



IAC-AH-SAR-V1

Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Number: UI-2021-001664

(HU/20299/2019)

THE IMMIGRATION ACTS

**Heard at Field House
On 13th September 2022**

**Decision & Reasons Promulgated
On the 06 October 2022**

Before

**UPPER TRIBUNAL JUDGE RIMINGTON
DEPUTY UPPER TRIBUNAL JUDGE BAGRAL**

Between

**MR MD MAHMUDAL HASAN MAHMUD
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Z Malik KC instructed by Chancery Solicitors

For the Respondent: Ms A Ahmed, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Bangladesh born on 22nd August 1988 and he appeals the Secretary of State's decision made on 27th November 2019 to refuse his application for indefinite leave to remain on the grounds of long residence and human rights. The appellant claims to have lived lawfully in the UK for more than ten years and that he ought to have been granted indefinite leave under paragraph 276B of the Immigration Rules ("the Rules").

2. The appellant entered the UK on 29th September 2009 as a student with leave to remain until 28th October 2012. He made an application on 28th October 2012 which was supported by a Test of English and International Communication (“TOEIC”) certificate administered by the Educational Testing Service (“ETS”) for a test taken on 18th April 2012. As a result his leave was extended to 30th September 2014. When the appellant made a further application for student leave on 29th April 2014 it was refused on 22nd July 2015 under paragraph 322(2) of the Rules because the English language test taken on 18th April 2012 was asserted to have been taken by a proxy. The decision was also refused under paragraph 245ZX(a) because the appellant was not awarded points for confirmation of studies owing to the absence of the Confirmation of Acceptance for Studies.
3. The appellant filed an appeal and on 16th March 2017 notice of hearing was sent to his then solicitors London Law Associates. The matter came before First-tier Tribunal Judge Skehan who dismissed the appeal. There was no appearance by the appellant or his solicitors and no explanation and the appellant had failed to file any evidence. That decision was promulgated on 24th April 2017.
4. The appellant appealed to the Upper Tribunal (now represented by Chancery Solicitors albeit the same individual solicitor) on the basis that an application for an adjournment was faxed to the Tribunal before the hearing on 18th April. The appeal was dismissed by Deputy Upper Tribunal Judge Farrelly on 5th February 2018, but the appellant applied to the Court of Appeal for permission to appeal. In a judgment dated 21st February 2019 Underhill LJ refused permission. The appellant’s appeal rights were exhausted on 5th March 2019.
5. The appellant then made an application to the respondent for leave to remain outside the Rules on compassionate grounds which was then varied on 17th September 2019, to an application for indefinite leave to remain on the basis of his length of residence.
6. The application was refused on 27th November 2019 on the basis that his presence in the UK was not conducive to the public good because his conduct made it undesirable to allow him to remain in the UK. It was noted that although he did not rely on the TOEIC certificate in his current application, his complicity in the fraud nonetheless contributed to an extremely serious attack on the maintenance of effective immigration controls and the public interest generally. Refusal was made under paragraph 322(2) of the Immigration Rules (general grounds). His application was also refused under paragraph 276B(iii) and under paragraph 276ADE(1)(i) on grounds of suitability because he failed to meet the requirements of S-LTR.1.1. and S-LTR.4.2. Exceptional circumstances were considered, and it was found that there were none. He had not provided any evidence of an exceptional level of dependency on anyone in the UK and it was considered that, with his qualifications and skills gained while living and working in the UK, he would be able to

reintegrate back into life in society in Bangladesh and establish his private life.

