



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM**  
**CHAMBER**

Case No: UI-2023-004904

First-tier Tribunal No:  
HU/06844/2019

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**

20<sup>th</sup> December 2023

**Before**

**UPPER TRIBUNAL JUDGE PITT**

**Between**

**Mr Sayeed Khan Mohammed**  
**(NO ANONYMITY ORDER MADE)**

Appellant

**and**

**The Secretary of State for the Home Department**

Respondent

**Representation:**

For the Appellant: Mr Ahmed, Counsel, instructed on Direct Access  
For the Respondent: Mr Melvin, Senior Home Office Presenting Officer

**Heard at Field House on 14 December 2023**

**DECISION AND REASONS**

1. This is an appeal against the decision issued on 12 September 2023 of First-tier Tribunal Judge Dineen which refused the appellant's appeal brought on Article 8 ECHR grounds.

## **Background**

2. The appellant is a citizen of India. He was born on 9 April 1983.
3. The appellant came to the UK with leave as a student on 2 February 2011. He was granted leave until 4 April 2015. He was told that his leave would be curtailed on 16 August 2013 because the licence of his college was revoked.
4. He applied for further leave on 2 April 2015. That application was refused on 17 September 2015 because the suitability criteria were not found to be met, specifically S-LTR.4.2.. This was because the respondent considered that the appellant had used a proxy for a TOEIC test taken in 2012.
5. The refusal of 17 September 2015 did not, initially, afford the appellant an in-country right of appeal. He made an application for permission to apply for judicial review, was refused, pursued the matter to the Court of Appeal and his case was then stayed behind the ETS litigation which culminated in Ahsan v SSHD [2017] EWCA Civ 2009. A consent order led to a new decision refusing leave to remain on Article 8 ECHR grounds on 26 March 2019. It is that decision which underpins these proceedings.
6. The appellant appealed against the decision of 26 March 2019. The appeal was dismissed by First-tier Tribunal Judge Gibbs on 29 July 2019. The Upper Tribunal found an error and on remittal the appeal was allowed in a decision of First-tier Tribunal Judge Apted dated 12 December 2022. That decision was also set aside by the Upper Tribunal and, after remittal, was again refused by Judge Dineen in the decision issued on 12 September 2023.
7. Judge Dineen refused the appeal, finding as followed:
  - "29. I have considered all the evidence and submissions in the appeal in the round, whether or not specifically referred to in this decision, which should be read as a whole, as set out above and below.
  30. My findings are as follows.
  31. As to the appellant's alleged cheating in his TOEIC tests, I take into account his detailed evidence of visiting the test centre and what took place there, contained in paragraphs 12 - 23 of his statement referred to above.
  32. However I bear in mind that attendance at the centre does not preclude the use of a proxy at the centre for the tests, whether or not any such proxy were to have acted in the presence of the appellant.

33. I take into account that a person who has a good command of English may nevertheless wish to employ a proxy for many different reasons; for example to deal with such aspects of the language, written or oral, which may give rise to difficulty,, or to make doubly sure of success in the tests, or to minimise the trouble and effort of taking the tests.

34. I bear in mind the authority of **DK and RK [2022] UKUT 00112** to the effect that the generic evidence currently tendered by the respondent is amply sufficient to discharge the burden of proof and so requires a response from any appellant whose test entry is attributed to a proxy.

35. The evidence provided by the look up tool in the present case is consistent with the details, including those of the appellant's passport, except for the erroneous description that he is of UK nationality. As noted in the Upper Tribunal determination remitting his appeal, a previous issue as to the misspelling of his name, has fallen away.

36. I am not satisfied that the misattribution of his nationality is other than an immaterial clerical error, because a UK national would not be in the position of requiring a TOEIC certificate; there is therefore no question, as I find, of the appellant having been confused with another entrant for the tests holding UK nationality, as there would not have been any other such entrant.

