IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003101
First-tier Tribunal Nos:
HU/51023/2021
IA/04961/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 25 May 2023

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

FOYEZ AHMED
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Z Malik KC, instructed by Westgate Solicitors
For the Respondent: Mr A Basra, Senior Home Office Presenting Officer

Heard at Field House on 18 April 2023

DECISION AND REASONS

1. The Appellant is a citizen of Bangladesh. His date of birth is 1 January 1982.

2. Upper Tribunal Judge Kamara granted the Appellant permission to appeal against the decision of the First-tier Tribunal (Judge Monson) to dismiss his appeal against the decision of the SSHD of 26 March 2021 to refuse his human rights claim.

3. The Appellant came to the UK on 17 February 2009 with valid entry clearance as a student. His leave expired on 1 April 2012. He made an application on 22 March 2012 to extend his leave as a student. With his application he submitted a

TOEIC certificate from ETS as well as other documents. According to the certificates awarded by ETS the Appellant achieved a listening score of 495 out of 495, and a reading score of 410 out of 495, following a test taken on 16 February 2012. He achieved a speaking score of 190 out of 200, and a writing score of 190 out of 200 following a test taken on 21 February 2012. They were valid for a period of two years and the Appellant relied on the same certificates for a further application for leave to remain as a student which he made on 19 April 2013. The application was successful and he went on to pursue further studies.

4. The Appellant enrolled on an Masters course at Anglia Ruskin University in September 2014 for which he was awarded a pass in April 2015. In order to pursue further studies the Appellant needed to take a fresh English language test because the TOEIC certificates had expired. On 20 September 2014 he took an International English Language Testing System (IELTS) test in which he achieved an overall score of 5.0 with his scores in the individual components being listening 4.5, reading 4.0, writing 5.5 and speaking 6.5. The Appellant retook the IELTS test on 22 November 2014 and achieved an overall band score of 5.5, with the individual components being as follows: listening 5.5, reading 4.5, writing 5.5, and speaking 7.0. The Appellant also achieved an overall band score of 5.5 in a further IELTS test which he took on 28 February 2015, with the individual component scores being as follows: listening 5.0, reading 4.5, writing 5.5 and speaking 6.5.

5. On 30 December 2014 the Appellant applied for leave to remain on the basis of his private life established in the UK and for a reason outside the Immigration Rules, which was because he had not been able to obtain a CAS from an educational provider and he wished to have more time to obtain one.

6. On 2 September 2015 the Respondent refused the Appellant's application. The first ground of refusal was that pursuant to paragraph S-LTR.1.6. of Appendix FM 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 reason for this was that in his applications dated 22 March 2012 and 19 April 2013 he had, according to the SSHD, submitted a fraudulent TOEIC certificate from ETS. ETS had undertaken a check of his speaking test and had confirmed to the SSHD that there was significant evidence to conclude that his certificate was fraudulently obtained by the use of a proxy test taker. His scores from the test taken on 21 February 2012 at the London School of Scholars had now been cancelled by ETS. On the basis of the information provided to her by ETS, the SSHD was satisfied that the certificate was fraudulently obtained and the Appellant had used deception in his applications on 22 March 2012 and 19 April 2013.

7. On 22 June 2016, the Appellant attended an asylum screening interview and claimed asylum in person. This application was refused on 21 December 2016 with a right of appeal which the Appellant did not exercise.

8. On 30 September 2020 the Appellant made the application which gave rise to the decision which was the subject of the appeal before Judge Monson.

9. The SSHD refused the application on suitability grounds because the Appellant had made false representations in a previous application for leave to remain (S-LTR.4.2.). The Respondent relied on the same allegation of deception which was relied on in 2015 referencing the application made on 19 April 2013 on which the

Appellant used deception by relying on his fraudulently obtained ETS certificate. The SSHD also concluded that the Appellant did not meet the Immigration Rules on family or private life grounds and that there were no exceptional circumstances.

10. In support of the allegation of deception the SSHD relied on the fact that on the date that the Appellant took the test at the London School of Scholars it was noted that 51 results were issued of which 13 were deemed questionable and 38 were found to be invalid.

11. The SSHD relied on the evidence of the look-up tool, two generic witness statements from Rebecca Collings and Peter Millington, and the expert report of Professor French.

