



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

**Appeal Numbers: HU/09597/2019
HU/09598/2019
HU/10105/2019**

THE IMMIGRATION ACTS

**Heard at Field House
On the 7th October 2022**

**Decision & Reasons Promulgated
On the 4th January 2023**

Before

**UPPER TRIBUNAL JUDGE NORTON-TAYLOR
DEPUTY UPPER TRIBUNAL JUDGE BAGRAL**

Between

**YP
ST
AP**

(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Turner, Counsel (Direct Access), Imperium Chambers
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) the anonymity direction previously made by the Upper Tribunal is maintained as AP is a minor. Unless the Upper Tribunal or court directs otherwise, no report of these proceedings shall directly or indirectly identify the appellants. This direction applies to both the appellants and to the respondent and a failure to comply with this direction could lead to contempt of court proceedings.

Introduction

1. This is a remaking of an appeal against a decision of the respondent dated 20 May 2019 refusing the appellants human rights application.
2. The appeal concerns a family unit; YP is married to ST and AP is their child. They are all nationals of Nepal. It is common ground that the appeal of ST and AP are dependent on the outcome of YP's appeal. Accordingly, for ease of reference, we shall refer below to YP as "the appellant", unless otherwise stated.

Background

3. The appellant has a protracted immigration and appeal history. We summarise the salient events as follows.
4. The appellant entered the UK on 6th August 2009 with entry clearance conferring leave to enter as a Tier 4 (General) Student valid until 2nd January 2012. He made an application on 20th June 2011 to extend his leave to remain in that category and leave was granted until 30th November 2013. On 13th November 2013 he made a further application as a student 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 15th October 2013. As a result his leave was extended to 30th November 2016.
5. On 13th August 2014 the appellant was served with an IS.151A notice (a section 10 removal notice) on the basis that he had used deception in a previous application for leave to remain. He was given an out-of-country right of appeal. The appellant pursued parallel proceedings seeking to challenge this decision by way of judicial review and on appeal to the First-tier Tribunal. First-tier Tribunal Judge Lingam allowed the appeal on 12th June 2015, a decision that was subsequently set-aside by the Upper Tribunal on 26th November 2015.
6. On 28th May 2015 the appellant had also made an application for leave to remain outside of the Immigration Rules (hereinafter "the Rules") on compassionate grounds. A refusal of that application on 2nd November 2015 was challenged by way of judicial review, a claim that was subsequently struck out on 3rd September 2015.
7. On 8th April 2017 the appellant renewed his application for judicial review. That application was withdrawn by consent on 8th April 2019 on the basis the respondent would make a human rights decision. By this date the appellant was married to ST and AP had been born.
8. On 2nd May 2019 the appellant raised a human rights claim naming ST and AP as dependents. This application was refused on 20th May 2019 under S-LTR.2.2 of paragraph 276ADE(1) of the Rules because the English language test taken on 15th October 2013 was asserted to have been taken by a proxy. The respondent thus reasoned that the appellant's 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. The application was also refused under paragraph 276ADE(1)(vi) of the Rules as it had not been shown there were very significant obstacles to his integration into Nepal, nor were there exceptional circumstances to warrant a grant of leave to remain outside of the Rules.

9. The appellant filed an appeal and the matter came before First-tier Tribunal Judge Reid. The parties were represented and Judge Reid heard evidence from the appellant and ST. Judge Reid concluded that the respondent had discharged the legal burden of proof to establish on the balance of probabilities that the innocent explanation of the appellant was to be rejected and he did use a proxy test taker. Separate consideration was given to the appellant's family and private life and the appeal was dismissed on all grounds. That decision was promulgated on 7th November 2019.
10. The appellant appealed with permission to the Upper Tribunal. The appeal was dismissed by Upper Tribunal Judge Jackson on 20th July 2020 who found no material error in the decision of Judge Reid and upheld the decision of the First-tier Tribunal. The appellant's application for permission to appeal to the Court of Appeal was refused by Upper Tribunal Judge Jackson in a decision dated 18th September 2020, but subsequently granted by Lewis LJ on 18th February 2022. In an order sealed on 19th April 2022, Lewis LJ allowed the appellant's appeal, set aside the decision(s) of Upper Tribunal Judge Jackson, and the appeals were remitted to the Upper Tribunal by consent.
11. In exercise of its case management powers, Upper Tribunal Judge Norton-Taylor issued Directions to the parties following a case management review hearing on 5th July 2022. The respondent was represented by Ms Ahmed and the appellant(s) was represented by Mr Turner. There was some debate between the parties at that hearing whether the Court's Order had the effect of placing the appeals at the re-making stage in the Upper Tribunal, or at the error of law stage. The source of that debate was a lack of clarity in the statement of reasons accompanying the Court's Order. Ms Ahmed submitted that the appeals were at the error of law stage and Mr Turner submitted that the appeals were at the remaking stage. Upper Tribunal Judge Norton-Taylor concluded that the appeals were at the error of law stage and issued Directions accordingly for an error of law hearing.
12. On 20th July 2022 the Upper Tribunal received correspondence from Ms Ahmed in which she admitted to being mistaken about the respondent's position. She confirmed that the respondent had conceded there was an error of law in the decision of the First-tier Tribunal before the Court of Appeal and, in view of that concession, invited the Tribunal to re-hear the appeal on its facts. That remained the agreed position of the parties at a further case management review hearing on 16th September 2022 before Upper Tribunal Judge Norton-Taylor, who despite some reservations acceded to the parties request and issued further Directions for a resumed hearing for the purposes of re-making the decision.

