



**UPPER TRIBUNAL  
(IMMIGRATION AND ASYLUM CHAMBER)**

**APPEAL NUMBERS:  
HU/03741/2019  
HU/03743/2019  
HU/03746/2019**

**THE IMMIGRATION ACTS**

**Heard at: Field House  
On the 22 September 2022**

**Decision and Reasons  
Promulgated  
On the 01 November 2022**

**Before**

**Upper Tribunal Judge Canavan  
Deputy Upper Tribunal Judge Mailer**

**Between**

**MRS HALIMA AKTER  
MR ASHIQUER RAHMAN  
DEPENDENT CHILD  
NO ANONYMITY DIRECTION MADE**

**Appellants**

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Respondent**

**Representation**

**For the Appellant: Mr R Wilcox, counsel**

**For the Respondent: Mr T Melvin, Senior Home Office Presenting  
Officer**

**DECISION AND REASONS**

1. The appellants are nationals of Bangladesh. The first and second appellants are husband and wife, born on 9 December 1982 and 3 December 1972 respectively. The third appellant is their 6 years old child.

### **Background**

2. The first appellant arrived in the UK on 10 October 2010 as a Tier 4 student, with a visa valid until 30 June 2013. Her husband was granted entry clearance as her dependant on 2 December 2010. Their daughter was born in the UK on 27 April 2016.
3. On 12 June 2013 she submitted an application for further leave to remain as a student. Her application was granted and she was given leave to remain until 29 December 2014. As part of that application, she submitted a Pass certificate and a TOEIC from ETS.
4. On 24 July 2014 the respondent served a notice of administrative removal, informing her that her leave was curtailed following an anomaly with her ETS speaking test of 12 December 2012. The respondent was satisfied, based on evidence provided by ETS, that her TOEIC test was procured by fraud, as it had been sat by a proxy, and it was accordingly invalidated.
5. On 16 February 2016 she was refused permission to judicial review the respondent's decision. On 24 June 2016, a further removal notice was served.
6. On 20 July 2016 she made an application for leave to remain, relying on her private and family life under Article 8 of the Human Rights Convention. This was refused and certified as clearly unfounded on 18 October 2016. She challenged that decision by way of judicial review, which resulted in a consent order in which the Home Office agreed to withdraw and reconsider her application dated 20 July 2016.
7. Following reconsideration, the respondent maintained her refusal pursuant to paragraph 276ADE(1)(i) with reference to S-LTR 4.2 of Appendix FM of the Immigration Rules. The respondent accordingly maintained the refusal based on the appellant's deception in procuring the TOEIC certificate. The applications of the second and third appellants were also refused.

### **Appeal to the First-tier Tribunal**

8. The appellants appealed to the First-tier Tribunal against the respondent's decision.
9. In a determination promulgated on 29 August 2019, First-tier Tribunal Judge Watson found that the respondent had satisfied the evidential

burden, and in all the circumstances she held that the TOEIC certificate had been fraudulently obtained. It coming to that decision she had regard to the All Party Parliamentary Group Report on TOEIC - "the APPG report" dated 18 June 2019 which sought to undermine the respondent's generic evidence, which included the expert report of Professor French, the "look up tool" which identified the appellant's test result as "invalid" and the Project Facade criminal investigation into the Queensway College, which had been relied upon by the respondent to satisfy the evidential burden of establishing fraud.

10. Judge Watson concluded that there is nothing exceptional in her case. The decision to refuse her leave was not in breach of her human rights.

### **Appeal to the Upper Tribunal**

11. On 28 November 2019 the appellants were granted permission to appeal that decision to the Upper Tribunal.
12. In granting permission First-tier Tribunal Judge Povey stated that the First-tier Tribunal Judge had been entitled to find that the respondent had discharged the initial evidential burden, but went on to conclude that the Judge appeared to make a factual error in respect of the first appellant's degree certificate, by confusing the date that the copy of the certificate was issued, namely, 11 February 2010 as appeared on the bottom corner of the certificate, with a letter in evidence from a UK College that the date the degree was awarded was 2005. Judge Watson had considered this to be a significant discrepancy and found that she could not therefore rely upon the documents that the appellant had produced to establish that she is a well qualified person with no reason to cheat.
13. Notwithstanding the other findings which informed Judge Watson's conclusion that the TOEIC certificate had been obtained fraudulently, this apparent error was of sufficient importance to the outcome to constitute an arguable error of law.
14. Despite his reservations about the other grounds, he stated that all grounds may be argued.