12. Mr Dingley representing the Appellant accepted that the Respondent had discharged the evidential burden of raising a prima facie case of deception relying on SSHD v Shehzad and Another [2016] EWCA Civ 6152. However he submitted that the Appellant had given a detailed account of how and when he sat the English language test and he had demonstrated his English language speaking capability by passing various English language tests and by obtaining qualifications taught in English which further supported his version of events and showed that there was no real need for him to utilise malicious means to pass an English language test. He submitted that the SSHD was in no position to discharge the legal burden of proof on the basis that there was no evidence from ETS such as the extract from the CBT manager or a copy of the information provided to the Respondent by ETS which showed that the Appellant's certificate was fraudulently obtained. Moreover, the All Party Parliamentary ("APPG") report on TOEIC further highlighted errors within the Respondent's ETS/TOEIC evidence. Mr Dingley relied on the findings of the report by the National Audit Office.

13. At the hearing the SSHD submitted a witness statement and exhibit (an ETS SELT source document Annex A1) from Ms Sreeraman in which she highlighted the relevance of certain passages in the generic evidence to the Appellant's case. She said that the Home Office was notified of the cancellation of the Appellant's result on the basis that ETS's own analysis showed the use of a proxy test taker, by way of an entry on a spreadsheet which was now produced. The evidence was admitted. Mr Karim did not object to this but he sought an adjournment in the light of the further evidence. The basis of Mr Karim's application for an adjournment was that the Appellant had prepared the appeal on the basis that "the Respondent's case did not get off the ground" as evidence had not been provided, until the hearing, that his test result had been categorised by ETS as invalid. Annex A1 provided evidence of this.

14. The judge refused to adjourn the appeal. The judge said:-

> "As on my reading of the evidence provided by the Appellant, and also of what had been said by Mr Dingley in his skeleton argument, there was no dispute between the parties as to the fact that the Appellant's speaking and writing test result had been declared invalid by ETS. The case of Shehzad did not lay down an inflexible rule of evidence that the Respondent's case could not get off the ground unless there was proof in the form of the ETS SELT source data document at Annex A1 that the impugned test result had

> been declared invalid and hence that the presence of a proxy test taker had been detected".

15. The judge took into account that Mr Dingley had accepted in his skeleton argument that the Respondent's case had got off the ground. He accepted that the Respondent had made out a prima facie case of deception. The point made by Mr Dingley later in his skeleton argument was not that there was a lack of proof that the Appellant had used an ETS certificate dated 21 February 2012, which upon checking, ETS (Education Testing Service) confirmed was invalid, but a lack of specific, as opposed to generic, proof that the certificate was fraudulently obtained in the Appellant's particular case.

16. The judge noted that it was an agreed fact that ETS cancelled the Appellant's test results of 21 February 2020 due to the apprehended presence of a proxy test taker and that the issue in dispute was and is whether the Appellant had in fact used a proxy test taker (see paragraph 39). The judge concluded at paragraph 40 that he did not consider that the Appellant was in any way prejudiced or disadvantaged by the late introduction of the witness statement.

17. The Appellant gave evidence before the judge relying on his witness statement as his evidence-in-chief. The evidence was recorded by the judge at paragraphs 41–46. There was a witness, Mr Hussain, who gave evidence adopting his witness statement. His evidence was that he had dropped the Appellant off at the test centre.

18. In submissions the representative for the Home Office relied on DK and RK (ETS: SSHD Evidence, proof) India [2022] UKUT 112 in which the Tribunal held that the evidence currently being tendered on behalf of the Secretary of State for the Home Department in ETS cases is amply sufficient to discharge the burden of proof. The Presenting Officer submitted that the case against the Appellant was strengthened by the fact that the voice on the recording that he had obtained from ETS was not his own voice. Mr Karim representing the Appellant adopted Mr Dingley's skeleton argument while acknowledging that matters had moved on in some respects. The three-stage approach referred to by Mr Dingley no longer applied, however Mr Karim sought to distinguish DK and RK on the facts and submitted that the Appellant's credibility had not been attacked with any real vigour and that the evidence of Mr Hussain had not been effectively challenged. Notwithstanding the findings that have been made by the Upper Tribunal in DK and RK, Mr Karim invited the judge to attach weight to the APPG report and also to a recently published news report on the BBC entitled "The English test that ruined thousands of lives", which had not been considered by the Tribunal in DK and RK.

19. The judge's findings are at paragraphs 53 onwards. There is a discussion of the findings in DK and RK relating to false positive rates and corroboration, the relevance or absence of direct evidence from ETS, and conclusion on the reliability of generic evidence and the relevance of the impugned test being taken at a fraud factory. The judge at paragraph 65 stated that he found that:-

> "The evidence of the voice recording which ETS had produced as being linked to the Appellant's speaking test means that it is highly probable that the Appellant used a proxy test taker to take his speaking test, subject to a chain of custody issue, and that as there is no independent evidence of an

> actual error in the chain of custody (such as proof that the speaking test administered on the day in question did not feature the topic that is being discussed on the voice recording produced by ETS), it is highly unlikely that a genuine speaking test undertaken by the Appellant has been muddled up with a test taken by a proxy, either by the test centre or by ETS" (paragraph 65).

