IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2021-000139
First-tier Tribunal No:
HU/05576/2020

THE IMMIGRATION ACTS

Decision & Reasons Promulgated:
On the 30 January 2023

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

ABDUL QADIR MOHAMMED
(NO ANONYMITY ORDER MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr M Biggs, counsel instructed by Liberty Legal Solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

Heard at Field House on 10 January 2023

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge MR Hoffman promulgated on 14 June 2021.

2. Permission to appeal was granted by Upper Tribunal Judge Keith on 18 November 2022.

Anonymity

3. No direction has been made previously, and there is no reason for one now.

Background

4. The appellant entered the United Kingdom on 3 June 2010 with leave to enter as a Tier 4 migrant. He was granted further periods of leave to remain in the same capacity until 20 March 2015. In a decision dated 4 June 2014, the appellant's Tier 4 leave was curtailed to expire on 9 August 2014. On 24 July 2015, his application for further leave to remain was refused on the basis that he had used deception to obtain leave to remain in previous applications. The appellant's appeal against that decision was dismissed on 11 November 2015 and his application for permission to appeal that decision was refused by the First-tier Tribunal.

5. On 1 May 2019, the appellant made a human rights claim based solely on his private life. That application was refused in a decision dated 14 April 2020 and it is this decision which is the subject of this appeal.

6. According to the decision of 14 April 2020, the Secretary of State refused the appellant's application, principally, as he was unable to meet the suitability requirements owing to the use of false representations. It was said that the appellant used deception in his application for leave to remain made on 26 October 2012 by relying on an ETS certificate dated 17 July 2012 which was fraudulently obtained. In addition, the respondent did not accept that there were very significant obstacles to the appellant's integration in India, that there were exceptional circumstances nor that there were compassionate factors which warranted a grant of leave to remain.

The decision of the First-tier Tribunal

7. Following the hearing before the First-tier Tribunal, the judge accepted that the appellant did not receive notice of the hearing before the previous judge (First-tier Tribunal Judge Mailer) owing to being the victim of a 'fake immigration advisor,' and that the appellant was not able to properly defend the deception allegation before Judge Mailer. Considering the allegation that the appellant relied upon a fraudulently obtained ETS certificate, the judge found that the respondent was entitled to conclude that the appellant practised deception, accepted that the appellant had put forward a plausible innocent explanation but rejected that explanation for reasons set out at [45-58] of the decision and reasons.

The grounds of appeal

8. There were four grounds of appeal. Firstly, that issues were not put to the appellant prior to an adverse finding being made. Secondly, that the judge erred in considering that the appellant's case was limited to him having no motive to cheat and failing to recognise that his case was broader than having competence in English for the reasons set out in the grounds. Thirdly, that there was a failure to consider relevant matters. The fourth ground challenged the weight attached to some of the evidence before the First-tier Tribunal.

9. Permission to appeal was granted in relation to the first three grounds alone, with the judge granting permission making the following comments.

> 4. The FtT's analysis of factors supporting the appellant's case, beyond the appellant's proficiency in English is arguably limited - see paragraph [57]. The FtT appears to have drawn adverse inferences from the absence of live supporting witness evidence, and evidence about the 'cultural environment in which the appellant operated'.

5. While the FtT does analyse the English language school reports from the appellant's high school (paragraphs [39] to [41) as well as letters of support from the appellant's former employers (paragraph [42]), in contrast, the respondent's rationale in her refusal letter was limited, and arguably generic. It is unclear, in that context, that the issues identified as of concern by the FtT were the subject of cross-examination or that the appellant's representative had the opportunity to address those issues. It is also arguable that the FtT failed to address evidence relied on in the appellant's favour, namely his movements on the test day and his claim to be of good character. Grounds (1) to (3) are at least arguable.

6. Ground (4) challenges the limited weight attached by the FtT to the evidence of Drs Harrison and Sommer, citing the transcript of evidence given to the APPG. This ground discloses no arguable error in light of SSHD v Akter & Ors [2022] EWCA Civ 741.

10. The respondent did not provide a Rule 24 response in advance of the hearing.

The hearing

11. Mr Tufan confirmed that there was no Rule 24 response in existence but stated that the appeal was opposed. At the outset, Mr Biggs referred to his skeleton argument which introduced an additional matter which he said the judge failed to consider. That matter was the judge's failure to consider the implications of the fact that a quarter of the test results on the same day and at the same location of the appellant's test were identified as 'questionable.' He argued that this was an expansion of the third ground rather than an additional ground of appeal. Mr Tufan had no objection to the Upper Tribunal considering this matter.

12. I then heard detailed submissions from Mr Biggs and a somewhat succinct response from Mr Tufan which mainly contained the argument that the decision in *DK and RK* (ETS: SSHD evidence, proof) India [2022] UKUT 112 (IAC) was determinative of any ETs-related appeal. I took these arguments into consideration in reaching my decision.

13. At the end of the hearing, I announced that I was satisfied that the decision of the First-tier Tribunal contained material errors of law. I give my reasons below. Mr Biggs urged me to preserve the judge's findings at [31] and to remit the matter to the First-tier Tribunal as the grounds identified procedural unfairness and there was a need for extensive fact-finding. I set aside the findings of the First-tier Tribunal except for [31] which was not subject to any challenge in the grounds of appeal.

