Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: UI-2023-001922**

First-tier-number: EA/06550/2021

THE IMMIGRATION ACTS

Decision and Reasons Promulgated
On 14th of December 2023

Before

Upper Tribunal Judge BLUNDELL
Deputy Upper Tribunal Judge MANUELL

Between

MR UBAID UR RAHMAN
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Z Raza, Counsel
(instructed by ATM Law Solicitors)
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

Heard at Field House on 1 December 2023

DECISION AND REASONS

Introduction

1. Permission to appeal was granted by First-tier Tribunal Judge Adio on 20 April 2022 against the decision to dismiss the Appellant's Article 8 ECHR appeal made by First-tier Tribunal Judge Dean in a decision and reasons promulgated on 9 February 2022.

2. The Appellant, a national of Pakistan born on 15 May 1980, relied primarily on paragraph 276B of the Immigration Rules. In an application made to the Respondent on 12 December 2020 he contended that he had completed 10 years continuous lawful residence in the United Kingdom, as he had entered the United Kingdom in December 2009 and had never left. In particular, the Appellant contested the section 10 decision made by the Secretary of State on 29 September 2014, by which the Appellant's existing leave to remain as a Tier 4 (General) Student had been curtailed. It was alleged that the Appellant had submitted a fraudulent application for an earlier extension of his student leave, by producing a dishonestly obtained ETS TOEIC certificate.

3. The Appellant challenged the 2014 decision (which carried an out of country right of appeal only) by way of judicial review proceedings. By a consent order dated 16 July 2019, following Ahsan v The Secretary of State for the Home Department (Rev 1) [2017] EWCA Civ 2009, it was agreed that the Appellant could make an "in-country" human rights appeal. That application was refused on 8 July 2020. The Respondent maintained that the Appellant had cheated in his TOEIC test by using a proxy taker. ETS had declared the test invalid for that reason. Refusal was on Suitability grounds, under paragraph S-LTR.4.2 of Appendix FM of the Immigration Rules. The application was also refused on private life grounds and because of the absence of exceptional circumstances.

4. Judge Dean found that the Respondent had discharged the legal burden of proving that the Appellant had cheated in his TOEIC test. Judge Dean also found that the Appellant had not shown that he had family life in the United Kingdom with his claimed partner and or as the father of the child which she was expecting. There were no significant obstacles to the Appellant's reintegration in Pakistan. The Appellant's private life interests were outweighed by the public interest in Immigration Rules.

5. Permission to appeal was granted by Judge Adio because he considered that it was arguable that the judge had erred as to the issue of the burden and standard of proof and the stages applicable to the evaluation of fraud. The judge had arguably insufficiently considered the evidence of the Appellant's previous qualifications and had incorrectly restricted himself when stating that the Appellant's previous test results were not from an internationally recognised language examination. It was also arguable that the judge had erred when assessing the Article 8 ECHR evidence.

6. The Respondent filed a rule 24 notice dated 11 May 2023, opposing the Appellant's appeal. It was submitted that the judge had reached properly reasoned and sustainable findings on the evidence, which had been fully considered. The correct approach had been taken to the shifting burden of proof applicable to the fraud allegation. The judge's findings as to the absence of family life had been open to him. There had been no corroboration. There was no error of law and the determination should be upheld.

7. Mr Raza for the Appellant applied for leave to amend the grounds of appeal to include an assertion that the judge had failed to consider Home Office guidance published on 18 November 2020 as to the discretionary nature of refusals under paragraph S-LTR 4.2 of Appendix FM of the Immigration Rules. The application was prefigured in his skeleton argument and was not opposed by Ms Cunha. In those circumstances, we indicated that we were content to hear argument on this point.

Submissions

8. Mr Raza for the Appellant relied on the grounds of appeal and the grant of permission to appeal. He drew attention to the changed legal landscape since Judge Dean's decision had been promulgated, i.e., DK & RK (ETS: Secretary of State for the Home Department evidence; proof) India [2022] 00112 (IAC), a departure from SM and Qadir (ETS – Evidence – Burden of Proof) [2016] UKUT 229 (IAC), upheld in Majumder & Qadir v Secretary of State for the Home Department [2016] EWCA Civ 1167. The Upper Tribunal had considered that the Respondent's evidence about ETS fraud had shown a case to answer, and not by a narrow margin: "The real position is that mere assertions of ignorance or honesty by those whose results are identified as obtained by 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 a true one."