The Proceedings

Preliminary matters

13. At the outset of the hearing before us, the representatives confirmed that the decision of the First-tier Tribunal and the decisions of Upper Tribunal Judge Jackson had been set aside and that the scope of the resumed hearing was that set out at [12]. For the avoidance of doubt, we record that the error identified was a procedural failure on the part of the First-tier Tribunal and the Upper Tribunal's error in failing to identify the procedural irregularity. In view of the position adopted by the parties we need say no more about that. Both

representatives confirmed that their presentations of the case would focus on whether, as contended by the respondent, the appellant used a proxy and therefore deception, when taking the Speaking element of the TOEIC test on 15th October 2013.

14. The documentation before the Tribunal consisted of the respondent's bundle, the respondent's supplementary bundle, the appellant's consolidated bundle of 196 pages identified in the index thereto and a skeleton argument authored by Mr Turner. Within the respondent's supplementary bundle is a witness statement dated 16th October 2019 from Seela Sreeraman, Senior Caseworker with the Home Office, a Project Façade Report on South Quay College dated 15th May 2015, ETS SELT Source Data and an ETS TOEIC Test Centre Look-up Tool. The ETS SELT Source Data confirmed that the appellant had taken the speaking test on 15th October 2013, and this had been declared invalid (speaking and writing tests with scores each of 200). Additionally there were witness statements from Rebecca Collings and Peter Millington and a report from Professor Peter French.
15. In the appellant's bundle there were, amongst other things, the bundle previously before the First-tier Tribunal which included two witness statements from the appellant dated 10th October 2019 and 20th September 2022 and a witness statement from ST dated 9th October 2019. There was correspondence between the appellant and Jones Day Solicitors requesting the voice recording and copies of the appellant's educational certificates and other documentation relating to his studies in Nepal and the UK.

The written and oral testimony

16. The appellant's evidence takes the form of two written statements and his oral testimony to the Tribunal. The evidence of ST takes the form of a witness statement and her oral testimony to the Tribunal. They both gave evidence in English and both affirmed the truth of their respective witness statements.
17. We shall consider first the salient elements of the appellant's witness statements.
18. The appellant completed his secondary school education with "first class grades" in 2001 and then completed intermediate level studies, equivalent to 'A' level in the UK, in 2003 in various subjects including English.
19. In 2007 he obtained a diploma, taught in English, in General Medicine and Surgery.
20. In 2008 he took the IELTS test before he applied for a visa to enter the UK and achieved an overall score of 5.0. He was interviewed on arrival at port by immigration officers in 2009 (and later in 2012) in English. From July 2009-July 2011, he studied a dental nursing course at South London College in the UK. This course was at a lower level to that which he studied in Nepal and so prior to its completion he switched to higher-level studies and enrolled on a course in Business Management. This course ended in September 2013.
21. In 2013 he enrolled on an MSc in Healthcare at the University of West London. Following the completion of that course in 2016, he was offered a PhD placement at Liverpool John Moores University. In order to receive that offer he gave a presentation in English to an academic board.