7. The appellant appealed that decision on human rights grounds on the basis that the respondent's decision was disproportionate and that he did not cheat in his English language test. First-tier Tribunal Judge Behan allowed the appeal, but that decision was set aside on the basis that the judge had erred in her interpretation and application of **Devaseelan v SSHD** [2002] UKIAT 00702. Secondly, the judge had failed to identify what evidence produced would allow her to depart from the determination of Judge Skehan, and thirdly she had relied on unnamed reports but it was submitted she referred to The All-Party Parliamentary Group report ("APPG report") dated July 2019 and the National Audit Office ("NAO") Report contrary to the guidance in **DK and RK (Parliamentary privilege; evidence)** [2021] UKUT 61 which was subsequently approved by **DK and RK (ETS: SSHD evidence, proof) India** [2022] UKUT 112 (IAC) and in turn approved by **Secretary of State for the Home Department and Halima Akter and Others** [2022] EWCA Civ 741.
8. The decision of Judge Behan was set aside, and the matter came before the Upper Tribunal for re-making.
9. The documentation before the Tribunal consisted of the appellant's bundle, the Secretary of State's bundle and an appellant's additional bundle. Within the Home Office bundle was a witness statement dated 16th March 2020 from Sanjay Vaghela, Senior Caseworker with the Home Office, a Project Façade Report on the Elizabeth College dated 15th May 2015, ETS SELT Source Data and an ETS TOEIC Test Centre Look-up Tool dated 18th April 2012. The ETS SELT Source Data confirmed that the appellant had taken the speaking test on 18th April 2012, and this had been declared invalid (speaking and writing tests with scores each of 190). Additionally there was a report from Professor Peter French.
10. In the appellant's bundle there were two witness statements from the appellant, the first dated 3rd March 2020 and the second 17th August 2020. The APPG report was included and there was correspondence with ETS requesting the voice recordings from ETS. In that correspondence, it was cited that his speaking score was given as 190 and his writing score at 190.
11. The appellant attended and gave oral testimony which we have not set out in detail but to which we have referred during the course of our conclusions. At the outset of the hearing there was a discussion as to the scope of the hearing and it was agreed that in line with **Devaseelan** the first Adjudicator's determination should be the starting point but facts happening since that determination may be explored and thus new evidence could be explored, albeit in relation to the allegation of cheating.
12. In her submissions, Ms Ahmed relied on the Secretary of State's refusal and submitted that **Devaseelan** was the starting point and there was no

evidence submitted such that the decision of Judge Skehan should be departed from. The respondent had discharged the evidential burden and that Deputy Upper Tribunal Judge Farrelly, whose decision had been upheld, agreed with the Home Office Presenting Officer that with the connivance of the representative the appellant had engaged in delaying tactics. She referred the Tribunal to **DK and RK (2)**. This appellant had achieved very high scores in the test, being 190 speaking and 190 for writing, both of which were invalidated. The criminal enquiry had shown that 73% of the tests taken at the Elizabeth College on 18th April 2012 were declared invalid. **DK and RK (2)** confirmed that voice recognition was a reliable product and in general there was no reason to doubt the analysis. **MA (ETS-TOEIC testing)** [2016] UKUT 450 (IAC) was clear that there needed to be cogent evidence that the appellant did not cheat. The appellant was wholly untruthful. His responses had been hesitant and could not withstand scrutiny. His assertion that he lived in Belgrave Road near Victoria was wholly incredible when he was a student. He had not given the whole postcode, and this was an affluent area, and it was not credible that he would have lived there. He was unable to remember his travel details from Victoria to Vauxhall despite saying he had lived in the area for a year and a half, and it was not plausible that he had travelled to the college three times.

13. In relation to the GP records there was still a failure to submit evidence and we were referred to [10] of Deputy Upper Tribunal Judge Farrelly's decision. What was submitted originally was a standard sick note because of back strain and there was nothing to say he was bed-bound or went to hospital, and he had merely bolstered his claim today. The appellant had failed to provide further evidence. He was asked a number of times why he did not contact ETS earlier and could not give an adequate answer. We were referred to **DK and RK (2)**, and the relevant paragraphs on voice recordings and the Tribunal was invited to reject the appellant's explanation. The ESOL (language test) certificate dated 2012 did not reflect his scores two years later from the ETS results.
14. There were no very significant obstacles or exceptional circumstances in relation to his Article 8 protected private life and Ms Ahmed relied on Section 117B of the Nationality, Immigration and Asylum Act 2002.
15. Mr Malik made reference to his skeleton argument which recognised that the appellant was unsuccessful in the previous appeal, however, in accordance with **Mubu and others (immigration appeals - res judicata)** [2012] UKUT 00398, res judicata did not apply in immigration appeals. He referred to the principles in **Devaseelan** [2002] UKIAT 00702 and outlined in **BK (Afghanistan)** [2009] EWCA Civ 1358, [36 to 38]. Each individual fresh application should be treated "with the necessary degree of sensible flexibility and desirable consistency of approach, without imposing any unacceptable restrictions on the second Adjudicator's ability to make the findings which he conscientiously believes to be right".