37. Thus I find that the respondent's evidence does not contain a material flaw regarding nationality.

38. There is no voice analysis evidence to call into question the respondent's case on technical grounds.

39. Taking account of all the above, I am not satisfied that the appellant has on the balance of probabilities rebutted the respondent's evidence.

40. Taking all matters in the round, I find on the balance of probabilities that the evidence of the respondent's look up tool is correct, and that the result relied on by the appellant is invalid."

### Grounds of Appeal

8. The core of the appellant's grounds is set out in paragraphs 15 to 19 of the written grounds. The appellant sought to rely on Majumder v SSHD [2016] EWCA Civ 1167, maintaining that the First-tier Tribunal had been required to address the considerations set out in [18] of that case:

"The UT accepted (at [69]) the submission on behalf 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 accused of dishonesty 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 are such that it was unnecessary or illogical for them to have cheated."

9. The First-tier Tribunal had failed to address those factors and also failed to provide reasons for rejecting the appellant's evidence of what happened when he took the test and his undisputed history of having been educated in English in India and studying to master's degree level in English in the UK.
10. Mr Ahmed did not pursue the grounds concerning the discretionary aspect of paragraph S-LTR.4.2..

### Discussion

11. The parties proceeded on the basis that the outcome of the Article 8 ECHR appeal turned on whether the appellant was found to have used deception in the TOEIC test in 2012.
12. Judge Dineen set out the appellant's case in [15] to [23]. He referred to the appellant's bundle of evidence at [15]. He noted that the appellant gave oral evidence and was cross-examined at [16]. The judge referred in [20] to the "detailed account" in the appellant's witness statement of what happened when he attended the test centre. The First-tier Tribunal set out again in [31] that the appellant's detailed evidence of going to the test centre was taken into account. At [21] Judge Dineen recorded that the appellant studied in English in India and obtained a master's degree in English in the UK, also noting the appellant's submission that this meant that he had no need to use a proxy. It is unarguable that Judge Dineen had the material elements of the appellant's case in mind when making his decision.
13. Having taken into account the appellant's evidence on attending the test centre, Judge Dineen gave reasons for not placing weight on that evidence in [32]. He considered that attending the test centre was not determinative of whether a proxy was used. As above, it is not the case that the First-tier Tribunal failed to take this part of the evidence into account. Paragraph 15 of the grounds refers to an absence of "cogent reasons" for rejecting the evidence on attendance at the test centre. That submission fails to address what Judge Dineen found which was not that the appellant did not attend the centre but that this was not determinative as to whether a proxy was used. I did not read paragraph 15 as attempting to argue that the judge's reasoning was perverse. If that was the intention, it did not appear to me to identify how that high threshold could be met or show that it was not open to the First-tier Tribunal to find that mere attendance was not sufficient to show that deception had not been used.
14. Judge Dineen also gave reasons for not placing weight on the appellant's level of English in [33]. Paragraph 19 of the grounds is not correct in asserting that no reasons were given on this aspect of the appellant's case.
15. Judge Dineen found that an incorrect reference in the look-up tool to the appellant being British was a clerical error. The ground only disagree with this finding and they were not pursued at the hearing.

16. I did not accept that the factors identified in [18] of Majumder had to be addressed in terms by the First-tier Tribunal. The material parts of the appellant's evidence had to be assessed and reasons given for the weight placed on them. As set out above, this is what Judge Dineen did. In [18] of Majumder the Court of Appeal was summarising the approach taken by the Upper Tribunal in that case with which both parties had agreed. The Court of Appeal was not making a legal decision on those specific matters or in any way setting them out as a check list that a decision maker had to take into account for an assessment to be lawful.
17. For all of these reasons it was not my view that the decision of Judge Dineen disclosed a material error of law.

Directions

18. The decision of the First-tier Tribunal dismissing the appeal does not disclose an error of law and shall stand.

S Pitt  
Upper Tribunal Judge Pitt  
Judge of the Upper Tribunal  
Immigration and Asylum Chamber

Dated: 14 December 2023