22. He booked the TOEIC test having found an approved provider on the Home Office's website. He paid £140 in cash for the tests and was given a receipt, which he did not keep. He received an email confirming the date, time and details of the two sites of where the tests would be taken. On 9th October 2013 he took the Reading and Listening tests at Cauldon College and on 15th October 2013 took the Speaking and Writing tests at South Quay College.
23. In respect of the Speaking and Writing tests at South Quay College he said the tests were held from 9.30 am to 11 am. On arrival he reported to reception and was invited to go upstairs where his passport was checked by staff members before he was sent to a room to take the test with 50 other students. The test was taken on a computer; he was asked 11 questions in the Speaking test and 8 questions in the Writing test.
24. He passed the tests and submitted the TOEIC certificate(s) to the Home Office in support of his application on 13th November 2013.
25. In 2020 he requested a copy of his voice recording from ETS. The voice on the recording is not his.
26. The appellant says that he did not cheat and stands wrongly accused. In consequence he has been unable to continue with his studies at PhD level, but the offer remains open to him if he is granted further leave to remain.
27. In oral evidence the appellant said he did not cheat. He has spoken English for more than 20 years. He referred to his academic transcripts from school, college and university in Nepal and said that he was taught in English throughout. He completed his secondary school education in the first division in 2001, and completed a course in General Medicine in 2007 achieving a score of 77%.
28. He began a dental study course in 2009, which he could not complete because the college could not find him a placement. He switched to a Business Management course at a higher level. He successfully completed that course and then completed an MSc in 2016. The respondent had not taken issue with the authenticity of the certificates relating to his studies in Nepal and the UK.
29. He requested a copy of his voice recording only to discover that the voice on the recording is not his and nor did the file refer to his name or candidate number. Jones Day Solicitors told him that they could not provide any further information. He did not pay anyone to take the test on his behalf. He had no need to cheat. He passed the requisite English language test in Nepal in order to gain entry to the UK; he had satisfied immigration officers at interview that he could speak English and had studied in English in the UK for four years and completed a diploma and an MSc. His wife also completed an MBA in the UK.
30. His parents, brother and sister lived in Nepal. His child was born in the UK.
31. The appellant said in cross-examination that he did not complete the course in dental nursing. He completed a year and six or seven months of a two-year course. He left because neither the college nor he could find a placement. The course was over prescribed with 150 students. He believed it would be beneficial to have a business qualification and switched to a Business Management course and passed. When asked to provide details of the modules he took as part of that course he identified them as Strategic Human Resource

Management, QMBM and Business Environment. Asked if he could remember the grades that he achieved, he said he got a "B" for QMBM. It was pointed out that he achieved a grade "C" for that module, to which the appellant replied it was a long time ago. He took the exams for all modules but could not remember where in London. He did not consider it was necessary to refer to the lack of a placement in his witness statement.

32. He booked to take the TOEIC test in person at Cauldon College in Ilford as it was near to his home. He attended with his passport and asked them to book the test. He found the college was approved on the Home Office website. He was advised that the tests would be taken at two different sites; Listening and Reading at Cauldon College and Speaking and Writing at South Quay college in Whitechapel. He asked them to book the tests and he was given a choice as to the dates. He was carrying "spare cash" of £200 out of which he paid £140 to Cauldon College for all tests. He was not aware if the two colleges were affiliated. He was verbally notified of the test dates which were confirmed in an email at the time of booking.
33. There was no re-examination.
34. The Tribunal questioned the appellant about some of his responses which required clarification. The appellant said that he was interviewed on arrival by immigration officers at Heathrow Airport and had satisfied them of his ability to speak English. He reiterated that he could not complete the dental nursing course without finding a placement and was given the option to continue his studies at a higher level. He confirmed that he provided the correct details to Jones Day Solicitors. When he spoke to Mr Coffey about the voice recording he was told they could provide no further information and not to contact him again.

The evidence of ST

35. ST in her witness statement said that she arrived in the UK as a student on 29th July 2009. She was granted leave to remain in that capacity until 30th March 2015, varied on application to a dependent of the appellant following their marriage on 14th June 2014, valid until 30th November 2016. She asserts the appellant's innocence and says that the false allegation has affected his general health.
36. In cross-examination she said the appellant came to the UK to study dental nursing but switched to a Business Management course because he could not find a placement. They were not married when the appellant took the TOEIC test, but they had spoken about it. He said that he was taking two tests at Cauldon College and two at South Quay College. He told her that he paid for the tests in cash; he was given a receipt, which they kept for "some time and lost it". She was not surprised that he performed well in the tests.
37. There was no re-examination.
38. We then heard submissions from Ms Everett and Mr Turner.
39. Ms Everett relied on the Secretary of State's refusal letter of 19th May 2019 and acknowledged that the case law in TOEIC cases had since moved on. We were referred to *DK and RK (ETS: SSHD evidence, proof) India* [2022] UKUT 112 (IAC) and the relevant paragraphs on voice recordings and the Tribunal was invited to

reject the appellant's explanation. The appellant she said had failed to provide comprehensive evidence to permit the Tribunal to depart from its findings.