20. The judge said that the SSHD's case was corroborated by the evidence that on the day in question the London School of Scholars was a "fraud factory" (see paragraph 66). The judge said in the same paragraph that:-

> "This emerges from the fact that 75% of the tests were found to be invalid, whereas the Tribunal considered one of the colleges under scrutiny in DK and RK as being a fraud factory with a lower percentage invalidity rate of 67%".

21. The judge acknowledged that it was not the SSHD's case that the Appellant did not have the ability to achieve the scores which he did, in particular the speaking score, but found that this did not serve to undermine their case. This was because the voice recordings linked to the Appellant do not contain his voice and there are many reasons why a candidate might choose to cheat in a TOEIC test and it is not necessary for the Respondent to prove motive.

22. The judge also took into account that although the Appellant achieved high speaking scores in his subsequent IELTS tests, his overall performance was distinctly "lacklustre" (see paragraph 70). The judge noted that despite the Appellant having undertaken an intensive English language course after arriving in the UK in 2009, and continuing exposure to the English language from 2009 to 2014, his initial IELTS test did not show a significant improvement in his overall ability since the IELTS test which he had taken in India in 2007. The judge said at paragraph 70 "I infer that the reason why the Appellant retook an IELTS test within a few months of his initial test in 2014 was because he did not meet the required level of CEFR B2 in all four language components in the initial test".

23. The judge took into account the Appellant's evidence in his witness statement that the reason for him taking the TOEIC test in February 2012 was because the college where he was studying had closed down and he needed to move to a new college. The judge said that if that was the case that would not have required him to take an English language test if he was already in possession of a valid certificate which had not expired.

24. At paragraph 72 the judge said that it was not credible that the Appellant could not have found a genuine test centre ("as opposed to a fraud factory") much closer to Luton or much closer to the college where he was or had been studying in the East End of London.

25. The judge found that the Appellant was unable to explain clearly how he first travelled to the test centre by public transport and he named as his final destination a station which did not exist. The judge took into account that his friend supported him in his account that he travelled to the test centre to take the test by car on both 16 and 21 February 2021. The judge said at paragraph 73 "I consider that this evidence only reaches the minimum level of plausibility and is far from being highly plausible".

26. The judge took into account that Mr Hussain was not specifically challenged on his account of having taken the Appellant to the test centre. However, he found that "it was a remarkable sacrifice of time that he undertook". The judge noted at paragraph 74 that the journey was one and a half hours each way and that Mr Hussain would also have had to occupy himself for some hours whilst the Appellant was doing the test.

27. The judge found that the Appellant's credibility was undermined by the "stark inconsistency in his oral evidence as to how many other candidates were in the same room" (see paragraph 75). The Appellant's initial evidence was that there were 25-30 candidates in the same room, but when challenged on this he said there were a maximum of 15 including himself.

28. At paragraph 76 the judge dealt with Mr Karim's submission that the Appellant's evidence was shown by the fact that he had sought production of the voice recording, which he would not have done if he knew he had used a proxy test taker. However the judge found that the argument did not stand up to scrutiny for two reasons. The first was that an adverse inference was liable to have been drawn had he not attempted to obtain his voice recording, and secondly the Appellant is likely to have been aware that in the event the voice on the recording was not his, he could raise a "chain of custody" issue.

29. The judge said as follows:-

> "77. Prior to DK and RK, the chain of custody issue, and more particularly the First and Second Hypotheses, had considerable traction as the expert evidence which supported it stood unchallenged, and it was not until DK and RK that the expert evidence was subjected to a real-world analysis. Since the APPG report is built upon the same 'academic' expert evidence, its probative value is nugatory for this reason and also because of the other shortcomings identified by the President in his discussion of the APPG report".

30. In relation to the BBC report the judge found that it was also of little probative value insofar as it traverses the same territory as DK and RK. It amounted to no more than an expression of disagreement with the findings made by the UT about the reliability of the Respondent's evidence.

31. The judge engaged with Mr Karim's oral submission that it was inherently implausible that 97% of TOEIC tests taken between 2011 and 2014 were suspicious. He found that this statistic is arrived at by combining invalid tests with questionable tests and that the generic evidence is that, as a precautionary measure, ETS adopted a practice of designating test results as questionable where they were not found to be invalid.