16. **BK** at [38] emphasised that:

“The flexibility for the Tribunal to take a fresh decision allowed proper regard to be given to the public interest giving effect to a consistent and fair immigration policy – the matter should be judged, Auld LJ said, ‘as one of fairness and maintenance of proper immigration control’”.

17. Mr Malik submitted that the previous decision contained few findings of fact. There was no clear finding that the appellant had cheated in his TOEIC test, and the judge simply upheld the Secretary of State’s decision. He referred to the three-stage process with reference to the burden of proof with reference to **SM and Qadir (ETS - Evidence - Burden of Proof)** [2016] UKUT 229, **Secretary of State v Shehzad and Chowdhury** [2016] EWCA Civ 615 and **Majumder and Qadir v Secretary of State for the Home Department** [2016] EWCA Civ 1167. There was one civil standard of proof. He accepted that **Majumder and Qadir** held that specific evidence from the Secretary of State together with generic evidence was sufficient for the purpose of the first stage of the analysis but not determinative of the third stage. The question of whether a person engaged in fraud was fact-sensitive as per **Ahsan v Secretary of State for the Home Department [2017] EWCA Civ 2009** which at [33] observed that even where an impugned test was taken at an established fraud factory such as the Elizabeth College and the voice file did not record the appellant’s voice, the decision would still be fact-specific. Mr Malik identified the factors to be considered and set out in **Majumder and Qadir** at [18]. **DK and RK (2)** confirmed that the burden of proving the fraud or dishonesty was on the Secretary of State and burdens of proof did not switch between parties but were those assigned by law. He acknowledged that the Court of Appeal in **Secretary of State v Akter [2022] EWCA Civ 741** found at [32] that **DK and RK (2)** was authoritative.
18. At the hearing Mr Malik made three concessions, first that the appellant had provided no good reason for not presenting evidence before the Upper Tribunal at his previous appeal; secondly, the evidence adduced by the Secretary of State was sufficient to discharge the evidential burden and raised an issue of fraud that required an answer; and three, that there were no significant obstacles to the appellant’s integration in Bangladesh.
19. He accepted that the issue of fraud had been determined by a previous Tribunal, and there was no medical evidence provided but the fact that there was no good reason or explanation for failure to adduce evidence was not determinative.
20. Mr Malik criticised the Project Façade Report because it had failed to update the Tribunal as to ongoing developments.
21. The appellant in this instance had given oral evidence in English. **MA** had accepted that there may be a good reason even for a person with good English to cheat, but the point made by Ms Ahmed that the appellant was

under time pressure to obtain the certificate was insufficient. The appellant's leave did not expire until 28th October 2012, but the appellant had taken his TOEIC test six months earlier in April 2012. There was no time pressure, and this was not a comparable case with **MA**. Ms Ahmed had submitted that the appellant's address in London had not appeared in her records, but she had given no evidence or printout to that effect. The appellant was said not to be able to recall his postcode, but he did give an address. There was no evidence as to how expensive Victoria was. It was not realistic for someone to expect to remember precisely how they took that journey, because it was only three times and the appellant had given evidence why he did visit three times and it was possible. The Tribunal was invited to find that he had lived in London in 2012. Further, there was no reason why he had to contact ETS, and the Tribunal was referred to [23] of **Ahsan**. That point was not determinative. Ultimately contact was made with ETS in 2020 and it was accepted it was not the appellant's voice.