40. The appellant's reliance on his educational achievements as robust evidence of his English language skills was tenuous. She pointed out that the Speaking test was taken at a time when proxy test taking was operating at its peak at South Quay College. In relation to the appellant's evidence his failure to mention in his witness statement that he could not find a placement is significant. She acknowledged the events were historic but she observed there was a lack of documentation and the narrative as to why he switched courses was difficult to accept. It was surprising the tests were taken at two colleges and that Caudon College accepted a cash payment. The appellant's evidence about his English language abilities was not reflected in his results. She submitted that a desire to pass the test was sufficient motivation to cheat. On the whole the appellant's evidence was not sufficiently robust to depart from the findings in DK and RK.
41. Mr Turner relied on his skeleton argument. In his oral submissions Mr Turner made it repeatedly clear that this was not a "chain of custody" case. He submitted that DK and RK did not strengthen the Secretary of State's position; the ETS lookup tool and the voice recording was not dispositive of the issue of deception and referred to MA (ETS - TOEIC testing) [2016] UKUT 00450(IAC). There were questions over the behaviour of ETS; it was not a "pukka organisation". He considered there were "big problems" with the ETS SELT source data in that it failed to refer to the tests taken at Caudon College which were not in dispute. This left a hole in the evidence from ETS who were either withholding information or had lost it. He submitted that "only a fool" would ask for the voice recordings if they had not taken the test. The voice recording did not identify the appellant; Jones Day Solicitors refused to assist and the appellant could do no more. Mr Turner criticised the Project Façade Report because of its brevity and it was out-of-date.
42. On the other hand, he submitted that the appellant's evidence was clear and cogent. Nothing turned on his failure to mention the receipt in evidence. The appellant contacted Jones Day Solicitors and could do no more. He had spoken English for 20 years, he passed exams in 2004 and by 2007, obtained a first class qualification and had studied in English throughout. He switched courses due to circumstances out of his control and passed the course in Business Management. He had demonstrated a proven ability to pass exams. Mr Turner acknowledged that the Tribunal's conclusions in DK and RK made it more difficult for the appellant, but nonetheless, his evidence was cogent and the Secretary of State's evidence was not "watertight".
43. At the close of their respective submissions we clarified with both representatives what they invited us to do in the event that we found deception was not established in this case. They both accepted that if we found that the respondent had displaced the onus of establishing deception the appeal fell to be dismissed. They both also accepted that the opposite finding required the respondent to act in accordance with her policy by granting a period of leave to enable the appellant to make an application for further leave to remain in the UK.

Findings and Conclusions

Scope

44. As we indicated at the outset this is a remaking of the appeal with no previous factual findings being preserved. Notwithstanding the scope of our remaking, as agreed by the parties, we note Mr Turner in his skeleton argument [at 25] (and not raised orally at the hearing) states that we should take into account a previous decision of the First-Tier Tribunal that found “*the TOEIC allegation had not been made out*”. We assume that must be a reference to the decision of First-tier Tribunal Judge Lingam in 2015. We have no hesitation in rejecting that contention. We observe, first, that the skeleton argument does not adequately reflect the decision of the First-tier Tribunal. Judge Lingam determined the appeal on the papers. Consequently, no oral evidence was given before her and nor had any evidence been filed by the respondent. That failure resulted in the inevitable conclusion by Judge Lingam that the respondent had failed to discharge the legal burden of proof. It was on that basis that the First-tier Tribunal concluded that the allegation had not been made out. Second, the decision of Judge Lingam did not survive and was set aside by the Upper Tribunal on 26th November 2015. In the circumstances we do not see how the decision of Judge Lingam can be relevant to our consideration of the facts; we are not bound by any previous decision(s) and the principles enunciated in *Devaseelan (Second Appeals - ECHR - Extra-Territorial Effect) Sri Lanka* * [2002] UKIAT 00702 do not apply in this case. We emphasise therefore that we have reached our conclusions independent of any previous decision(s) of the First-tier Tribunal and, indeed the Upper Tribunal, and our findings are based solely on the evidence before us.
45. The focus of the evidence centres around the allegation of deception in relation to the appellant’s TOEIC certificate corresponding to a Speaking test taken on 15th October 2013 at South Quay College. In considering this issue, whilst we have considered the entirety of the written and oral testimony and the documentary evidence adduced by the parties, our findings below reflect the salient elements of that evidence.
46. The parties rightly acknowledge that the law concerning TOEIC cases has moved on since the Secretary of State made her decision on 20th May 2019. Whilst historically the case-law is considerable, two recent reported decisions have emerged from the Upper Tribunal in *DK and RK (Parliamentary privilege: evidence* [2021] UKUT 00061 (*DK and RK (1)*) and *DK and RK (ETS: SSHD evidence)* [2022] UKUT 00112 (*DK and RK (2)*) and considers the issues raised in cases of this kind. The conclusions reached in the latter case are pertinent to the issues before us.

