



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

**Appeal Number: UI-2022-003769  
On appeal from HU/55586/2021  
IA/13882/2021**

**THE IMMIGRATION ACTS**

**Heard at Field House  
On the 12 December 2022**

**Decision & Reasons Promulgated  
On the 20 December 2022**

**Before**

**UPPER TRIBUNAL JUDGE GLEESON**

**Between**

**TAREQUE HOSSAIN  
[NO ANONYMITY ORDER]**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

Representation:

For the appellant: Mr Michael Biggs of Counsel, instructed by Liberty Legal Solicitors LLP

For the respondent: Mr Myroslav Diwnycz, a Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant appeals with permission from the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision on 16 September 2021 to refuse him leave to remain in the UK on private and family life grounds pursuant to paragraph 276ADE of the Immigration Rules HC 395 (as amended) and Article 8 ECHR. The appellant is a citizen of Bangladesh.

2. **Mode of hearing.** The hearing today took place as a blended face to face and Microsoft Teams hearing. There were some limited technical difficulties, as Mr Diwnycz's connection dropped out for short periods on a few occasions. They were resolved by repeating the last remark, and Mr Diwnycz confirmed that he was able to participate adequately in the hearing.
3. I am satisfied that all parties were in a quiet and private place and that the hearing was completed fairly, with the cooperation of both representatives.

## **Background**

4. The appellant came to the UK on 2 February 2010 as a Tier 4 student. He was 23 years old. He had leave on that basis until 30 August 2014, when his status was curtailed on the basis that he had obtained leave by deception, by using an ETS/TOEIC test from Queensway College which the ETS LookUp tool later found to be invalid. There was no right of appeal against the August 2014 curtailment and the appellant raised no judicial review challenge.
5. On 27 August 2014, the appellant was served with form IS151A as a person liable to removal. He made another application for Tier 4 leave two days later, which was rejected. The appellant did not embark, choosing to remain in the UK without leave.
6. On 31 May 2017, three years later, the appellant made an application for international protection, which was refused with an in country right of appeal which he did not exercise. The refusal was later reconsidered by agreement, but the appellant withdrew his protection claim on 21 September 2020.
7. On 21 October 2020, the appellant made a private and family life application for leave to remain. It is the refusal of that application which is the subject of this appeal. The respondent considered that the appellant could not bring himself within the Rules, both on time grounds (he had not been here for 20 years) and on suitability grounds. There were no exceptional circumstances for which the appellant should be granted leave to remain outside the Rules.
8. The appellant appealed to the First-tier Tribunal.

## **First-tier Tribunal decision**

9. The First-tier Tribunal decision was taken following remote evidence from the appellant and two witnesses, Mr Islam and Mr Majumder. The appellant and respondent were both legally represented by Counsel at the hearing. The evidence of the two witnesses is recorded in the transcript in the supplementary bundle, as well as that of the appellant. There were some difficulties with the evidence of Mr Islam, whose connection was not very reliable. At one point, the transcript records that he had his ear rather than his face to the camera.

10. First-tier Judge Beg did not find the appellant to be a credible witness, on the basis of his oral evidence and his witness statements. She also found the evidence of the witnesses to lack credibility, for the reasons given in her decision.
11. The Judge found that the appellant would be able to use his education and work experience to seek employment in Bangladesh, where he had a network of supportive family members. His father, who had run two businesses in Bangladesh before his retirement, had paid for the appellant's education in the UK.
12. The Judge accepted the respondent's case that the appellant had used deception in his ETS/TOEIC test. She noted that in *Secretary of State for the Home Department v Alam* [2020] UKAITUR JR131382014 (24 September 2020), the Upper Tribunal had found that Queensway College, from which the appellant had obtained his ETS/TOEIC qualification, was a fraud factory. The Judge inserted an incorrect citation for *Alam* in her decision, but it is clear from the passage cited that she was looking at the Upper Tribunal decision of Mr Justice Dove.
13. The Judge accepted that the appellant did have a private life in the UK, but that it was established in the full knowledge that a Tier 4 student visa was not a settlement route. He would be able to keep contact with his friends in Bangladesh and re-establish a private life there. Any interference with his Article 8 ECHR rights would be legitimate and proportionate, and would not result in unjustifiably harsh consequences.
14. The appellant's Counsel did not raise with the Judge any concerns about the questions she asked during the hearing.
15. The appellant appealed to the Upper Tribunal.