### **The decision of the Upper Tribunal**

15. On 20 January 2020 Upper Tribunal Judge McWilliam heard the appeal and on 3 February 2020 she set aside First-tier Tribunal Judge Watson's decision. She found that the APPG report is capable of undermining the strength of the respondent's case against the appellant. Judge Watson did not properly engage with the report and did not adequately reason why the opinions and recommendations expressed in it were of 'little evidential weight'. She found this to be a significant error [18].

16. She held that the decision to curtail the appellants' leave in 2014 was wrong [24]. She directed that there be a resumed hearing to consider whether the decision breached the appellant's rights under Article 8 of the Human Rights convention. She set the hearing for 18 March 2020.
17. At the resumed hearing on 18 March 2020, the respondent filed an application pursuant to Rule 43 of the Tribunal Procedure (Upper Tribunal) Rules 2008 inviting her to set aside her earlier decision on the basis that it was contrary to decided authority, namely, SSHD v Shehzad [2016] EWCA Civ 615 and Majumder v SSHD [2016] EWCA Civ 1167, which held that generic evidence relied on by the SSHD is sufficient to discharge the initial evidential burden of proof. The Upper Tribunal had not taken into account that the APPG had not received evidence from the SSHD and its report was not akin to judicial scrutiny of evidence.
18. Judge McWilliam dismissed that application on the basis that the Upper Tribunal did not depart from binding precedent, and that she had directed herself on the law with reference to SM and Qadir v SSHD (ETS - Evidence - Burden of Proof) [2016] UKUT 00229.
19. Consequently, the SSHD conceded that in accordance with Ahsan v SSHD [2017] EWCA Civ 2009, the appellant's removal from the UK would be incompatible with Article 8. The appeal was accordingly allowed on Article 8 grounds in a decision promulgated on 27 April 2020.
20. The respondent thereafter sought permission to appeal which was stayed by Upper Tribunal Judge Kamara on 24 June 2020, pending the final determination in DK and RK. The decision was subsequently promulgated on 27 January 2021: DK & RK (Parliamentary privilege: evidence) [2021] UKUT 00061 " DK & RK (1)".
21. On 6 October 2021 permission was subsequently granted to the respondent to appeal to the Court of Appeal. The perfected grounds of appeal asserted that (i) there was no error in law in the First-tier Tribunal's decision and it was not open to the Upper Tribunal to interfere with it; and (ii) the Upper Tribunal's conclusion that the APPG report undermined the respondent's case as to the fraud to the extent that it no longer discharged the evidential or legal burden of proof, is perverse, inadequately reasoned and wrong in law.
22. In Secretary of State for the Home Department v Halikma Akter and others [2022] EWCA Civ 741, promulgated on 27 May 2022, the Court of Appeal referred to the decision of the same Presidential panel of the Upper Tribunal in DK & RK (ETS: SSHD evidence' proof) India [2022] UKUT 00112 IAC- "DK & RK (2)".
23. It noted that the Upper Tribunal regarded the APPG transcripts of the experts' evidence unfavourably [89.] The APPG transcript showed that

those involved were not entirely well informed on materials already available [90]. Nor was the APPG operating judicially.

24. Under the heading General Conclusions, the panel in DK & RK (2) held that:

[127] Where evidence derived from ETS points to a particular 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.

25. In the result, the Court of Appeal in Secretary of State for the Home Department v Halikma Akter and others, [2022] EWCA Civ 741, concluded at [31], that the decision of Upper Tribunal Judge McWilliam in this case simply cannot withstand the criticism levelled against it in the grounds of appeal. She had described the APPG report as having “significant evidential weight”, and specifically relied upon the conclusions of the APPG regarding the reliability of expert evidence. She did not otherwise engage directly with the evidence of the experts. The Court considered that DK & RK (2) is authoritative in this regard. The evidence relied upon by the respondent in the appellant’s case was sufficient to discharge the evidential burden, and there is a case for the appellant to answer.
26. The Court of Appeal accordingly set aside the error of law and remaking decisions of UT Judge McWilliam at [34] and the case was remitted for rehearing before another UT Judge.
27. It directed at [34] that the recast grounds of appeal that are to be remitted are in summary, that it is arguable that the First-tier Tribunal fell into an error of law: (i) by requiring the appellant to prove that her TOEIC was not invalidated by the use of a proxy and thereby effectively reversed the burden of proof and/or applied the wrong test: and (ii) made an inadequate assessment and analysis of her evidence, which

undermined the respondent's case. The original argument that appeared at paragraph 11 of the original grounds of appeal, namely, that the First-tier Judge had erred in giving little evidential weight to the opinions and recommendations of the APPG report, is no longer available to the appellant in the light of their decision.