DK and RK (2)

47. At [60] of *DK and RK (2)* the Presidential Panel of the Upper Tribunal identified the first step in the process we should carry out:

“We therefore ask first whether the Secretary of State’s evidence would enable a properly-instructed trier of fact to determine that the burden of proof had been discharged on the balance of probabilities. If the evidence at this point would not support a finding that the matter was proved on the balance of probabilities, the appellants would be entitled to succeed in their appeals. If, however, it would support such a finding, the evidence as a whole falls for consideration in order to decide whether the appeals succeed or fail.”

48. We observe the following. We accept in determining that first step that an individual allegation should be assessed in the context of all the background evidence and is fact specific.
49. We note that in *DK and RK (2)* it was found that the general evidence provided by the respondent showing fraudulent activity in a number of ETS centres is overwhelming and provides the context for evaluation of the evidence overall, making individual allegations more plausible than they would otherwise be. Further, the voice recognition process was found to be clearly and overwhelmingly reliable in pointing to an individual test entry as the product of a repeated voice. By “overwhelmingly reliable” the Upper Tribunal did not mean conclusive or infallible or to use Mr Turner’s phrase “watertight”, but in general there is said to be no good reason to doubt the result of the analysis. Similarly, there was found to be every reason to suppose that the ETS evidence linking voice recordings to candidates is likely to be accurate - see [67]-[75], [103]-[107] and [117].
50. Further still, we accept the reasoning at [82], [104]-[106], [114] and [120-125] of *DK and RK (2)* that the evidence did not indicate that ETS were complicit in any fraud, and regarding the general integrity of the “continuity of records’ and ‘chain of custody’ process there was no reason to consider that anybody other than the candidates and the test centres in collusion would have wanted to falsify results in this way. What would be needed would be a process after a candidate’s genuine entry that could substitute an entry consisting of answers given by a proxy tester. There was no evidence that this could be technically achieved or that anyone did act in this way.
51. We also accept the general conclusions reached in *DK and RK (2)*, which are as follows:
- “126. The two strands, therefore, amount respectively to the virtual exclusion of suspicion of relevant error by ETS, and the virtual exclusion of motive or opportunity for anybody to arrange for proxy entries to be submitted except the test centres and the candidates working in collusion.
127. Where the evidence derived from ETS points to a particular test result having been obtained by the input of a person who had undertaken other tests, and if that evidence is uncontradicted by credible evidence, unexplained, and not the subject of any material undermining its effect in the individual case, it is in our judgment amply sufficient to prove that fact on the balance of probabilities.
128. In using the phrase “amply sufficient” we differ from the conclusion of this Tribunal on different evidence, explored in a less detailed way, in *SM and Qadir v SSHD*. We do not consider that the evidential burden on the respondent in these cases was discharged by only a narrow margin. It is clear beyond a peradventure that the appellants had a case to answer.
129. In these circumstances the real position is that mere assertions of ignorance or honesty by those whose results are identified as obtained by a proxy are very unlikely to prevent the Secretary of State from showing that, on the balance of probabilities, the story shown by the documents is the true one. It will be and remain not merely the probable fact, but the highly probable fact. Any determination of an appeal of this sort must take that into account in assessing whether the respondent has proved the dishonesty on the balance of probabilities.”

52. We turn first to the evidence relied upon by the respondent in this appeal, which consists of a witness statement dated 16th October 2019 from Seela Sreeraman, Senior Caseworker with the Home Office, a Project Façade Report on South Quay College dated 15th May 2015, ETS SELT Source Data and an ETS TOEIC Test Centre lookup tool. The ETS lookup tool confirmed that the appellant had taken the Speaking and Writing test on 15th October 2013 at South Quay College, and this had been declared invalid (speaking and writing tests with scores each of 200). Additionally there were standard witness statements from Rebecca Collings and Peter Millington and a report from Professor Peter French. The witness statements relied upon by the respondent explain what is meant by the appellant's "invalid" test shown in the ETS evidence (as further described in detail in *DK and RK 2*).
53. Further, it is clear from the Project Façade criminal enquiry into TOEIC abuse at South Quay College dated 15th May 2015, that between 20th March 2012 and 5th February 2014, ETS identified 67% of the tests as "invalid" with the remainder deemed "questionable". There are also statistics in the ETS lookup tool showing that 88% of the tests taken on 15th October 2013 at that college were "invalid" and 12% were "questionable". We accept that an investigation and criminal report is not necessarily determinative, and we also note the effluxion of time since the date of that report, but that report does reflect a snapshot of the activity at that college at exactly the period during which the appellant said he took his test. This is the period of which we are directly concerned and there was evidently organised and widespread abuse at that testing centre on the day the appellant took his Speaking and Writing tests.
54. Furthermore, the appellant has accepted that the voice on the recording is not his. The emails between the appellant and Mr Coffey of Jones Day Solicitors (acting on behalf of ETS) show that the recording is linked to the details provided by the appellant including his name, date of birth, the date and test centre at which he took the Speaking and Writing tests and his ETS registration number. In respect of the latter we note that the registration number the appellant provided to Jones Day Solicitors corresponds to the number on his TOEIC Official Score Report that also bears his photograph.
55. Whilst Mr Turner accepts in his skeleton argument, no doubt in view of all the above, that the respondent has satisfied the initial burden of proof, his oral submissions appeared to stray from this admission in the following respects.
56. First, Mr Turner contended that the ETS lookup tool in respect of the appellant was problematic because it failed to refer to the tests taken by the appellant at Cauldon College. He suggested therefore that there is a possibility of error in the evidence by ETS who were not in his view a "pukka organisation", and as such were either withholding data or had lost it. Second, he reminded us of the appellant's evidence that there had been a mix-up and that the recording of another candidate has been mistakenly allocated to his records.
57. We have no hesitation in rejecting these submissions. The first submission seeks to directly impugn the conduct of ETS and suggests that there has been a deliberate lack of candour on their behalf. Although not cited to us we note the panel in *DK and RK (2)* observed that there was nothing in the evidence before them that would indicate generally that the lookup tool was unreliable and nor was there material that raised the suspicion that ETS were concealing evidence that might otherwise exonerate any individual appellant: at [82]-[109]. We