### **Permission to appeal**

16. Permission to appeal was granted on the basis that the Judge had arguably erred in embarking on cross-examination, questioning in an aggressive manner and had descended into the arena.
17. The grounds of appeal also asserted that the First-tier Judge had erred by:
  - (i) Making adverse credibility findings about two witnesses when the respondent had not made adverse credibility submissions about them;
  - (ii) Relying on factual findings in another appeal, on which the evidence was not before her;
  - (iii) Placing an evidential burden on the appellant;
  - (iv) Making irrational and erroneous findings of fact;

- (v) Giving inadequate reasons for her conclusions, and failing to consider material evidence; and
- (vi) Making mistakes of fact.

18. Permission to appeal was granted on all grounds.

### **Rule 24 Reply**

19. The Secretary of State filed a Rule 24 Reply. She noted that Mr Shahadoth Karim, the appellant's Counsel below, had settled the grounds of appeal and was still acting. He had not recused himself to act as a witness, nor had he challenged the claimed bias during the hearing.
20. The respondent would rely on the guidance given by the UTIAC President in *PA (protection claim: respondent's enquiries; bias) Bangladesh* [2018] UKUT 0337 (IAC). The witness statements provided for the appellant should not be given weight, as there had been no challenge during the hearing.
21. The First-tier Judge had not erred in applying *Alam*, which was a reported judicial review decision. The grounds of appeal did not go so far as to suggest that Queensway College was not a fraud factory, such that even if the Judge had erred in having regard to that decision, that challenge was immaterial to whether the respondent had discharged the evidential burden upon her. The respondent had maintained her position that the appellant had committed fraud and the Judge was entitled to have regard to inconsistencies in the evidence before her.
22. At [21] and [26] of her decision, it was clear that the First-tier Judge was aware of where the burden of proof lay: see *DK and RK (ETS: SSHD evidence, proof) India* [2022] UKUT 112 (IAC) (25 March 2022). The remaining challenges were disagreements with findings of fact and credibility which were open to the Judge: see *Volpi & Anor v Volpi* [2022] EWCA Civ 464 (05 April 2022) at [2]. The errors of fact and irrationality alleged were, at best, wholly immaterial and the appeal should be dismissed.
23. That is the basis on which this appeal came before the Upper Tribunal.

### **Upper Tribunal hearing**

24. On 1 December 2022, the day before the Upper Tribunal hearing, the appellant provided a supplementary bundle containing a witness statement from Mr Shahadoth Karim, Counsel at the First-tier Tribunal hearing. Mr Karim now said that he had not considered it necessary to recuse himself or to provide a statement as the First-tier Judge's record of proceedings made the case for her descent into the arena.
25. The appellant is not represented by Mr Karim today. He now, properly, has recused himself and the appellant is represented by Mr Biggs. At the beginning of the hearing, given the statement received from Mr Karim, Mr

Diwnycz withdrew the criticism of his non-recusal in the Rule 24 Reply. He also accepted that the Judge had asked a great many questions of the witnesses, as was demonstrated in the transcript in the supplementary bundle. The transcript did not indicate that she had done so aggressively.

