



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

**Case No: UI-2022-005255**  
**First-tier Tribunal No:**  
**PA/53306/2021**

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**  
**On the 15 August 2024**

**Before**

**UPPER TRIBUNAL JUDGE LINDSLEY**

**Between**

**BURHAN UDDIN CHOWDHURY**  
**(NO ANONYMITY ORDER MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr H Youssefian, of Counsel, instructed by Hubers Law

For the Respondent: Mr N Wain, Senior Home Office Presenting Officer

**Heard at Field House on 6 August 2024**

**DECISION AND REASONS**

*Introduction*

1. The appellant is a citizen of Bangladesh born on 25<sup>th</sup> January 1987. He arrived in the UK on 23<sup>rd</sup> April 2010 with leave to enter as a Tier 4 student migrant, but leave was subsequently refused due to a change of circumstances. However, the appellant appealed this decision and was successful which led to his being granted leave to enter as a Tier 4 student migrant on 17<sup>th</sup> May 2010 until 31<sup>st</sup> August 2013. His leave to remain was extended in this capacity until October 2016, but then was curtailed to expire on 24<sup>th</sup> June 2014 without a right of appeal because the Secretary of State had received information that he had cheated in

his English TOEIC test and submitted a false certificate. The appellant made an asylum and human rights claim on 2<sup>nd</sup> February 2018. This application was refused on 14<sup>th</sup> May 2021. His appeal against the decision was dismissed by First-tier Tribunal Judge GJ Ferguson after a hearing on 7<sup>th</sup> June 2022 in relation to the protection/asylum claim but allowed on human rights grounds relating solely to his being put in the same position as he would have been had he not been accused of TOEIC cheating.

2. Permission to appeal was granted and I found that the First-tier Tribunal had erred in law and set aside the decision allowing the appeal on Article 8 ECHR grounds for the reasons set out in my decision which I append as Annex A to this decision. I preserved the findings dismissing the appeal on asylum grounds and also the findings at paragraph 58 of the decision of the First-tier Tribunal with respect to Article 8 ECHR, that the claimant could not succeed in his appeal under paragraph 276ADE(1)(vi) of the Immigration Rules because he would not have very significant obstacles to integration if returned to Bangladesh as he has relatives there who can help him integrate whilst he seeks work, and any medication he requires is available in Bangladesh.
3. The matter came before me to remake the appeal, the sole issue being whether the respondent had shown on the balance of probabilities that the appellant had cheated in his TOEIC test taken on 24<sup>th</sup> July 2013 at Eden College.

#### *Evidence & Submissions - Remaking*

4. The relevant evidence of the appellant can be summarised from his two statements and oral evidence as follows.
5. The appellant came to the UK on 23<sup>rd</sup> April 2010 as a Tier 4 student migrant and initially studied for an HND at Whitechapel College in hospitality management, but the college had its licence revoked and so he had to find a new college. In his supplementary witness statement he says that at his appeal in October 2010 he gave evidence in English, but at the hearing before me, in oral evidence, he said he could not remember this appeal. The appellant explained that he had come to the UK with the equivalent qualifications to A levels, and he did some of these studies in English. He took his TOEIC test so that he could obtain a CAS to study at the College of Advanced Studies, and started to study there in September 2013. The appellant claims that he was asked to leave this college because of the issue with the TOEIC test; but was informed that he had ceased to study with them in a letter from the Home Office which curtailed his leave in June 2014. The college refused to refund his fees. He was unable to find another college due to the issue with his TOEIC test, and did not study further. He is adamant that he did not cheat in his TOEIC test and that he took the test himself and not via a proxy. He said that he took four tests over two days for his TOEIC exam. He points to the fact that he did a previous English test, prior to the TOEIC one, with City & Guilds which he passed. When he

was accused of cheating by the Home Office he was very afraid as a friend was taken into immigration detention following receipt of a similar letter so he went into hiding in the UK with a friend or relative in Birmingham who supported him, and went out of contact with the Home Office. He did no further studies. He remained out of contact with the Home Office until he made his asylum claim in 2018. During his asylum interview, which was conducted in Sylheti, he said that the languages that he could speak were Bengali and a bit of Hindi. He did not mention English but this does not mean he could not speak English. He maintains that the evidence in support of his asylum claim was genuine, notwithstanding the fact that the First-tier Tribunal found that he had manufactured evidence and he was not a credible witness. He did not know why his solicitors had not followed up the request for the tape from the TOEIC test since November 2021.