22. However, in the cases in **Ahsan** the voice recording did not match and there was extensive evidence given as to the chain of custody in other cases which attracted serious and significant issues. It was not possible to look at the appellant's ESOL results comparatively, and there was no element which concerned speaking and thus the marks were not comparable. There was evidence that his English competence was sufficient, and he did have the IELTS evidence in his bundle. The appellant completed a diploma at the Institute of Administrative Management in 2012 and the Tribunal was asked to consider how plausible it was that if one was studying for diploma one would cheat. He was awarded a level 5 diploma in 2013 and he was also awarded an MBA. Why with these academic qualifications would the appellant take the risk of cheating? We were referred to the seven factors in **Majumder** at [69] which should be considered. Despite his application being refused he continued to study and that was testament to his character. The allegation was a serious one and his explanation needed to be that at the minimum level of plausibility.
23. Mr Malik made no submissions on Article 8. He acknowledged that if the Tribunal concluded the appellant had cheated, he could not succeed on Article 8. However, if he were exonerated the appeal should be allowed in line with **Ahsan v Secretary of State** [2017] EWCA Civ 2009 and **TZ v Secretary of State** [2018] EWCA Civ 1109 [34].

Analysis

24. At the outset we set out the principles of **Devaseelan**, and, as also set out at [32] of **BK (Afghanistan)** [2019] EWCA Civ 1358:

“(1) The first adjudicator's determination should always be the starting point. It is the authoritative assessment of the appellant's status at the time it was made. In principle issues such as whether the appellant was properly

represented, or whether he gave evidence, are irrelevant to this.

- (2) Facts happening since the first adjudicator's determination can always be taken into account by the second adjudicator.*
- (3) Facts happening before the first adjudicator's determination but having no relevance to the issues before him can always be taken into account by the second adjudicator.*
- (4) Facts personal to the appellant that were not brought to the attention of the first adjudicator, although they were relevant to the issues before him, should be treated by the second adjudicator with the greatest circumspection.*
- (5) Evidence of other facts, for example country evidence, may not suffer from the same concerns as to credibility, but should be treated with caution.*
- (6) If before the second adjudicator the appellant relies on facts that are not materially different from those put to the first adjudicator, the second adjudicator should regard the issues as settled by the first adjudicator's determination and make his findings in line with that determination rather than allowing the matter to be re-litigated.*
- (7) The force of the reasoning underlying guidelines (4) and (6) is greatly reduced if there is some very good reason why the appellant's failure to adduce relevant evidence before the first adjudicator should not be, as it were, held against him. Such reasons will be rare.*
- (8) The foregoing does not cover every possibility. By covering the major categories into which second appeals fall, the guidance is intended to indicate the principles for dealing with such appeals. It will be for the second adjudicator to decide which of them is or are appropriate in any given case".*

25. Evidence was supplied by the Secretary of State for the 2017 hearing before the First-tier Tribunal but the appellant neither attended nor produced a bundle of evidence for the hearing.

26. The appellant maintained to us that there was an explanation for his absence at the previous hearing in 2017 and that he had been in hospital and had a GP note. That was not produced before us and the only reference to a sick note we could locate was that reference in the decision of Deputy Upper Tribunal Judge Farrelly at [10] stating the following:

"I agree with the Presenting Officer that the appellant has with the connivance of his representative engaged in delaying tactics. The fax receipt suggests it was sent on 12th April 2017 with a covering letter dated 13th April 2017. It refers to a five page medical report. What was submitted was a standard sick note

issued by a GP dated 11th April 2017 stating the appellant should refrain from work for two weeks because of back strain. There is nothing to indicate he was unable to attend the hearing”.