26. For the appellant, Mr Biggs accepted that Mr Karim could be criticised for not raising the question of bias with the Judge at the hearing: see *PA (Bangladesh)*. Mr Karim's statement gave his reasons for his conduct. Although Mr Karim had appeared in *Alam*, both before the Upper Tribunal and on appeal to the Court of Appeal, he had no reason to believe that the Judge would take Dove J's into account and it was unfair of her to have done so.
27. The role of a Judge had been clarified by then UTIAC President McCloskey in *AM (fair hearing)* [2015] UKUT 656 (IAC) (10 November 2015).
28. The appellant would rely on *WA (Role and duties of judge) Egypt* [2020] UKUT 127 (IAC) (16 March 2020) and argue that the Judge had gone beyond her 'merely supervisory' role in asking the questions she did. There had been no suggestion by the respondent's Counsel that the witnesses were not credible.
29. The appellant had provided a list of errors in the judgment, as compared to the transcript, and Mr Biggs relied thereon. The decision was finalised at 5.30 p.m. on the date of hearing, which indicated that the Judge had a closed mind and that the decision was unfair.
30. If the Tribunal was with him, then applying the guidance given by the Court of Appeal in *AEB v Secretary of State for the Home Department* [2022] EWCA Civ 1512 (18 November 2022), Mr Biggs submitted that the appeal should be remitted to the First-tier Tribunal for rehearing afresh. In his submission, that would be the correct approach, as the appeal came within the exception established in paragraph 7.2(a) of the Senior President of Tribunals' Practice Statement of 13 November 2014.
31. In response, Mr Diwnycz acknowledged that Mr Biggs had made cogent and focused submissions.
32. I reserved my decision, which I now give.

### **Senior President's Practice Statement**

33. Section 12(1) of the Tribunals Courts and Enforcement Act 2007 provided simply that the Upper Tribunal has an unfettered discretion as to whether to remit a decision for remaking in the First-tier Tribunal or to remake the decision itself.
34. Paragraph 7 of the Senior President's Practice Statement gave guidance as to how that discretion should be exercised:

#### **"7 Disposal of appeals in Upper Tribunal**

7.1 Where under section 12(1) of the 2007 Act (proceedings on appeal to the Upper Tribunal) the Upper Tribunal finds that the making of the decision concerned involved the making of an error on a point of law, the Upper Tribunal may set aside the decision and, if it does so, must either remit the case to the First-tier Tribunal under section 12(2)(b)(i) or proceed (in accordance with relevant Practice Directions) to re-make the decision under section 12(2)(b)(ii).

7.2 The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:-

(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or

(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

7.3 Remaking rather than remitting will nevertheless constitute the normal approach to determining appeals where an error of law is found, even if some further fact finding is necessary."

## **Guidance on bias**

35. In 2015, the Upper Tribunal in *AM* gave the following guidance:

*"(i) Independent judicial research is inappropriate. It is not for the judge to assemble evidence. Rather, it is the duty of the judge to decide each case on the basis of the evidence presented by the parties, duly infused, where appropriate, by the doctrine of judicial notice.*

*(ii) If a judge is cognisant of something conceivably material which does not form part of either party's case, this must be brought to the attention of the parties at the earliest possible stage, which duty could in principle extend beyond the hearing date.*

*(iii) Judges are entitled to form provisional views in advance of a hearing provided that an open mind is conscientiously maintained.*

*(iv) Footnotes to decisions of the Secretary of State are an integral part of the decision and, hence, may legitimately be considered and accessed by Tribunals.*

*(v) Fairness may require a Tribunal to canvas an issue which has not been ventilated by the parties or their representatives, in fulfilment of each party's right to a fair hearing."*

36. In *PA (Bangladesh)* in 2018, a Presidential panel (UTIAC President Lane), gave the following guidance on how allegations of bias should be handled:

### **"2. Allegations of judicial bias**

*(1) An allegation of bias against a judge is a serious matter and the appellate court or tribunal will expect all proper steps to be taken by the person making it, in the light of a response from the judge. ...*

*(4) As a general matter, if Counsel concludes during a hearing that a judge is behaving in an inappropriate manner, Counsel has a duty to raise this with the judge.*

*(5) Although each case will turn on its own facts, an appellate court or tribunal may have regard to the fact that a complaint of this kind was not made at the hearing or, at least, before receipt of the judge's decision.*

*(6) Allegations relating to what occurred at a hearing would be resolved far more easily if hearings in the First-tier Tribunal were officially recorded."*

I pause to observe that the present First-tier Tribunal hearing was officially recorded, giving the Tribunal an opportunity to read a transcript of the proceedings.