- 6.** Mr Wain submitted that he relied upon the reasons for refusal letter and the respondent's review, and also made oral submissions. The totality of the submissions for the respondent were, in short summary, as follows. The respondent's supplementary bundle provides sufficient evidence to show that it was highly probable that the appellant had cheated in his TOEIC test. This evidence included the appellant's own results taken from the spreadsheet/ look up tool which show that his test, taken at Eden College, had been treated as invalid by ETS on the basis that they had detected that his test was taken by a proxy through voice verification software. Further data shows that for the day the appellant's test was taken at Eden College 70% were invalid and the remaining 30% questionable on the same basis. Reliance was placed on the expert evidence of Professor Peter French which concluded that the evidence of ETS was reliable. Reliance was also placed on the Project Façade criminal enquiry into abuse of TOEIC at Eden College. On the basis of this evidence it was submitted that there was substantial evidence that the appellant had obtained his TOEIC qualification through use of a proxy test taker. As a result it was rightly concluded that the appellant had been involved with an attempt to defraud the Home Office and that it was not conducive to the public good for him to be permitted to remain.
- 7.** Mr Wain submitted that the appellant had not produced a credible response to the allegation of deception which undermined the strength of this evidence. The appellant had no credible documents to support his case, he had not produced the decision of the First-tier Tribunal from 2010 to support his contention that he spoke English at that appeal, the document relating to his Bangladeshi qualifications does not show his English level, and further he had not taken a test after the TOEIC one to show that it truly reflected his level of English. His witness statements give no details of the TOEIC tests that he claims he took. He had also gone to ground after receiving notification that the Home Office believed he had cheated which was not the action of a person who had been wrongfully accused, but rather that of a person who had cheated and was afraid of being caught and removed from the UK. We have no

evidence of what he did during the four year period between 2014 and 2018 when he claimed asylum. He had not listed English as a language he could speak in his asylum interview when asked directly about those languages he could speak. He had not pursued any sort of complaint against ETS and his solicitor had not obtained the voice records from the test. Further he had been found not to be credible and to be a person who manufactured evidence in preserved findings of the First-tier Tribunal when determining his asylum appeal. It is therefore contended that the respondent had made out the case that the appellant had obtained his TOEIC certificate by use of a proxy test-taker, and that deception was shown on the balance of probabilities.

- 8.** Mr Youssefian submitted that the respondent had not shown on the balance of probabilities that the appellant had used deception. Whilst the look up tool is generally a valid document it is not infallible. Mr Youssefian emphasised that the burden was on the respondent. The respondent's case is not that the appellant did not attend the test but that he used a proxy whilst there, so evidence of how the appellant got there and details of the test would be of no assistance. Mr Youssefian emphasised that there was very good evidence of the appellant having a good level of English at the time of his TOEIC test as he took a City & Guilds test in March 2013 in which he passed the communications element "first class". Evidence of the appellant's English level after the event would not be as good as this evidence, and it is irrelevant that he did not mention his English ability in his asylum interview or produce his appeal determination from 2010. The appellant clearly had no need to cheat in his TOEIC test and so would not have done so as he would have had a lot to lose. His solicitors did request the appellant's voice recordings from ETS and could do nothing further if they were not provided.
- 9.** At the end of the hearing I reserved my decision.

#### *Conclusions - Remaking*

- 10.** Applying DK & RK (ETS: SSHD evidence; proof) India [2022] UKUT 112 the burden of proving the fraud or dishonesty is on the Secretary of State and the standard of proof is the balance of probabilities; and the evidence currently being tendered on behalf of the Secretary of State in ETS cases 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. Further, 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 remains not merely the probable fact, but the highly probable fact.
- 11.** Varkey & Joseph (ETS - Hidden Rooms) India [2024] UKUT 142 upholds DK & RK finding that it is clear beyond peradventure that where there is evidence from ETS that points to the test relied upon by the individual

as having been taken by someone other than that person, that is strong evidence that will weigh against the individual and calls for a credible explanation. Further, contemporaneous evidence to support an account remains important and the absence of documents that should be capable of being produced to support an individual account, is a factor that is capable of weighing against the individual. If the account given by witnesses cannot be tested by reference to other evidence before the Tribunal, the judge is likely to place greater reliance upon their assessment of the credibility of the witness overall, and the inherent plausibility (or implausibility) of their account.

- 12.** Directing myself in accordance with DK & RK and Varkey & Joseph as set out above I start from the position that the ETS evidence suffices to show dishonesty on the part of the appellant unless his evidence to the contrary goes beyond mere assertion of honesty and amounts to a credible explanation, and that in the consideration of the credibility of the appellant's explanation the credibility of the appellant as the sole witness in this appeal will be relevant.
  