27. In refusing a grant of permission to appeal in the Court of Appeal, Lord Justice Underhill stated:

‘Secondly it is said that it was unfair for the hearing to proceed in the applicant’s absence and in any event unfair for the Upper Tribunal not to set aside the decision of the FtT in the light of the explanation provided. As to the former, it is plain that there was no unfairness. It is entirely understandable that the FtT was unaware of the adjournment application since it had only been submitted the previous working day. As to the latter, assuming (without deciding) that an appeal was the right procedure, the reasons retrospectively advanced in support of an adjournment were plainly inadequate for the reasons given by UTJ Frances, namely (a) since Mr Hussain did not know whether the adjournment would be granted it was his obligation to turn up and renew the application, if necessary at the hearing; (b) the supposed medical evidence did not show that the applicant was not fit to attend the hearing; and (c) no appeal bundle had been lodged, so there was no basis on which the UT could assess whether the applicant had a viable case. The UT Judge was thus entitled to refuse to set the FtT’s decision aside even without the findings that he made at Ps. 9 – 10’.

28. As held by Lord Justice Underhill the supposed medical evidence did not show that the appellant was not fit to attend the hearing. As set out in **Devaseelan**, ‘An appellant who seeks, in a later appeal, to add to the available facts in an effort to obtain a more favourable outcome is properly regarded with suspicion from the point of view of credibility’. Although it was accepted in **Devaseelan** that there may be some very good reason why the Appellant’s failure to adduce relevant evidence before the first decision maker should not be held against him, ‘such reasons will be rare’. Despite the lengthy delay in this matter at no point has the appellant produced a copy of the sick certificate nor any medical evidence from the hospital confirming his stay there.
29. Most of the facts presented to us and said to be relevant, were capable of being placed before the First-tier Tribunal in 2017 and Mr Malik candidly accepted that there was no good reason for not presenting evidence which the appellant adduced before this Tribunal in his previous appeal.
30. We accept, however, that there were minimal findings by Judge Skehan in his decision dated April 2017 when dismissing the appellant’s appeal against the Secretary of State’s refusal letter of 22nd July 2015. We have thus considered all the evidence provided in this appeal holistically, noting that the appellant did not give oral evidence before the First-tier Tribunal

and we have taken that into account, notwithstanding the guidance and circumstances outlined above.

31. The Court of Appeal in **Secretary of State for the Home Department v Shehzad and Chowdhury** [2016] EWCA Civ 615 endorsed a three-stage process when considering the question of whether a person has cheated in their TOEIC test. The Secretary of State must provide sufficient evidence to raise the issue of fraud in relation to the TOEIC certificate and, if that is satisfied, the appellant must raise an innocent explanation which satisfies the minimum level of plausibility. If that stage is met the Secretary of State must establish on the balance of probabilities that the explanation is to be rejected.
32. The headnote of **DK and RK (ETS: SSHD evidence, proof) India [2022] UKUT 112 (IAC)**, having addressed the issue of the APPG report, added to the picture as follows:
 - “1. *The evidence currently being tendered on behalf of the Secretary of State in ETS cases is amply sufficient to discharge the burden of proof and so requires a response from any appellant whose test entry is attributed to a proxy.*
 2. *The burden of proving the fraud or dishonesty is on the Secretary of State and the standard of proof is the balance of probabilities.*
 3. *The burdens of proof do not switch between parties but are those assigned by law”.*
33. The respondent’s evidence comprised the generic evidence of the Secretary of State which included a witness statement of Sanjay Vaghela dated 16th March 2020. This confirmed that the appellant’s test was invalidated by ETS. The look-up tool provided showed that the appellant’s speaking test was cancelled by ETS because, on its analysis, the test was taken by a proxy tester. The witness statement of Sanjay Vaghela also referred to the witness statements of Rebecca Collings and Peter Millington confirming the process of analysing the tests.
34. The appellant took his test at a centre at which a criminal investigation was conducted. The test was taken by him in April 2012, and it was found in the Project Façade Report that between 18th October 2011 and 26th September 2012 the Elizabeth College undertook 3,919 tests of which all were found to be either questionable or invalid. Of those 2,074 were declared invalid, that is 69% and the remainder being 1,845 were questionable. That specific college was described as a fraud factory in **Ahsan**. We accept that an investigation and criminal report is not necessarily determinative, as Mr Malik submitted, and we also accept that the investigation was ongoing, but that report does reflect a snapshot, at exactly the period during which the appellant said he took his test, and of the activity at that college. There was evidently organised and widespread abuse of the TOEIC at that testing centre.