accept that reasoning and no material specific to this appellant has been put before us to persuade us otherwise. We consider that the lookup tool simply provides the evidence to support the individual allegation. In this case that allegation relates to the tests taken at South Quay College. We are not concerned with the tests taken at Cauldon College.

58. The second submission is not predicated upon 'voice-recognition' as the appellant accepts the voice on the recording is not his. The appellant's evidence suggests that there is a 'chain of custody' issue on the basis that there is some possibility of error in the evidence. Whilst Mr Turner repeatedly resiled from that being an issue in this case, we received no satisfactory explanation as to what the appellant's case could otherwise be, so we shall deal with it.

59. The panel in *DK and RK* stated thus:

"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.

104. The continuity of records between the test candidate and the test entry are the subject of detailed criticism by, in particular, Professor Sommer. As we have pointed out above, he has made numerous suggestions about how the tests could have been operated in such a way as to reduce fraud, and he has indicated places where the evidence linking candidates to entries might not be entirely watertight. In particular, the sound recordings eventually used for analysis do not carry metadata associating them with the recordings received by ETS, because they have been 29 converted by several stages onto a form suitable for use for voice recognition analysis. That does not mean that there have been errors: it simply means that he cannot rule out whatever errors he thinks this hypothetical material might have excluded.

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."

60. The panel undertook a forensic analysis of all the relevant evidence in relation to the issues of "voice recognition" and the "chain of custody" and we agree with it. The panel did not conclude that errors were not possible, but rather that in general such errors were not occurring and moreover there would have been no incentive or motive to misattribute recordings and would have made efforts not to do so. The panel acknowledged at [107-108] that there may be "room for error" and possible corroboration may be relevant, but 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" [at [119]. We consider there is no good reason to revisit the panel's analysis - see [29] of *SSHD v Akter* [2022] EWCA Civ 741. We therefore reject the

suggestion that there has been a mix-up in the appellant's case and the wrong audio file has been allocated to his records.

61. For all of the above reasons, we are therefore satisfied that the respondent has provided evidence which is capable of showing that a proxy took the test for the appellant.
62. We recognise however that the respondent's evidence should not be viewed in isolation and could be contradicted by credible assertions, or material undermining the effects of it in this appellant's case.
63. The appellant vehemently denies any suggestion that he cheated. He relies on his assertions that he was fluent in English before he came to the UK having studied in English throughout his education in Nepal, and his educational achievements in the UK. He relies on his proficiency in English which spans over the course of twenty years and says that he has a proven record of taking and passing exams all of which should lead us to conclude that he did not cheat and had no reason to do so.
64. Having considered the evidence in its totality, we do not believe the appellant's evidence. We found his evidence lacked clarity and detail, and the evidence of his linguistic abilities at the relevant time is, we consider, overstated.
65. The appellant has provided evidence of his qualifications obtained in Nepal and in the UK between 2001 and 2016. These include school leaving certificates and examination results in English as well as other subjects. He is described as completing his school education in the "first division" and his mark in the subject of English is given as 54/100. He obtained a Bachelor qualification in Science and Technology from Tribhuvan University; a two-year course from 2003-2004, the copy certificate is of exceptionally poor quality and difficult to read, but we can discern albeit with a degree of difficulty that his marks in English are stated as 44/100 and possibly 36/100. There is a certificate and an academic transcript of results from 2005-2007 relating to a course in Health Science (General Medicine), his overall score was 77.22% and his marks for the subject of English was 63/100.
66. In the UK he obtained a diploma in Business Management in September 2013 from the Association of Business Executives; his grades over the course of eight modules range from three C's, a D, three E's and a B. He then obtained a Master of Science in Healthcare from the University of West London in 2016. He was offered a PhD placement to study Health in 2016.
67. We accept that the appellant is an intelligent and assiduous individual. We also accept that he had some level of English in Nepal, however his results show that he was not a high achiever in the subject of English and was average at best. We consider that this evidence far from demonstrates that he was proficient or indeed fluent in English prior to coming to the UK.
68. We are prepared to accept the evidence that the appellant took an IELTS test and achieved an overall band score of 5.0 in order to register on the National Certificate for Dental Nurses course at South London College in 2009. We have not seen a copy of that certificate, but it is referred to in the registration letter issued by South London College. However, in the absence of that certificate we do not know the appellant's scores for each component in speaking, listening, reading and writing and the appellant's evidence is silent on the matter. We have