- 13.** I accept that the appellant has demonstrated that he had sufficient English ability to have taken the TOEIC test in June 2013 due to having obtained a first class pass in spoken ESOL at EMD Ltd on 21<sup>st</sup> March 2013, some four months before his TOEIC test. Whilst it is a little odd that he did not claim to speak English when asked about his languages at his asylum interview that question was in a very different context and he may not have seen the relevance of English. I accept that the appellant has failed to produce a copy of the 2010 decision of the First-tier Tribunal before which he asserts he gave evidence in English and that his Bangladeshi Higher Secondary Certificate for 2007 does not provide explicit evidence of his English ability but I find the "First Class Pass" from the City & Guilds is good evidence of an appropriate English ability, and I note that Mr Wain did not submit otherwise. I also agree with Mr Youssefian that a later English test taken after the TOEIC test would not be as good evidence that the appellant had no "standard of English language" related reasons to cheat.
  
- 14.** However I do not find that a sufficient level of English and mere assertions of honesty suffice to show that the appellant has produced a credible explanation which undermines the strength of the evidence of the respondent. I find that the appellant has produced no evidence of any value to support his claim that he genuinely took the TOEIC test beyond that going to his standard of English. There is no detailed description of the test he took and how it was done, and his solicitors have not pursued ETS's representatives for the relevant voice records since sending two emails requesting them in October and November 2021. I also agree with the submission of Mr Wain that the action of the appellant in going into hiding for four years after receiving the letter in which the respondent accused him of having acted deceitfully by submission of the TOEIC certificate and doing nothing to resolve the issue and recommence studying is not one of a person who believed that they had been wrongfully accused of cheating and was a genuine

student in the UK. Further, the weight that can be given to the appellant's assertions of innocence are seriously undermined by the assessment of his credibility by the First-tier Tribunal Judge Ferguson who found that he "is someone who is capable of manufacturing false evidence to support an immigration application" and found overall found that he was not a credible witness.

- 15.** For the reasons above, taking all of the evidence before me into account, I find that the respondent has shown on the balance of probabilities that the appellant employed a proxy test taker to take his TOEIC English test in 2013 and that he therefore employed deception when applying for leave to remain in the UK as a student. As such there is no basis for him to be permitted leave to remain outside of the Immigration Rules on human rights grounds.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
2. I set aside the decision of the First-tier Tribunal allowing the appeal on the basis that deception was not established by the Secretary of State but preserved the finding that the asylum and humanitarian protection appeal was dismissed.
3. I remake the appeal by dismissing it on human rights grounds.

**Fiona Lindsley**

Judge of the Upper Tribunal  
Immigration and Asylum Chamber

**6<sup>th</sup> August 2024**

**Annex A: Error of Law Decision**

**DECISION AND REASONS**

*Introduction*

1. The claimant is a citizen of Bangladesh born on 25<sup>th</sup> January 1987. He arrived in the UK on 23<sup>rd</sup> April 2010 with leave to enter as a Tier 4 student migrant. His leave was extended in this capacity until October 2016, but then curtailed to expire in June 2014 because the college had informed the Secretary of State that he had ceased to attend. On 16<sup>th</sup> July 2014 the Secretary of State informed the claimant that he had received information that he had cheated in his English TOEIC test, and he was then unable to make a further application as a student. The claimant made an asylum and human rights claim on 2<sup>nd</sup> February 2018. This application was refused on 14<sup>th</sup> May 2021. His appeal against the decision was dismissed in relation to the protection/asylum claim but allowed on human rights grounds relating solely to his being put in the same position had he not been accused of TOEIC cheating by First-tier Tribunal Judge GJ Ferguson after a hearing on 7<sup>th</sup> June 2022.
2. Permission to appeal was granted by Upper Tribunal Judge Kopieczek on 15<sup>th</sup> December 2022 on the basis that it was arguable that the First-tier judge had erred in law in applying the case of DK & RK (ETS: SSHD evidence; proof) India [2022] UKUT 112. The listing of the case was adjourned to wait for the decision of the Presidential Panel in Varkey & Joseph which was promulgated on 11<sup>th</sup> March 2024 and reported as Varkey & Joseph (ETS - Hidden Rooms) India [2024] UKUT 142 on 17<sup>th</sup> May 2024.
3. The matter came before me to determine whether the First-tier Tribunal had erred in law, and if so whether any such error was material and the decision should be set aside.

*Submissions - Error of Law*

4. In grounds of appeal it is argued for the Secretary of State, in short summary, as follows. It is argued that the conclusion in DK & RK, that it was highly probable that those for whom the evidence of the Secretary of State showed they have cheated in their TOEIC tests had indeed done so, was not taken into account in this decision when assessing whether the Secretary of State had proven dishonesty on the balance of probabilities. In this appeal the ETS test was deemed not valid and there was relevant evidence, which the First-tier Tribunal failed to consider, that Eden College, where the claimant took his test, was a focus of organised and widespread abuse with details provided of the way in which the cheating was carried out. It is argued that the claimant had not shown the Secretary of State's evidence was flawed. The only factor in his favour was his standard of English and this did not suffice to show that the Secretary of State had now shown that he had cheated to the required standard of proof.