37. In *WA (Egypt)* in 2020, UTIAC President Lane and Vice-President Ockelton gave the following guidance:

*"1. During the taking of evidence, a Judge's role is merely supervisory.*

*2. If something happens during a hearing that disrupts the normal course of taking evidence it is essential that the Judge records what happened and why; who said what; and what decision the Judge made and on what basis."*

38. The guidance in *AM* does not really bear on the issue in this appeal. The same is true of *WA*: it is not suggested that something happened at the hearing which was not recorded in the decision.

39. In *DK and RK*, the Upper Tribunal considered the admissibility of the appg report, a question which had troubled Dove J in *Alam*, and which had been the main issue before the Court of Appeal when it reviewed and upheld his decision. The Upper Tribunal held that:

*"(1) 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.*

*(2) 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. "*

40. That is the judicial background against which the present appeal falls to be considered.

## **Analysis**

41. I must decide whether the First-tier Judge's decision can be challenged, either on the ground of bias or on any other ground advanced in the grounds of appeal.
42. It is clear from the record of the oral submissions of Ms Eva-Camaro, who represented the respondent before the First-tier Tribunal, that she did put the appellant's credibility in issue. Mr Karim has provided a typed attendance note which records his oral submissions. He submitted that the appellant's evidence was credible. He said that there was no burden on the appellant: see *DK and RK*. He then said this:

"Extensive cross-examination of witnesses by SSHD and also extensive questions by IJ. No challenge to credibility of witnesses or their evidence. Adversarial system. Based on this evidence appeal can be allowed. Not been shown any aspect which is materially discrepant. Prepared for examination, why would he? Also took friend to test centre. Why would he if committing a crime?

Not same test centre as witness.

No Project Façade in this case.

No evidence of fraud in this case - no prosecution evidence. Unlike DK and RK. ...

No JR - because the case law not of assistance - out of country appeal right."

43. Mr Karim observed in his witness statement that it was the appellant's unchallenged evidence that he had called Queensway College and written to ETS, and eventually to Jones Day. He had obtained the voice files for his examination and he accepted that they were not his voice. A query had been raised with Jones Day about the voice files, but the appellant had not received a response to that query. What more could he have done?
44. Mr Karim's witness statement comes very late in the day. Mr Karim explains his approach in the following manner:

"2. It was not deemed necessary to provide a witness statement earlier, because the appellant's solicitors had requested a transcript of the hearing that took place before the Judge - this would have provided an indisputable record of what happened at the hearing. However, the First-tier Tribunal has not yet provided that transcript and in light of the rule 24 response of the respondent, and in the interests of justice, this statement is now being provided. ...

3. At the hearing, the Judge extensively questioned the appellant and his two witnesses. In my view, some of the questioning can properly be perceived as amounting to cross-examination. I took a professional decision not to intervene on the basis that I did not objectively observe any material inconsistencies in the evidence (indeed, I made a submission to that effect - see below).



4. Additionally, I made an argument during closing submissions that the witnesses were extensively cross-examined by the respondent, and asked a number of questions by the Judge, and their answers were not discrepant and there was no challenge to their credibility by the respondent. The Judge did not, in response to that submission, raise any concerns regarding the credibility of the two witnesses, however raised concerns in the determination.”

The transcript gives more detail. Mr Karim referred frequently to what he knew from other cases in which he was involved, and in particular, he cited findings in *Khan*, another case in which he had appeared and with which he described himself as ‘intimately familiar’. He made no mention of *Alam*.