32. The judge accepted that there was no evidential burden on the Appellant to refute the SSHD's evidence, however he found that the evidence and arguments relied upon by the Appellant were not sufficient to undermine the evidence against him. The judge found that the SSHD had discharged the burden of proving on the balance of probabilities that the Appellant had used a proxy test taker on 21 February 2012 at the London School of Scholars and that he thereby dishonestly obtained a TOEIC certificate which he dishonestly deployed in his

application for leave to remain in April 2013 (and also in his application of 2012, albeit that this is not part of the Respondent's case as set out in the decision).

33. The judge found that the Appellant had not led any evidence in support of his two other grounds for seeking leave to remain under the Rules or outside the Rules, and that he had not made out a case that there are very significant obstacles to his reintegration into life and society in Bangladesh. The judge went onto find with reference to Razgar v SSHD [2004] UKHL 27 , that questions 1 and 2 should be answered in the affirmative, however found that the decision was proportionate applying s.117B of the 2002 Act.

The Grounds of Appeal

Ground 1

34. The judge did not consider and apply the guidance in Nwaigwe (adjournment: fairness) [2014] UKUT 418. He did not consider whether fairness demanded an adjournment. The judge did not adequately, if at all, consider whether in light of what are very serious allegations the Respondent failed to comply with directions and respond to the Appellant's skeleton argument. Fairness dictated that an adjournment be granted, especially as the key evidence, namely the look-up tool specific to the Appellant had been produced. The Appellant's case was that without the look-up tool his case was that the initial evidential burden had not been met at all.

Ground 2

35. The judge erred in categorising London School of Scholars as a "fraud factory". There was no evidence in this case of this college being a fraud factory. There are a number of reported cases which have listed or referred to colleges that are categorised as fraud factories, however, in this case there was no:-

(a) Project Façade report.

(b) Statistical analysis by Mr Sewell (as was the case in DK and RK).

(c) Criminal prosecutions.

The judge erred in categorising this college as a fraud factory in the absence of evidence referred to above or anything like the evidence in DK and RK.

36. The FtT relied heavily on factual conclusions of the Upper Tribunal in DK and RK, however the Appellant submits that as a matter of fairness, factual conclusions cannot be binding on other Tribunals. In this case the Appellant was not provided with the same evidence the UT had in DK and RK. He had no opportunity to challenge it or respond to it, or cross-examine any witnesses. Fairness would therefore dictate factual findings, especially where the evidence relates to completely different colleges, cannot be binding and the Upper Tribunal's conclusions cannot be used to undermine this appeal.

Ground 3

37. The Appellant's credibility was not challenged. His witness confirmed that he drove the Appellant to the test centre on both occasions and then discussed the

test after completion. The judge erred in making speculative and adverse findings with reference to paragraph 74. In any event the issue was not put to the witness. Moreover, the judge drew inferences as to why two IELTS tests were taken in 2014. He speculated that this was because the Appellant had not achieved the required scores. However, neither the Respondent or the judge put these concerns to the Appellant for comment.

Ground 4

38. Despite DK and RK making it plain that there is no burden on the Appellant, even to provide an account which satisfies the minimum level of plausibility, the judge erred at paragraph 73 by applying the three-stage approach and wrongly placing some burden on the Appellant. The judge's approach to the voice recordings at paragraph 76 and the adverse conclusion reached were matters that were also not put to the Appellant. The judge failed to properly make findings in respect of the communication with ETS and its consequences, especially the Appellant's assertion to ETS that the speaking test was not like his one.

Ground 5

39. The judge erred in respect of his approach to the APPG report and the BBC Newsnight article. The ground highlights the conflict between DK and RK and Alam v SSHD [2021] EWCA Civ 1538 in which the First-tier Judge was referred to but appears not to mention in the determination.

Ground 6

40. The judge erred in failing to consider and apply the factors set out at paragraph 69 of SM and Qadir as approved by the Court of Appeal at paragraph 18 of Majumder v Secretary of State for the Home Department (Rev 1) [2016] EWCA Civ 1167.

41. The judge was required to give express consideration to the factors including the Appellant's performance under cross-examination, his academic achievements and whether it was logical for him to cheat. The judge erroneously suggests that there may be many reasons why a person may cheat but does not identify a motive (and neither did the Respondent). The reference to MA is erroneous because that judgment talks about "motive" in the abstract.