5. In a Rule 24 notice and in oral submissions from Mr Sharma it is argued that there is no error of law in the decision of the First-tier Tribunal because it is not an error to take account of the claimant's standard of English when considering whether he cheated. DK & RK was cited by the First-tier Tribunal. It is argued that the First-tier Tribunal did not solely rely upon the claimant's level of English at the time he took his TOEIC test in allowing the appeal, he also placed reliance on the fact that he had passed a similar level English test which showed in addition to the claimant having the correct English level that he was able to pass a relevant examination. Mr Sharma also argued that the First-tier Tribunal had clearly directed itself by reference to DK & RK and given the evidence of the Secretary of State weight, and had understood that the Secretary of State's evidence not only included an invalid test for the claimant but also included Project Façade evidence. It was not irrational for the First-tier Tribunal to have made its decision in the way that it did, and the decision should therefore be upheld.
6. At the end of the hearing I informed the parties that I found that the First-tier Tribunal had materially erred in law. I did not give an oral judgement but set out my reasons in writing below. Mr Sharma argued that the remaking hearing should be adjourned and remitted to the First-tier Tribunal. He argued that he wished to file a further witness statement for the claimant and possibly some expert evidence given the findings in Varkey & Joseph. Mr Terrell argued that the hearing could take place immediately in the Upper Tribunal.
7. I found that the extent of remaking would not be that large, given that I found that I could preserve all the findings relating to the protection claim at paragraphs 24 to 46 of the decision and those relating to the Article 8 ECHR at paragraph 58 of the decision, thus meaning the only issue in the appeal would be whether the Secretary of State had established that the claimant used deception in his TOEIC test. As a result it was appropriate to retain the remaking appeal in the Upper Tribunal as the extent of remaking was not great. I found however that given that Varkey & Joseph had only been put on the Upper Tribunal website as a reported case yesterday and is some 36 pages long that it would be fair to adjourn the remaking hearing so that the decision could be considered by the claimant and his representatives, and consideration could be given as to whether any further evidence was required.

### *Conclusions - Error of Law*

8. DK & RK is cited by the First-tier Tribunal at paragraphs 48 -49 of the decision. At paragraphs 50 and 52 it is found that the Secretary of State's ETS evidence "carries weight towards the conclusion that "a proxy test taker had taken the claimant's test. At paragraph 51 of the decision reference is made to the evidence that 70% of people at his college had tests considered invalid on the day the claimant took his test, providing reason to believe that the evidence regarding cheating at Eden College had been considered. The First-tier Tribunal directs



itself properly at paragraph 52 of the decision that the Secretary of State's evidence will show that it is a "highly probable fact" that those who are identified as having obtained a result through a proxy did indeed do so. I find that the First-tier Tribunal properly directs itself by reference to DK & RK.

9. I find however that the First-tier Tribunal then either fails to follow these directions and/or the decision is insufficiently reasoned thereafter. At paragraph 54 a first class pass test result in an ESOL examination taken three months before the TOEIC test is found by the First-tier Tribunal to show that the claimant had very good English ability at the time of his Eden College test, and it is this factor which leads the First-tier Tribunal to conclude that he would have not needed to employ a proxy to pass his TOEIC test. Further, it is found, that the claimant's English language was good enough for him to be questioned in English by the Immigration Service at the time of his arrival. Whilst it is acknowledged that the claimant could have used a proxy test taker when able to sit the examination because it might have been more convenient it is considered that this would be unlikely as the claimant had a proven ability to pass English tests as well as to speak English. These factors alone are identified as sufficient to counter the evidence of the Secretary of State, and this was despite it also being acknowledged that the claimant "is someone who is capable of manufacturing false evidence to support an immigration application", as it was found he had done in his asylum application. I find that the consideration at paragraph 56 of the decision fails to explain how the claimant knowing he is good enough at English to pass as test puts the Secretary of State's evidence that shows it is a highly probable fact that the claimant did cheat in any doubt, particularly given that the claimant was found to have manufactured false evidence in support of another application, and fails thereby to properly apply DK & RK.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
2. I set aside the decision of the First-tier Tribunal allowing the appeal on the basis that deception was not established by the Secretary of State.
3. I adjourn the remaking of the appeal.

Directions:

1. Any updating evidence relating to whether the claimant cheated in his TOEIC English examination in June 2013 on which either party wishes to rely must be filed with the Upper Tribunal and served on the other party ten days prior to the remaking hearing.

**Fiona Lindsley**

**Case No: UI-2022-005255**  
**First-tier Tribunal No: PA/53306/2021**  
Judge of the Upper Tribunal  
Immigration and Asylum Chamber

**21<sup>st</sup> May 2024**