### **The error of law hearing**

28. With regard to Ground 2 of the appellant's grounds of appeal, Mr Wilcox referred to the factual error identified by First-tier Tribunal Judge Povey in granting the appellant permission to appeal, namely that Judge Watson appeared to confuse the date that the copy of the appellant's degree certificate was issued (11 February 2011), with the date that the degree was actually awarded (2005). This was 'a significant discrepancy' which resulted in Judge Watson finding that she could not rely upon the documents that the appellant produced to establish that she is a well qualified person with no reason to cheat. Even if the degree was awarded in 2010, the material point is the date when the examination was taken.
29. In this regard the Judge also failed to take into account that whilst the appellant only completed only three papers in her accountancy course, she had in fact passed all of them [A35-37]. She also failed to take into account that the appellant had successfully completed an IELTS in 2009 with an English speaking score of 6 and an overall score of 5.51 - A34. The date of the test was 31 October 2009.
30. He contended that her failure to properly take into account the appellant's historic proficiency, affects the whole decision.
31. With regard to the Ground 1 of the grounds of appeal, he submitted that the Tribunal erred '...by requiring (the appellant) to show that it was her voice on the ETS recording and that a proxy was not used, and that she had not given a reasonable explanation for the recording of her test as invalid.
32. He submitted that this effectively reversed the burden of proving the allegation of fraud against her, and/or applied the wrong test. He referred to the decision of the Tribunal in DK & RK (2) at [47]. The burden of proof does not shift from one side to the other during the course of a trial. The burden of proof is fixed by law according to the issue under examination. As stated by the Tribunal at [49] it is not for the appellant to disprove dishonesty, but for the Secretary of State to prove it.
33. Moreover, at [57] the Tribunal stated that finding facts is an individual mental process, not a mechanical one, and it may be that psychologically the trier of fact will respond to an imperative to take a more probing approach to evidence tending to prove a matter where the consequences are likely to be more severe. But the test fixed by law is the same in every case. The test is whether, when taking the evidence as a whole,

the trier of fact is satisfied on the balance of probabilities that the proposition of fact advanced by the party with the burden of proof is made out.

34. The decision of the First-tier Tribunal should accordingly be set aside as unsafe.
35. In reply Mr Melvin relied on his 'Error in law skeleton argument' dated 21 September 2022.
36. With regard to the assertion that the Judge reversed the burden of proof, he submitted that she was aware that the respondent had the burden of showing that the appellant had acted dishonestly [7]. He referred to the decision in DK & RK (2).
37. The fact that the appellant passed an IELTS test in 2009 to obtain entry clearance is not indicative of the appellant not cheating in the TOEIC test three years later. Every student entering the UK has to show some English language ability.
38. As to the factual findings made by Judge Watson, he contended that she was entitled rationally to find with regard to the three accountancy modules taken by the appellant, that there were in fact still nineteen papers remaining [10]. She properly took into account that the appellant taken over two and a half years to complete a small percentage of the required papers to complete a course.
39. Further, as noted by the Judge at [9] the appellant made no inquiries to the college or to ETS to ascertain why her test had been cancelled. She had had advice in 2014 since making the latest application and receiving the refusal, but no action was taken to approach the provider of information or to request the tapes.
40. In the circumstances, there has been no material error of law in the First-tier Tribunal's decision.

### **Assessment**

41. The circumstances in which the Upper Tribunal may interfere with a finding of fact by a First-tier Judge, who has seen and heard the evidence, are narrow: see R (Iran) v Secretary of State for the Home Department [2005] EWCA Civ 982 at [90] in the judgment of Lord Justice Brooke, with whom Lord Justices Chadwick and Maurice Kay agreed:
  - (a) "It may now be convenient to draw together the main threads of this long judgment in this way. ...
  - (b) Before the IAT could set aside a decision of an adjudicator on the grounds of error of law, it had to be satisfied that the correction of the

error would have made a material difference to the outcome, or to the fairness of the proceedings. This principle applied equally to decisions of adjudicators on proportionality in connection with human rights issues;