35. Additionally according to the Secretary of State's data, 73% of the tests taken at the college on 18th April 2012 were invalid. That is the day the appellant took his speaking and writing tests.
36. We therefore accept that the evidence tendered by the Secretary of State was sufficient to discharge the Secretary of State's burden at the 'first stage'.
37. We considered the response and 'innocent' explanation from the appellant. He accepted that the voice recording was not that of his own but maintained nevertheless that he had taken the examination. When asked why it was that it was not his voice on the voice recording, his answer was essentially that "if management do something" intimating that there must have been some form of system error for which he could not be responsible.
38. When asked in relation to his previous appeal of 2017 why he did not attend he stated that he was in hospital but as we have identified already there was no evidence from the hospital despite the length and ample time taken between his appeal to the Court of Appeal in 2018 and the present hearing in 2022. The Court of Appeal remarked on the lack of evidence to show he was unfit to attend the hearing and we have still not received further evidence as to his incapacity. The appellant was on notice he had not produced evidence and remarkably at the re-making before us he told the court that if required, he could obtain a letter from the GP if this was still available after five years. Initially he made no mention in the oral evidence of his visit to hospital but at the end of oral evidence alluded to it. We found this inconsistent. From the date of the UT decision on the error of law dated 30th June 2022 the appellant was on notice that this evidence would be required, see [23]. No such evidence was produced to show the appellant had been hospitalised at the time of his hearing in 2017 and we do not accept that he was so. We take that into account when considering his overall credibility. We notice that he did give oral evidence before Judge Behan that he went to hospital and thus it is even more surprising that he failed to produce this evidence.
39. We were not impressed with the appellant under cross-examination. Some of his answers were less than clear and although we accept that he did not use an interpreter and could have been nervous, questions had to be repeated to him and his answers were frequently unclear as his evidence developed. For example, when asked why he did not contact ETS when told of the allegation against him, he insisted on emphasising his English qualifications stating, "I take over a hundred exams". This question was repeated three times. His response could have been his inability to understand or his refusal to answer the question directly. His answer to why the voice recording on the tape was not his during the test was "if management do something" and thereafter he failed to give a clear answer. He had no real explanation as to why his voice would be submitted by someone else. We were most surprised to see that the appellant managed to score 190, a very high score, on his speaking test

according to the ETS Source Data in 2012. That said his English may have deteriorated in the 10 years since he has been living in the United Kingdom, but we do not accept that his English was such that it would exclude cheating, or it would be illogical for him to cheat.

40. The appellant's description of attending Elizabeth college three times, the first two occasions to meet the staff and check the circumstances of the college, prior to taking the test, did not sit comfortably with the fact that the test could be booked online. He was not going to attend the college for any course. Initially the appellant stated that he travelled from Victoria to Vauxhall via the Northern Line. Then he said he travelled on the Victoria Line via the Northern Line. We take judicial notice that the Northern Line does not run through Victoria and his description of the journey, which on his evidence was repeated was simply not credible. We found the fact that the appellant maintained that he lived in Belgrave Road near Victoria was not a factor necessarily to be taken against him because of the cost to a student but his description of how he managed to get to the test centre three times by using the Northern Line, which he reaffirmed a number of times in evidence especially when guided by a phone, was simply not credible, particularly as he claimed he had lived there for over a year. If he could not remember how he got there he did not say so. Further, he confirmed that he could have booked the test online and yet chose to attend the college twice before he asserted, he attended for a third time when he did the test. He could not remember the details of the test for which he paid in cash.
41. We found his oral evidence that the errors in recording someone else's voice was to do with 'management' did not accord with the findings in **DK and RK**:

"103. ..., there is no reason to suppose that the voice recognition process was substantially defective. There may be a false positive rate of one per cent, or even possibly three per cent, but there is no proper basis for saying that the false positive rate was or would be any higher than that. ...ETS would have no known motive for exaggerating the level of the fraud on their system, and a reputational motive for confining the declared fraud to that clearly demonstrated by the data. We conclude that the voice recognition process is clearly and overwhelmingly reliable in pointing to an individual test entry as the product of a repeated voice. By 'overwhelmingly reliable' we do not mean conclusive, but in general there is no good reason to doubt the result of the analysis.