45. A careful reading of the transcript shows that the Judge did ask many questions, but there is no indication that she did so in an aggressive manner. At one point when the Judge was asking why Mr Mazumder recommended Queensway College over the College where the appellant had intended to book his test, it appears that the Judge and witness were talking at the same time and Mr Karim intervened to say ‘Well, Madam, let him finish the thing’. There was then what was described as ‘crosstalk’ between Mr Karim and the Judge. At the end of the Judge’s questions, Ms Eva-Camaro and Mr Karim were each given an opportunity to ask further questions. Mr Karim’s response was ‘No Madam thank you, that’s the evidence’. Mr Karim did not raise that exchange in his submissions.
46. In his witness statement at [5], Mr Karim asserted incorrectly that the decision in *Alam* was not a reported case and that the evidence, such as a Project Façade report, or evidence of prosecutions in respect of Queensway College, was not provided. The judgment of Mr Justice Dove (as he then was) in *Alam* is a matter of public record. It is a reported judicial review decision. In *Alam*, Dove J held that:

“26. ... the respondent has demonstrated on any view both that there were a significant number of false tests identified by ETS at the Queensway College and that the applicant's was identified in the investigations undertaken following the discovery of issues with the testing undertaken by ETS as being amongst that number. Whilst further doubt has been cast over the reliability of that material in the recent report by the All-Party Parliamentary Group, in my view it is difficult to conclude other than on the balance of probabilities there was a significant amount of cheating being undertaken at the Queensway College and that it was a location at which proxy tests were occurring: it was a fraud factory. ...

28. ... I have reached the conclusion, in particular in the light of the absence of any attempt to locate and evaluate the recording of the applicant’s test, that on balance the weight which can still properly be attributed to the generic evidence and the material pertaining to Queensway College justifies the conclusion that the respondent has discharged the burden placed upon her to demonstrate that it is more likely than not that the applicant’s TOEIC certificate in the present case was obtained by deception. ...”

47. The decision of Dove J was upheld in the Court of Appeal in *Alam v Secretary of State for the Home Department* [2021] EWCA Civ 1538 (22 October 2021), in which Mr Karim appeared and settled pleadings. I do not consider that the First-tier Judge erred in having regard to that conclusion as part of her overall consideration of the evidence in the present appeal.
48. Mr Karim did not give the Judge an opportunity during the hearing to respond to any perception he may have had of inappropriate questioning, save for the one exchange mentioned above, on which he neither sought to ask any questions in re-examination, nor made any submissions at the end of the hearing. I find that Mr Karim was not concerned at the hearing about the Judge's questions: he did not consider it his duty to raise anything with the Judge, and it is clear, both from his note and from the transcript, that at no time did he do so. There was no procedural unfairness: if there had been, Mr Karim would not have hesitated to say so at the hearing.
49. On the evidence before the First-tier Judge it was unarguably open to her to conclude that the evidence from the LookUp tool, taken with the finding in *Alam* that Queensway College was a fraud factory, was sufficient to discharge the evidential burden upon her.
50. The burden on the respondent having been discharged, it was for the appellant to show an innocent explanation. The Judge was entitled to reject the oral evidence of the witnesses: she did not need the respondent's permission to do so, and Ms Eva-Camaro had tested the evidence of both witnesses in cross-examination. There is no record of Ms Eva-Camaro stating that the evidence of the witnesses, such as it was, was accepted to be credible following her cross-examination.
51. It was open to the Judge to find the appellant's evidence to lack credibility, for the reasons she gave. It follows that the appellant had not provided an innocent explanation for his apparent deception.
52. The remainder of the grounds of appeal are in reality no more than a detailed disagreement with findings of fact which were open to the Tribunal on the evidence. There is no error of fact at the level of an error of law, which is what would be required for the Upper Tribunal to interfere with the findings of fact by a Judge who saw and heard the appellant and his witnesses give their evidence.
53. The criticism of the Judge for preparing and issuing her decision on the day of the hearing is also unarguable. A prompt decision is desirable and indicative of thorough preparation for the hearing.
54. Accordingly, this appeal must fail.

## **DECISION**

55. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of no error on a point of law

I do not set aside the decision but order that it shall stand.

Signed [Judith AJC Gleeson](#)  
2022

Date: 7 December

Upper Tribunal Judge Gleeson