- (c) A finding might only be set aside for error of law on the grounds of perversity if it was irrational or unreasonable in the *Wednesbury* sense, or one that was wholly unsupported by the evidence.
  - (d) A decision should not be set aside for inadequacy of reasons unless the adjudicator failed to identify and record the matters that were critical to his decision on material issues, in such a way that the IAT was unable to understand why he reached that decision.”
42. The evidence before the First-tier Tribunal was that the appellant submitted a TOEIC certificate from ETS. A record of her speaking test was held. Using their voice verification software, ETS is able to detect when a single person is undertaking multiple tests. A check was taken of the appellant's test and it was confirmed to the respondent there was significant evidence to conclude that her certificate was fraudulently obtained by the use of a proxy test taker.
  43. The panel in DK & RK (2) held that there is no good reason to conclude that the evidence does not accurately identify those who cheated. It is amply sufficient to prove the matter on the balance of probabilities, which is the correct standard. The context for the determination based on an appellant’s own individual facts is that there were thousands of fraudsters and that the appellant has been identified as one of them by a process shown to have been generally accurate.
  44. On that basis, her application was refused under paragraph 276ADE (1)(i) with reference to S-LTR.4.2 of the Immigration Rules.
  45. We do not find on an assessment of the evidence as a whole, that Judge Watson “effectively reversed the burden of proving the allegation of fraud against her and/or applied the wrong test”.
  46. She was well aware that the respondent had the burden of proving dishonesty [7]. She stated that the appellant had not discharged the burden upon her to put forward a reasonable explanation for the finding that her test was invalid [12]. In DK & RK (2), the Tribunal stated at [115] that if faced with scientific evidence apparently pointing to his liability, an appellant will need to provide some good reason why it should be trusted in the instant case.
  47. Judge Watson considered the evidence of the appellant at [8-10]. She noted that the fact that she might have had a good command of English in 2012 when the test was taken, cannot show that she was wrongly identified as a person who took part in the fraud.



48. She had regard to the fact that the appellant took only three modules in her chosen accountancy course but that there were nineteen remaining. The course started in September 2010 and by May 2013 she had only taken a small percentage of the required papers to complete the course. It had thus taken her more than two and a half years to complete those modules. Her conclusion that this was not consistent with the activities of a genuine student is sustainable when the appellant had only completed a fraction of the overall course.
49. Nor was there any evidence that she had taken any exams after changing to a diploma in Management at the London Regal College.
50. We have also had regard to the look-up-tool and Project Facade report used, that were before the First-tier Tribunal, which were produced in the supplementary bundle. The evidence revealed that 80% of the speaking and writing tests taken on 12 December 2012 were deemed invalid, including the appellant's. The Project Facade report shows the percentage invalid for all tests taken between 2011 and 2014 was less than 1%. The inquiry showed that the total percentage found invalid at Queensway College was 70%. The report from Detective Inspector Carter is entirely consistent with the finding of the look-up-tool which noted 80% of tests taken on the day submitted by the appellant were deemed invalid.
51. First-tier Tribunal Judge Watson properly took into account that the appellant had at no stage requested her audio tapes, nor had any explanation been offered to the Tribunal to explain this. She noted moreover that she had had legal advice since 2014 and since making her latest application and receiving the refusal notice, no action was taken to approach ETS or to request the tapes.
52. Although Judge Watson confused the date of the appellant's degree certificate with the date the degree was actually awarded, we do not find that to be material in the circumstances. She was entitled on the basis of all the other evidence to conclude that the appellant was not a genuine student with a plan of study which had been disrupted by the investigation into the ETS tests. She has undertaken a proper assessment of the appellant's evidence in considering whether the respondent had discharged the burden of proof regarding the taking of the TOEIC test.
53. For the reasons set out above, we consider that the decision of the First-tier Tribunal did not involve the making of an error of law and we uphold it.

### **Notice of Decision**

1. The decision of the First-tier Tribunal did not involve the making of an error on a point of law.

2. We do not set aside the decision, but order that it shall stand.
3. No anonymity direction made.

Signed

Date 28 October 2022

Deputy Upper Tribunal Judge Mailer

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### **NOTIFICATION OF APPEAL RIGHTS**

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.
3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.
4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically)**.
5. A **"working day"** means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.
6. The date when the decision is "sent" is that appearing on the covering letter or covering email