivalent in English, level 5 in IELTS, degree course taught in English in Bangladesh) and had been speaking English since the age of 6. These are not matters that have ever been contested by the respondent. In these circumstances, it is unlikely that he suffered from a lack of confidence or fear of failure. The appellant clearly had the time to dedicate to the task. It was also expensive to pay for a proxy – at the time he was living in a room with three others, whilst working the maximum 20 hours he was permitted, albeit I bear in mind he clearly had funds to pay for legal representation at the time and was receiving financial support from his family in Bangladesh. The appellant has demonstrated clear respect for the immigration system and rules at all material times. This is explained in detail in his witness statement and was not the subject of any cross-examination. This is therefore a case in which there is clear and undisputed evidence that the appellant was much more proficient in English than the TOEIC demanded. Whilst it is not necessary for the respondent to adduce any evidence on why the appellant cheated, in this case there is reliable and uncontested evidence in support of the appellant's case that there was no rational reason for him to pay the extra funds that cheating demanded. I emphasise that I make these observations by way of background only.

24. I am satisfied that the appellant has provided a comprehensive and entirely credible account of what took place at the test centre, and there are ample cogent reasons to believe him notwithstanding the strength of the general evidence deployed on behalf of the respondent, as analysed in DK. I bear in mind the panel's observation at [129] "*that mere assertions of ignorance or honesty by those whose results are identified as obtained by a proxy are very unlikely to prevent the Secretary of State from showing that, on the balance of probabilities, the story shown by the documents is the true one.*" However, I am satisfied that the unique facts of this case are such that the respondent has not displaced the burden and the story told by the documents cannot be said to be more likely than not to be the true one vis a vis this particular appellant.
25. I note that the 2019 FTT did not identify any specific reasons to disbelieve this appellant save for his failure to ask for his audio file and the general information known about Eden College. The former is no longer a justifiable concern in the light of the acceptance of the evidence I have summarised above. The relevant circumstances surrounding the latter do not mean that amongst those results that are deemed questionable there could be no possible innocent explanation, when all the evidence is considered holistically. I also note the concerns outlined within the 2021 FTT decision, which led to the overall conclusion that the appellant did not provide an innocent explanation which satisfied the minimum level of plausibility. These are not matters that were relied upon by Mr Tufan. As I have indicated above, the parties approached the hearing before me on the basis that the entirety of the 2021 FTT decision had been set aside. However, it remains an unescapable fact that the 2021 FTT did not believe the appellant and I have borne that in mind when making my own findings.
26. Having heard the appellant give oral evidence, which I have weighed up in the context of the general background of widespread fraud, I am satisfied that his evidence has been and remains reliable. He made every effort to answer questions directly and was prepared to concede matters where his memory failed him. He was an impressive witness who took every opportunity to seek corroboration for his consistently articulated position that he did not cheat and had no need to cheat.
27. Mr Tufan was only able to point to two matters said to reflect poorly upon the appellant's credibility. In my view the appellant credibly said that he could not recall how many were in the room during the test, albeit that there were at least 10 and maybe up to 20. I accept his evidence that he was focussing on his own situation and recalled the number of his own computer terminal but not the number of those around him. I also accept his evidence that he did not notice anything untoward at Eden College at the time and date in question. Although fraud was widespread at Eden College, I was not taken to evidence to demonstrate that it took place every day and with every invigilator. In

any event as I have already said, the appellant was focussing upon his own test.

28. There are particularly cogent features of the appellant's evidence that support his claim that he did not cheat and a mistake may have been made in linking his details to the voice recording he accepted was not his: he provided documentary corroboration of having booked the ETS test and paid a fee of £150 which is consistent with the amount genuine students would pay; he has provided an entirely plausible explanation as to why he chose to take the test with ETS (availability and licensed by the respondent) and the location (very close to where he lived at that time); he provided a careful account of his route to Eden College - he explained that although it was just one tube stop away from his home area, his eye was causing him discomfort and he elected to take a taxi to get him there on time; he provided a description of his attendance to take the TOEIC that was entirely consistent with the background evidence; his description of the procedures for registration and the content of the assessments is also consistent with those in place for genuine candidates; the appellant made every reasonable effort to request the audio files to enable him to prove that it was he who took the test.
29. I therefore conclude that when the evidence is considered holistically, i.e., both the weighty general evidence in DK and the appellant's own credible evidence, the respondent has not established that this appellant used a proxy and has therefore been unable to establish deception on his part.

Disposal

30. I bear in mind the public interest in the maintenance of effective immigration controls. Mr Tufan accepted that if I make a finding that there was no deception, there is no immediate public interest in removing the appellant and indeed, he would be granted six months leave to enable a further application.
31. The appellant clearly has a private life in the UK having been here since 2009 - see Ahsan v SSHD [2017] EWCA Civ 2009 at [86]. For completeness I have considered s. 117B of the Nationality Immigration and Asylum Act 2002. Private life was established when the appellant's immigration status was temporary and precarious, and as such I must attach "little" weight to it. However, his immigration history is such that but for the allegation of deception he would have been granted further leave as a student in 2014. In other words, his application for leave to remain was only refused on the basis that he used TOEIC deception. I have found that allegation not to be proven to the requisite standard. The appellant has at all material times spoken English well and there is no reason to believe that he will be a financial burden on the state, when he has the desire and means to be financially independent.

32. In my judgment, the respect for the appellant's private life and the absence of immediate countervailing public interest considerations are such that any removal at this juncture would be a disproportionate breach of the appellant's private life. I therefore allow the appeal on Article 8 grounds.
33. The leave that follows from this is entirely a matter for the respondent – see [119-121] of Ahsan. I merely observe that I have not been invited to and have made no findings regarding the appellant's current ability to meet the Immigration Rules. I have allowed his appeal on a very limited basis as indicated above.

Decision

34. I allow the appeal on human rights (Article 8 of the ECHR) grounds.

Signed: *UTJ Melanie Plimmer*
Upper Tribunal Judge Plimmer

Dated: 2 September 2022