not therefore drawn much assistance from this evidence and it is in any event approximately four years prior to the challenged test.

69. While we take full account of the appellant's qualifications and consider that some level of English would be required for his school exams and more particularly for the qualifications obtained in the UK, the evidence does not provide any basis for us to understand the level of spoken English which would have been required (if any) in or around 2013 when the appellant says he took the Speaking test. The fact that he commenced a MSc in 2013 does not avail him and we note, in particular, that in offering him a place on the course the university relied on the results of the appellant's TOEIC certificates including his score of 200 in the Speaking test in order to satisfy itself that he was proficient in English to the level required.
70. We recognise the appellant gave evidence in English before us and he exhibited reasonably good English, but he was not so proficient that it could be said he was fluent. There were times during the course of his evidence when he struggled to construct a comprehensive sentence. This was noticeable for example when he tried to explain why he switched courses and when he was challenged about it. We failed to comprehend fully from his evidence the exact reasons for the switch which required the Tribunal to seek further clarification from the appellant in evidence. However, we also recognise that any assessment based on the appellant's proficiency of English at the hearing is beset with problems, not least the fact that the hearing was nearly nine years after the disputed test during which time the appellant has continued to live in the UK.
71. We are not satisfied that the appellant has been entirely candid about his reasons for switching courses and we agree with Ms Everett that his failure to refer to the difficulties in finding a placement in two witness statements is a significant omission. We note that in his first witness statement dated 10th October 2019, the appellant briefly states that he "...undertook National certificate for dental Nurse then a Business Management course" (sic) and says no more. This infers that he completed the course in dental nursing which is contrary to his evidence before us. We note that it is only in his much later witness statement of 20th September 2022 that he states he did not complete that course and says that he switched to a course in Business Management because the dental nursing course was at a lower level of study to the course in General Medicine and Surgery he studied in Nepal. Whilst we acknowledge that the appellant switched courses in 2011 and completed the course in Business Management in September 2013, shortly before the date of the challenged test, we are satisfied that his lack of candour in relation to events leading up to the relevant time period are matters that we should be concerned about.
72. We are reinforced in this conclusion when we consider the transcript of results issued by ABE Examinations in relation to the Business Management course dated 13th September 2013. His grades for each of the modules, of which there are 8, save for a grade B in Organisational Behaviour are not impressive. He achieved mostly low grades which are not reflective, as the appellant seeks to persuade us, of a student who was fluent in English and was able to achieve the highest score in a Speaking test approximately one month after he completed this course.
73. In assessing the appellant's evidence we note that he was able to give an account of why he had chosen the test centre, and in his witness statements he

gives a description of the constituent elements of the actual tests at Cauldon College and South Quay College. The appellant's account of events is by no means detailed. There is a stark omission of any details of his journey to South Quay College and he makes no mention of having his photograph taken that is affixed to his TOEIC certificates. Further, whilst we draw no adverse inference from the appellant's failure to mention the receipt in oral evidence (he does refer to it in his witness statement), we found his account that he just happened to be carrying £200 in cash when he attended Cauldon College, which enabled him to make a cash payment of £140 to that college for a Speaking and Writing test that was to take place at South Quay College, with no evidence that the two colleges were affiliated, is not in the context of all the evidence believable.

