



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006213
First-tier Tribunal No:
HU/51194/2022
IA/01887/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 16 May 2023

Before

UPPER TRIBUNAL JUDGE SHERIDAN
DEPUTY UPPER TRIBUNAL JUDGE JOLLIFFE

Between

K M Abu Kalam
(NO ANONYMITY ORDER MADE)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mr Gajjar, Counsel instructed by Wildan Legal Solicitors
For the Respondent: Mr Clarke, Senior Home Office Presenting Officer

Heard at Field House on 27 March 2023

DECISION AND REASONS

1. The appellant is a citizen of Bangladesh born on 31 December 1982 who has been in the UK since 2010. In February 2021 he applied for leave to remain on the basis of his private life in the UK.
2. On 14 February 2022 his application was refused. One of the reasons given for refusing the application was that the respondent was satisfied that in an application for leave to remain in March 2013 the appellant used an ETS certificate that was invalid because he had cheated on an English language test taken at Elizabeth College on 13 December 2011.
3. The appellant appealed against the respondent's decision. The appeal came before Judge of the First-tier Tribunal Shanahan ("the judge"). In a decision dated

18 October 2022 the judge dismissed the appeal. The appellant is now appealing against this decision.

Decision of the First-tier Tribunal

4. The central issue in contention before the judge was whether the appellant cheated in the English language test that he took in 2011.
5. The judge began her assessment by summarising and setting out key findings in the recent Upper Tribunal decision *DK and RK (ETS: SSHD evidence, proof) India* [2022] UKUT 00112 (IAC).
6. The judge noted that the evidence adduced by the respondent included a “lookup tool” for Elizabeth College for the date on which the appellant took the English language test which showed that, of 251 tests taken on that day, 80 were considered to be questionable and 171 were considered invalid. The judge also observed that in a Court of Appeal case *Assam and others* [2017] EWCA Civ [2009] Elizabeth College was included amongst centres identified as “fraud factories”.
7. The judge noted (in paragraph 19) that one of the arguments advanced on behalf of the appellant was that the data in respect of Elizabeth College provided by the respondent did not “tell the whole story” because it did not include individuals who “have been exonerated or where the respondent was found not to have discharged the burden of proof on her”. The judge stated in respect of this :

“While that may be the case, I am dealing with the evidence which is before me and I find that it is evidence capable of showing that a proxy took the test for the appellant”.
8. The judge then went on to consider the appellant’s evidence. In paragraph’s 20 - 21 the judge stated the following:
 - “20. I have considered the appellant’s evidence and history to assess his credibility. The appellant’s leave expired on 1 September 2015 when his June 2014 application was refused without a right of appeal. The appellant says that he never received this decision and I accept that it is not unheard of for individuals to be unaware of decisions. However, the appellant was encountered in May 2018 some four years after he made the application and he has given no evidence to show that at any time during those four years did he attempt to contact the Home Office to find out what was happening.
 21. Then following his apprehension in May 2018 he made an asylum claim. He was released on immigration bail with reporting conditions. He failed to attend the initial interview for his claim and failed to report as required. Further, there was no further contact with the Home Office until January 2021 when he sought a fee waiver for the current application. No explanation has been provided by the appellant for these failures. I consider these matters lead me to the conclusion that the appellant was seeking to remain in the UK at any cost. This undermines his credibility.”
9. In his witness statement the appellant provided a detailed account of how and why he chose Elizabeth College to take the English language test. The judge stated in paragraph 23:

“I find that the information about how he travelled to the college is information he could quite easily have researched for the appeal and as to what happened in the test itself again this is information that could have been rehearsed.”

10. The judge also drew an adverse inference from the absence of evidence indicating that the appellant had attempted to contact ETS to find out about the fraud allegation.
11. The judge considered the applicant’s ability to speak English but found that an ability to speak English did not overcome the respondent’s evidence, having regard to what is said on this in *SSHD v MA* [2016] UKUT 450 (IAC).
12. After finding that the appellant had engaged in fraud, the judge proceeded to consider whether he would face very significant obstacles integrating in Bangladesh, which is the test under paragraph 276ADE(1)(vi) of the Immigration Rules. The judge concluded that he would not face any such obstacles. The judge also found that the appellant’s removal would not be disproportionate under Article 8 ECHR.