9. Mr Raza submitted that DK & RK nevertheless did not discount the possibility of an individual's testimony proving sufficient to show that the overall burden of proof had not been met by the Respondent. As noted at [18] of Majumder & Qadir (above): "The Upper Tribunal accepted (at [69]) the submission of the Secretary of State, that in considering an allegation of dishonesty the relevant factors included the following: what the person accused had to gain from being dishonest; what he had to lose; what is known about his character; the cultural environment in which he operated; how the individual concerned performed under cross examination, and whether the Tribunal's assessment of that person's English language proficiency is commensurate with his or her TOEIC scores and whether his or her academic achievements were such that it was unnecessary or illogical for them to have cheated".

10. The correct approach in long residence cases was that a curtailment of leave to remain premised on ETS fraud would be overlooked if shown to have been mistakenly applied by the Respondent. If the Appellant succeeded it would be for the Respondent to decide the leave to remain to be granted, as in all Article 8 ECHR appeals.

11. Parts of Judge Dean's decision were not challenged by Mr Raza, in particular that the Respondent had discharged the initial legal burden, so that the burden had shifted to the Appellant. In the present appeal there had been no evidence of widespread cheating or that the relevant institution was a 'fraud factory'. That was the context for the determination of the Appellant's innocent explanation/ rebuttal. The Appellant had challenged the decision since it first arose.

12. But Judge Dean had given insufficient weight to that and had gone on to act irrationally by ignoring the fact that the Appellant had obtained his Master's degree in 2014, thereby demonstrating his proficiency in English. That evidence had not been properly treated. The judge had also failed to consider that there were no obvious reasons for the Appellant to cheat, e.g., it was clear that the Appellant had not been pressed for time and the award of his MBA showed that he was a genuine student.

13. The judge's approach had been to move straight to Article 8 ECHR outside the Immigration Rules, rather than to examine the Suitability refusal, which was discretionary. The determination was unsafe, even in the light of DK & RK (above), and should be set aside to be reheard *de novo*.

14. Ms Cunha for the Respondent relied on the rule 24 notice and submitted that there was no material error of law at all. RK & DK (above) applied. The judge had applied the correct framework and used the correct approach. The judge had adequately explained the difference between "questionable" and "invalid". It was not in dispute that the Appellant's results were invalid. The judge had been right to state that the Appellant had not produced any previous internationally recognised English language proficiency certificate, while accepting that the Appellant spoke English. As to the Appellant's false asylum claim, whilst it was said on his behalf that he had asked for it to be withdrawn prior to the hearing, there was no evidence that the Appellant had taken any action against his former solicitors for failing to follow his instructions. The judge had been entitled to give weight to the Appellant's making of a false claim.

15. The Appellant's claim that he had sought to pursue ETS was hollow. The only contact with ETS of which he had produced any evidence had been in 2017, some three years or more after the curtailment of his leave.

16. As to the Appellant's Article 8 ECHR claim, there was no dispute about the address anomaly between the Appellant and his claimed partner. There had been no evidence of paternity before the First-tier Tribunal. Suitability for Appendix FM purposes could not be established when ETS fraud had been found. Sustainable findings had been reached and explained. The appeal should be dismissed.

16. There was nothing further which Mr Raza wished to raise by way of reply.

Conclusions

17. The tribunal finds that there was no error of law in Judge Dean's decision, so that the appeal must be dismissed. The judge correctly determined first of all whether or not the Respondent had established a *prima facie* case, and then moved to a review of the Appellant's evidence. As was

accepted on behalf of the Appellant, it was not necessary for the judge to cite all of the relevant authorities as they are well-known. The applicable principles were followed. That was reinforced by the subsequent decision in DK & RK (above).