Decision on error of law

14. The first ground concerns an allegation of procedural unfairness regarding two matters. The first relates to the judge's finding at [55], that he can attach little weight to 'two emails' said to have been sent by the appellant to Synergy. The reasons provided by the judge were that it was unclear whether the email was sent because of an absence of an email address or time stamp and the attachment referred to was not provided. This evidence was not expressly challenged by the respondent's representative at the hearing. There is no indication that any of these concerns were raised with either the appellant or his counsel at the hearing. Furthermore, the evidence contained in the appellant's

bundle at pages 159-160 suggests that the judge misunderstood the evidence relating to the single email which was sent to Synergy.

15. I find that had the judge given some indication to counsel of his concerns, counsel would have been able to clarify the evidence in the appellant's bundle. That evidence indicated that the email to Synergy was on page 160 and the attachment referred to in that email was at page 159. This error is material, as the evidence contained in the email, goes to support the appellant's case that he promptly contacted his college after learning of the allegation of cheating.

16. If any authority were needed for the foregoing point, *AM* (fair hearing) Sudan [2015] UKUT 00656 (IAC) at [7(v)] says the following.

If a judge has concerns or reservations about the evidence adduced by either party which have not been ventilated by the parties or their representatives, these may require to be ventilated in fulfilment of the "*audi alteram partem*" duty, namely the obligation to ensure that each party has a reasonable opportunity to put its case fully.

17. A second area of procedural unfairness relates to the judge's criticism of the lack of live witness evidence. Again, this concern was not raised at the hearing and the appellant was not cross-examined about this matter. Had concerns been raised, counsel for the appellant could have drawn the judge's attention to the statement of the witness which explained that he was not in the United Kingdom and counsel would have been able to further explain that the witness could not give evidence from abroad, with reference to *Agbabiaka* (evidence from abroad, Nare guidance) Nigeria [2021] UKUT 286 (IAC). In addition, it is apparent from the decision and reasons, that there was no consideration of the evidence of the witness, which provided support for the appellant's claim that he had prepared for his English language test and attended to take his test.

18. The grounds refer to other findings by the judge which were reached in the absence of any discussion during the hearing. There is also merit in these arguments. These procedural errors suffice to show that the decision of the First-tier Tribunal was vitiated by unfairness, and I will comment briefly on the other grounds.

19. In relation to the second ground, the judge characterised the appellant's innocent explanation as being based on having no need to cheat because his level of English was sufficient, at [37] and [44]. In reaching this finding, the judge did not consider the unusual feature of the appellant's case in that he had provided evidence of paying a significant sum of money for a preparatory course and that he had taken a mock test in advance of the TOEIC examination. On the face of it, the appellant taking such steps could undermine the argument that he cheated. In addition, the judge did not engage with the appellant's account of the testing process or with the unchallenged evidence of the witness which went to these issues.

20. As for the third ground, it is argued that there were a series of issues which the judge did not consider. Mr Tufan did not make any real submissions in relation to these matters. The unconsidered issues include character evidence from the appellant's witness and his English tutor; the absence of a motive for cheating; that the appellant had an adequate level of English both at the time of the test and the hearing and that according to the Project Façade report into Synergy Business College shows that in the period including the date of the appellant's test (24 November 2011 and 15 January 2013) 51 % of the 4894 test results were

identified as questionable and the remainder invalid. The latter point is material given the respondent's definition (in the statements of Ms Collings and Mr Millington) of a questionable test being where there is not sufficient evidence of fraud as well as the evidence of Professor French that ETS voice recognition system had a less than 1% rate of error. The material relating to the high level of questionable test results also calls into question the judge's rejection of the appellant's claim not to have witnessed anything out of the ordinary.

21. In deciding whether to retain the matter for remaking in the Upper Tribunal, I was mindful of statement 7 of the Senior President's Practice Statements of 25 September 2012. Taking into consideration the nature and extent of the findings to be made as well as that the appellant has yet to have an adequate consideration of his appeal at the First-tier Tribunal, I reached the conclusion that it would be unfair to deprive him of such consideration.

22. For the absence of doubt, only the following, unchallenged, findings are preserved from Judge Hoffman's decision and reasons.

> 31. Ms OstadSaffar did submit that the appellant was by his own evidence still in contact with UK Immigration Consultants after he claims they ceased acting for him, and therefore, if the notice of hearing was sent to them, it was unlikely that they would not have received it and forwarded it on to him – they did after all receive the determination and pass it on. Mr Karim submitted in response that it is inconceivable that the appellant would not have attended his appeal hearing had he known about it. I attach some weight to that argument, although it is of course quite common for appellants not to turn up for their hearings before the tribunal for reasons best known to themselves. However, on careful consideration, taking all of the evidence in the round, I am just about willing to accept on balance of probabilities that the appellant did not receive notice of the hearing before Judge Mailer. In my view, in the light of the contents of the IAFT-1 and IAUT-1 that do point to the appellant being the victim of a fake immigration advisor, in my view it is plausible that confusion caused by the poor quality of service provided by Mr Sayeed may have meant that the appellant was not properly notified of the hearing and that this was not properly brought to the attention of the tribunal in the equally poorly drafted application for permission to appeal. As a consequence, the appellant was not able to properly defend himself against the allegations of deception before Judge Mailer.

Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

The decision of the First-tier Tribunal is set aside.

The appeal is remitted, de novo, to the First-tier Tribunal to be reheard at Taylor House, with a time estimate of 3 hours by any judge except First-tier Tribunal Judge Hoffman.

T Kamara

Judge of the Upper Tribunal
Immigration and Asylum Chamber

11 January 2023