Grounds of Appeal

13. The appellant advanced three grounds of appeal. Ground 1 concerns the evidence relied on by the respondent about the extent of cheating at Elizabeth College. It is argued that the respondent’s evidence is incomplete – and may give a misleading picture – because it does not take into account individuals who were subsequently exonerated. The grounds submit that the judge acknowledged that “missing information” about candidates who were exonerated could be material and it is submitted that the judge fell into error by not taking this into account. It is also argued that as the burden of proof was on the respondent it was irrational for the judge to decide the case on the basis of a potentially misleading picture of the level of fraud at Elizabeth College.
14. Ground 2 submits that the adverse inferences as to the appellant’s credibility made in paragraphs 20 and 21 of the decision (which are set out above in paragraph 8) are based on events that are immaterial because they are unrelated to the alleged fraud and therefore the judge erred by placing weight on them.
15. Ground 3 argues that the judge applied an excessively high standard of proof by rejecting the appellant’s innocent explanation on the basis that he might have researched how to travel to the college or what occurred at the test centre. It is submitted in the grounds that an innocent explanation need only satisfy the minimum/basic level of plausibility.

Analysis

16. Although we have not set out or made specific references in this decision to the submissions of Mr Gajjar and Mr Clarke, we have considered their (clear and helpful) submissions carefully and, where appropriate, incorporated them into our assessment.
17. In *DK and RK* a Presidential Panel of the Upper Tribunal considered in detail evidence submitted by the respondent in multiple cases where individuals have been identified as having cheated in an ETS English language test. We will refer to this evidence as “the respondent’s generic evidence”.

18. The panel in *DK and RK* rejected the argument that there were significant flaws in the respondent's generic evidence. Two key reasons given were that (i) there was overwhelming evidence of fraudulent activity in a number of ETS centres which were "institutions for the manufacture of fraudulent qualifications"; and (ii) ETS's methodology and process of identifying individuals who cheated was reliable.
19. The appellant's argument in ground 1 (that the respondent's generic evidence is undermined by not updating the data on cheating at Elizabeth College to take account of individuals who were subsequently exonerated) needs to be considered in the context of the robust conclusion reached by the panel in *DK and RK* about the reliability of the respondent's generic evidence.
20. Information about the number of individuals (if any) who were initially identified by ETS as having cheated at Elizabeth College on the day the appellant took his test but who were subsequently exonerated (in the sense of having an adverse decision withdrawn or succeeding in an appeal) would not change the fact that there was overwhelming evidence of fraudulent activity at Elizabeth College and that ETS's methodology of identifying individuals who cheated is reliable. In these circumstances, information about the number of individuals subsequently exonerated (with such "exonerations", if any, most likely taking place, for the most part, prior to *DK and RK*) could not, on any legitimate view, reduce the weight to attach to the respondent's generic evidence in the light of the robust findings in *DK and RK*. The appellant therefore cannot succeed on ground 1.
21. The judge was entitled to take a broad and holistic assessment of the evidence when assessing the appellant's claim that he had not cheated. As part of that assessment the judge was entitled to have regard to the appellant's immigration history and dealings with the respondent. Accordingly, the factors identified in paragraphs 20 and 21 were not immaterial considerations and therefore it was not legally erroneous for the judge to take them into consideration. Ground 2 therefore has no merit.
22. In ground 3 the appellant argues that because the appellant only needed to put forward an "innocent explanation" that satisfied a minimum/basic level of plausibility the judge's rejection of the appellant's explanation indicates that too high a standard of proof was applied. The difficulty with this argument is that it ignores *DK and RK*, which makes it plain that an explanation that only met a minimum/basic level of plausibility would be insufficient in the light of the reliability of the respondent's generic evidence. This is explained in paragraph 129 of *DK and RK*, where it is stated:

"[T]he 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."
23. For these reasons, we are satisfied that the grounds of appeal do not identify an error of law.

Notice of Decision

24. The decision of the First-tier Tribunal did not involve the making of an error of law and stands.

D. Sheridan
Judge of the Upper Tribunal
Immigration and Asylum Chamber

20.4.2023