The Rule 24 response

42. The SSHD relied on a response under Rule 24. The SSHD opposed the Appellant's appeal asserting that there is no procedural unfairness in relation to the refusal to adjourn. The Appellant's representative in his skeleton argument had accepted that the ETS test result had been invalidated and that it was a matter of knowledge that this was done when ETS had detected the presence of a proxy test taker. The judge was entitled to conclude that a college where 75% of tests sat were invalidated could reasonably be described as a "fraud factory" when those with a lower figure were considered as such by the Upper Tribunal in DK and RK. The SSHD had not been referred to any supporting evidence that

only a college officially designated as a fraud factory should be considered to be one. As a matter of common sense it was open to the judge to conclude that a college where more tests were invalidated than the colleges in DK and RK could legitimately be described as a fraud factory.

43. The evidence of the Appellant's witness had to be considered in the round. A failure to challenge specific parts of his evidence does not lead to a conclusion that he was a credible witness.

44. Contrary to the grounds the judge at paragraph 72 onwards clearly considered the Appellant's performance under cross-examination and noted the inconsistencies and implausibilities in his account.

45. I heard extensive submissions from both representatives. Mr Basra relied on the Rule 24 and expanded on it. Mr Malik withdraw ground 5 at the hearing before me.

Error of Law

46. The challenge in ground 1 is to the judge's consideration of the application for an adjournment. The guidance in Nwaigwe (adjournment: fairness) [2014] UKUT 418 is relied on. The headnote confirms that in considering an adjournment application fairness is the key issue. The judge said at paragraph 40 that he did not consider that the Appellant was "prejudiced or disadvantaged by the late introduction of Ms Sreeraman's witness statement and exhibits". The judge did not apply the right test when considering an adjournment. It was incumbent on the judge to consider fairness which is a wider concept than the Appellant being prejudiced or disadvantaged. The judge was of the view that the evidence made no difference to the Appellant's case. He relied on a skeleton argument that had been prepared by Mr Dingley of Counsel who did not attend the hearing in order to represent the Appellant on the day. Considering the skeleton argument it is difficult to see how the new material could be material because the Appellant's case was not that the test had not been invalidated. I have taken into account that Mr Karim's submission appeared to depart from how the case was put in the skeleton argument on which the judge relied which cannot be explained by the case of RK and DK. At the end of the day the SSHD relied on evidence which arguably strengthened their case which was not served in accordance with the directions of the Tribunal. The Appellant and his Counsel should have been given the opportunity to consider this and the impact on the Appellant's case. The judge did not need to adjourn the case to another day. It may have sufficed for him to have put the matter back. While the reasons given by the judge for not adjourning are logical, fairness demanded the Appellant be given time in order to consider evidence which was served at the last minute and which arguably strengthened the case against him. Ground 1 is made out.

47. I find that ground 2 is made out. I accept that that the term "fraud factory" has been used by the UT in relation to certain colleges. The judge adopted the term and applied it to the college where the Appellant sat his test. There is substance in the ground because the evidence of fraud relating to the college in the instant case fell short of the evidence in the cases before the UT where the term had been coined. The case was not presented by the SSHD on the basis that the college was a fraud factory.

48. I find that ground 3 is made out. The judge raised issues relating to the evidence of Mr Hussain and the Appellant (see paragraph 71) and specifically Mr Hussain's "remarkable sacrifice of time that he undertook" in taking the Appellant to the test centre (see paragraph 74), the implication being that this was not credible. These are matters that were not raised by the SSHD and they were not matters put to the Appellant or the witness in cross-examination.

49. Ground 4 is not made out. The judge was cognisant of DK and RK and at paragraph 79 he stated that "there is no evidential burden on the Appellant to refute the Respondent's evidence". Paragraph 73 does not disclose an error. It is still incumbent on the judge to consider the Appellant's evidence. In stating that " I consider that this evidence only reaches the minimum level of plausibility and is far from being highly plausible" does not support that he placed a burden on the Appellant. What it supports is that he did not believe the Appellant. Mr Malik did not rely on ground 5. In respect of ground 6, I am of the view this amounts to disagreement with the findings.

50. In the light of my conclusions, I set aside the decision of the judge to dismiss the Appellant's appeal. In light of the nature of the unfairness taking into account Begum v SSHD [2023] UKUT 00046 (IAC) I agree with Mr Malik that following the setting aside of the decision of the First-tier Tribunal, the matter should be remitted to the First-tier Tribunal for a rehearing.

51. The decision of the First-tier Tribunal is set aside. The appeal is remitted to the First-tier Tribunal to be heard afresh.

Joanna McWilliam

Judge of the Upper Tribunal
Immigration and Asylum Chamber

24 May 2023