74. The appellant urges us to accept that he had no good reason to use a proxy given his qualifications, educational background including studies in English and circumstances generally before he took the test in October 2013, but we bear in mind that *DK and RK [2]* warns that there are numerous reasons why a person who could pass a test might nevertheless decide to cheat even if they have qualifications or characteristics which would indicate otherwise.
75. The appellant was first made aware of the allegation of cheating as far back as 2015. Whilst he has sought to legally challenge the allegation there is little other evidence of action taken by the appellant in response to what we would have expected to have been serious news for a person who had honestly taken the tests. A person with a post-graduate qualification might reasonably be expected to contact South Quay College and/or ETS asking for an explanation of how the certificate previously issued to him was now said to be invalid. It was not until November 2020 that the appellant endeavoured to obtain a copy of the voice recording. We do not accept Mr Turner's submission that only a fool would do so if he had not taken the test, as the importance of making such a request is well-known in cases of this kind. The appellant accepts the voice on the recording is not his, and for the reasons we gave earlier we reject the suggestion that the wrong recording was allocated to his identity.
76. Neither representative referred to the evidence of ST in their submissions. We are not surprised about that given that she was not in a relationship with the appellant when he took the test, and her evidence on the issue is entirely based on what the appellant has told her. We have not drawn any assistance from her brief written and oral testimony on the issue of whether the appellant cheated.
77. Considering the evidence in the round, for the reasons given, we find the appellant's explanation not credible. We are persuaded following careful consideration and examination of the evidence, that the respondent has discharged the burden of proof to show the appellant was indeed involved in fraud in obtaining the TOEIC test in 2013. We find on balance that the appellant obtained a test through cheating, and he cannot therefore qualify for leave to remain under the Immigration Rules.
78. In the event that we reached this conclusion, it was not argued by Mr Turner before us that the appeals of the appellant, ST and AP could otherwise succeed on human rights grounds. However, we again note that in his skeleton argument there is an attempt to argue the appeal on article 8 grounds outside of the Immigration Rules. Reliance is placed on the appellant's length of residence, his studies and the extant offer to study a PhD, the position of AP who was born in the UK and it is said that it would be in her best interests to remain in the UK.

Given the manner in which this appeal was argued before us we can deal with these matters relatively swiftly.

79. We conclude, in line with *R (Agyarko)* [2017] UKSC 11, there would be no unjustifiably harsh consequences on the removal of the appellant, ST and AP to Nepal.
80. We have considered the best interests of AP as a primary consideration. She is a young child of 3 years and 8 months. She was born in the UK, but she is a national of Nepal. We have not received any evidence of her circumstances, but given her age she will be dependent on her parents. She can access education and healthcare if required in Nepal and where she is likely to have extended family. She is also at this very young age able to adapt to life in Nepal with the assistance and support of her parents. It has not been established that her best interests are only served if she remains in the UK. It will be in her best interests to remain with her parents whether that is in the UK or in Nepal.
81. The appellant, ST and AP are a family unit and will be removed together. There will be no interference with family life in that eventuality. We are prepared to accept for the purposes of our assessment that there would be an interference with the private life of the appellant and ST based on their respective periods of residence in the UK since 2009. However, the interference with their respective private lives would be in accordance with the law and have the legitimate aim of the maintenance of effective immigration controls and of public confidence in their maintenance.
82. Moving on to consider the question of proportionality, we recognise that the requirements of the Immigration Rules and the statutory provisions are said to reflect the respondent's position as to where a fair balance is struck for the purpose of applying those rights. Neither, the appellant, ST or AP qualify for leave to remain under the Immigration Rules. We have found that the appellant has acted dishonestly and he does not have an absolute right to study in the UK. There is also of course the weight to be given to the public interest in effective immigration control.
83. We take into account that the appellant and ST have lived in the UK since 2009 and that AP was born here. The appellant and ST are likely to have ties to Nepal where they have spent the majority of their lives. They are familiar with the culture and way of life in Nepal and can support AP in adapting to a new environment. We are mandated to give little weight to the appellants private life in view of their precarious immigration status, and the ability to speak English and live financially independent lives are neutral factors in the proportionality assessment. The factors identified by Mr Turner are not exceptional.
84. Given our findings above and the weight of interests on each side of the scales, we are satisfied that there are no exceptional circumstances which render refusal of leave to remain a breach of Article 8 because it would result in unjustifiably harsh consequences for either the appellant, ST or AP.
85. We therefore conclude that removal would not amount to a disproportionate interference with the right to private life for the purpose of Article 8(2) of the ECHR. Consequently the respondent's refusal is not unlawful under section 6 of the Human Rights Act 1998.

Notice of Decision

The decision we re-make is to dismiss the appellants' appeal on human rights grounds.

Accordingly we make no fee award.

R.Bagral

Deputy Upper Tribunal Judge
Immigration and Asylum Chamber

Date: 15th November 2022