18. There was no error of fact in the judge's decision. The only evidence that the Appellant had raised any issue about his invalid TOEIC tests with ETS was dated 2017, long after the event, and not followed up. That evidence, such as it was, was made available to the panel but it had not been placed before the judge and there was no explanation for its earlier absence. It was correct for the judge to observe that the Appellant produced no *internationally recognised* English language proficiency certificate from his studies in Pakistan before he came to the United Kingdom. It was the case that the Appellant had submitted an asylum claim falsely asserting his same sex orientation, which was relevant to what was known about his character.

19. The Appellant had obtained an MBA degree in the United Kingdom, but that was in April 2014, i.e., some two years *after* the contested TOEIC test and so attracting little or no weight. Whilst we accept that the judge made no express reference to that particular document in his decision, it shed no real light on the Appellant's English language ability in 2012. Even if it had done so, there are many reasons why a person who is proficient in the English language might choose to employ the services of a proxy, as the judge noted with reference to MA (Nigeria) (ETS - TOEIC testing) [2016] UKUT 450 (IAC).

20. Insofar as Mr Raza submitted that the judge had failed to consider the Appellant's educational and vocational achievements as a whole when deciding whether or not he had cheated in his TOEIC test in 2012, we find no merit in that submission. The judge was evidently cognisant of the Appellant's achievements in the UK as there is reference to those achievements throughout his decision: [10], [13] and [21]. The Respondent had not asserted that the college at which the test was taken was a 'fraud factory'. Nor did the judge. The approach which the judge adopted, taking account of relevant matters which weighed for and against the allegation that the Appellant had cheated, was precisely the approach required by [18] of Majumder v SSHD, as set out above.

21. Mr Raza's additional ground of appeal concerned the absence of any reference in the judge's decision to the discretionary

nature of a refusal under paragraph S-LTR 4.2 of the Immigration Rules. We accept that the judge did not make reference to the fact that a refusal under this paragraph of the Rules is discretionary, but we agree with Ms Cunha that any such lacuna in his reasoning process was immaterial to the outcome. The Appellant was evidently unable to succeed under the Rules because he had not accrued sufficient lawful residence and, on the judge's findings, the curtailment in 2014 had been for good and proper reason. Any consideration of S-LTR 4.2 would therefore have been otiose to the judge's consideration of whether the appellant could succeed under the Rules. And we cannot see how that lacuna in the judge's reasoning was disadvantageous to the appellant in terms of the wider Article 8 ECHR analysis the judge went on to conduct. He correctly proceeded on the basis that the Appellant was unable to meet the Rules and he weighed the Appellant's past dishonesty as part of his assessment of proportionality. In substance, therefore, the judge reached the correct conclusion inside the Rules and left nothing out of account when he came to consider Article 8 ECHR.

22. Nor was there any error of fact in the judge's examination of the evidence served in support of the Appellant's Article 8 ECHR claim. There was indeed no evidence of paternity and no corroboration of the claimed family life between the Appellant and his recently-acquired partner. The judge had been entitled to treat that social connection as part of the Appellant's private life. There was no challenge to the judge's findings that Appellant could reintegrate in Pakistan. There had been no claim of exceptional circumstances.

23. Nor was there any error in the judge's approach to the Article 8 ECHR claim. Once the judge had found that the Appellant had failed to rebut the TOEIC fraud allegation, the curtailment of the Appellant's leave to remain in 2014 stood and the long residence claim necessarily failed. That left consideration of Article 8 ECHR outside the Immigration Rules.

24. Mr Raza's criticism of the decision seemed predicated on the basis that the decision needed to have been longer. That is not so. The judge's decision was incisive as well as cogent and concise, and explained precisely to the Appellant why his appeal had failed. Nothing about the judge's findings can be characterized as being against the weight of the evidence or otherwise erroneous.

25. In the tribunal's judgment the First-tier Tribunal Judge reached sustainable findings, in the course of a decision and reasons

which securely resolved the issues. If the Appellant wishes to assert with reference to new evidence that his removal would be contrary to Article 8 ECHR, the proper course is for that evidence to be placed before the Secretary of State in support of a fresh human rights claim.

DECISION

The Appellant's appeal to the Upper Tribunal is dismissed.

There was no material error of law in the First-tier Tribunal's decision and reasons, which stands unchanged.

Signed **Dated** **6** December 2023

R J Manuell
Deputy Upper Tribunal Judge Manuell