105. Clearly, if there were no general reason to link particular candidates' input with particular test recordings, that would be a powerful criticism. There is no reason at all to suppose that they would be other than extremely careful to ensure that the fraudulent entries were indeed credited to the fraudulent candidates. The suggestion of any general

mix-up at this stage runs counter to the ordinary experience of the provision of a service.

106. *The second stage is while the test entries are in the control of ETS. A suggestion of dissociation of entry from candidate at that point strikes at the heart of ETS's analytical process. If there had been mix-ups at that point it would mean that as an examining authority ETS was unable to be sure that it was, in general, able to attribute the appropriate test results to candidates. ... ETS is the largest private not-for-profit educational testing and assessment organisation in the world, administering 50 million tests annually in 25,000 test centres in 192 countries. It is responsible in the USA for the SAT, a college admissions test, taken by 3 million students a year. It also administers the TOEFL (Test of English as a Foreign Language) test, the most widely respected English-language test in the world, recognised by thousands of colleges, universities and agencies in numerous countries, including the UK, the USA, Australia and Canada. It is clear from its international role and continued viability and dominance that (outside these cases) nobody seems to be suggesting that it cannot be relied upon to attribute test entries to candidates correctly”.*

42. As stated in **DK and RK** at [119] in the context of the test centres as fraud factories, ...

“It is overwhelmingly likely that those to whom the proxy results are now attributed are those who took their tests by that method. There are two parallel strands to this conclusion, and neither contradicts the other. Each could stand alone, but their combined effect is wholly compelling”.

43. A point well made in **DK** was who else would wish to falsify results by removing genuine entries and substituting false ones? It was concluded that there was no acceptable way in which the proxy test entries could have been inserted in the system after the candidates had taken an honest test.

44. It is also correct that when the appellant discovered he had been accused of cheating in 2015 he waited five years before instructing solicitors to request a voice recording from ETS. His answer that he did not do so immediately because he had taken the IELTS test in 2014 did not address the reason he had delayed as an innocent man in establishing the facts and countering a very serious allegation of fraud.

45. We consider the issues raised in **Majumder and Qadir** at [18]:

‘... in considering an allegation of dishonesty the relevant factors included the following: what the person accused had to gain from being dishonest; what he had to lose; what is known about his character; the cultural environment in which he operated; how

the individual accused of dishonesty performed under cross-examination, and whether the Tribunal's assessment of that person's English language proficiency is commensurate with his or her TOEIC scores; and whether his or her academic achievements are such that it was unnecessary or illogical for them to have cheated'.

46. We have dealt with how the appellant performed under cross examination above.
47. What had the appellant to gain from being dishonest? We accept the appellant was only within six months of his visa expiring, having been in the UK for three years, but that is still a relatively short period when considering the length of time involved in applications for visas to the Secretary of State. Further the appellant gave oral evidence that “so many” of his friends at college were accused of cheating and some as a result were, as he put it, ‘deported’, and that suggests that it was commonplace in the cultural environment in which he operated. There was no indication that the appellant had any convictions but that does not necessarily indicate that he did not cheat. The answer to the question as to what he had to lose was that at the time he took the test the appellant had not achieved the various academic qualifications that he emphasised latterly he had achieved. The development of his qualifications was subsequent to the cheating which initially ensured the extension of his leave.
48. The International English Language Testing System (“IELTS”) test dated 1st November 2014 was largely blanked out in our evidence but in his second witness statement the appellant states he achieved an overall band of 6.0. Nonetheless this post-dated the test under scrutiny as do the various academic qualifications. The Institute of Administrative Management (“IAM”) Level 4 Diploma in Administrative Management dated 25th May 2012 had no indication of the English component or examination conditions, nor did the IAM Level 5 Diploma in Business Management in May 2013, nor the EduQual Postgraduate Diploma in Business management issued in November 2014, nor the Graduate Diploma in Business Administration in January 2015 from ‘EBMA’, nor his food safety qualification in Catering dated 18th January 2015 (we were unclear how food safety dovetailed with business administration but we do not hold this against the appellant), and nor did the Master of Business Administration in July 2015 from Anglia Ruskin University. We place little reliance on these certificates as an indication that the appellant was proficient in English in April 2012.
49. We have commented on his English above although this is not a determinative factor in our deliberations. We are fully aware that we are not experts in assessing the language capabilities of appellants particularly since time has elapsed.
50. As explained by the Upper Tribunal in **MA** at [57]:

'there is a range of reasons why persons proficient in English may engage in TOEIC fraud. These include, inexhaustively, lack of confidence, fear of failure, lack of time and commitment and contempt for the immigration system. These reasons could conceivably overlap in individual cases and there is scope for other explanations for deceitful conduct in this sphere'.

51. Only the APPG report was provided to us in the case bundle. Extracts from the National Audit Office ('NAO') Report dated 24th May 2019 were included in the skeleton argument before the First-tier Tribunal, but the NAO report was not provided in full to us. Mr Malik, we think rightly, placed no reliance on the APPG report or the report of the NAO published in 2019. Both criticised the respondent's conduct in dealing with the TOEIC cases and concluded that the response the Home Office had undertaken and was a flawed reaction to a systemic failure by a private company.
52. In relation to the APPG and NAO reports **DK and RK (1)** had this to say:

"... 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'.
53. Further, **R (Sohrab Mahmud) v Secretary of State** [2021] EWCA Civ 1004 at [50] identified when addressing the significance of the APPG report identified that

'none of the evidence in the transcript descended into detail about the coincidence of the numbering of the voice file in Mr Mahmud's case with the numbering on the test result'.
54. The Court of Appeal in **Akter** considered **DK and RK (2)** to be 'authoritative' in its approach to the APPG report and noted at [26] that **DK and RK** at [90], regarded the APPG transcripts of the experts' evidence unfavourably and that in particular "The APPG transcript shows "that those involved were not entirely well informed on the materials already available" and "*The APPG was not "operating judicially"*".
55. Considering the evidence in the round we find that the Secretary of State has discharged the legal burden. For the reasons given we find the appellant's explanation not credible. We are persuaded following careful consideration and examination of the evidence, including the appellant's oral testimony, that the Secretary of State has discharged the burden to show the appellant was indeed involved in fraud in obtaining the TOEIC test in 2012. We make this decision independent of that of Judge Skehan, albeit that his decision was the starting point. We find on balance that the appellant obtained a test through cheating, and he cannot fulfil paragraph S-LTR 4.2 of the Immigration Rules.

56. Mr Malik accepted that the appellant would not pursue Article 8 should he be found to have cheated. We conclude, in line with **R (Agyarko)** [2017] UKSC 11, there would be no unjustifiably harsh consequences on his removal to Bangladesh. **Secretary of State v Kamara [2016] EWCA Civ 813** held that

"integration" calls for a 'broad evaluative judgment of whether the individual will be enough of an insider in terms of understanding how life in that other country is conducted and a capacity to participate in it, have a reasonable opportunity to be accepted, operate on a day-to-day basis and to build up within a reasonable time a variety of human relationships'.

57. We find the appellant has family in Bangladesh, spent his formative years there and is conversant with the language and his experience and qualifications, obtained in the UK, equip him for re-integration there. Section 117B of the Nationality, Immigration and Asylum Act 2002 does not assist the appellant.

58. We dismiss the appeal.

Notice of Decision

The appeal is dismissed.

No anonymity direction is made.

Signed Helen Rimington

Date 6th October 2022

Upper Tribunal Judge Rimington

We have dismissed the appeal and therefore there can be no fee award.

Signed Helen Rimington

Date 6th October 2022

Upper Tribunal Judge Rimington