Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/03294/2020**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On the 2nd June 2021	**On the 16th June 2021**

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

MD SHAHA AZIZ
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the Appellant: Mr Slatter, Counsel instructed by JKR Solicitors
For the Respondent: Mr Clarke, Senior Home Office Presenting Officer

This has been a remote hearing to which both parties have consented. The form of remote hearing was video by Microsoft Teams (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. I did not experience any difficulties, and neither party expressed any concern, with the process.

DECISION AND REASONS

Background

1. The appellant is a citizen of Bangladesh born on 8 May 1980, who has been in the UK since 2009.

2. In 2014, whilst in the UK with leave as a Tier 4 student, the appellant was served with a removal notice. He was informed that Educational Testing Service (ETS) had identified an anomaly with his speaking test taken on 21 August 2012 at Queensway College; that the scores from the test were cancelled; that the respondent had concluded that the certificate from ETS was obtained fraudulently; and that he was liable to removal under section 10 of the Immigration and Asylum Act 1999.

3. Following protracted judicial review proceedings, and further submissions made by the appellant, the respondent made a decision on 19 February 2020 ("the respondent's decision") refusing the appellant's human rights claim which generated a right of appeal to the First-tier Tribunal.

4. The respondent's decision considered whether the appellant was entitled to a grant of leave under paragraph 276ADE(1). The respondent stated that the application fell for refusal on grounds of suitability under paragraph 276ADE(1)(i) because section S-LTR.1.6 (and also S-LTR2.2(a)) was applicable. No reason was given for applying S-LTR2.2(a). The reason it was said that S-LTR.1.6 applied was that the respondent was satisfied that the appellant had fraudulently obtained a certificate in respect of an ETS test taken on 21 August 2012 by use of a proxy test taker. The respondent's decision states that because of this the appellant's scores for tests taken on 21 August 2012 and 23 August 2012 had been cancelled. The respondent stated that she was satisfied that deception was used when, in an application on 27 August 2013 for leave to remain as a Tier 4 student, the certificates for these tests were submitted to the respondent.

5. The respondent also stated that the requirements of sub-paragraphs (iii) to (vi) of paragraph 276ADE(1) were not met and there were not exceptional circumstances that would render refusal of leave a breach of article 8 ECHR.

6. The appellant appealed against this decision to the First-tier Tribunal where his appeal came before Judge of the First-tier Tribunal Beg ("the judge"). In a decision promulgated on 3 February 2021 the judge dismissed the appeal. The appellant is now appealing against this decision.

Decision of the First-tier Tribunal

7. The judge directed herself, at paragraph 22 of the decision, that, with respect to the burden of proof, there is a three stage process: first, the burden is on the respondent to adduce evidence to raise the issue of fraud; second, it then falls to the appellant to raise an innocent explanation which satisfies the minimum level of plausibility; and third, if that burden is discharged, it falls to the

respondent to establish on the balance of probabilities that the explanation is to be rejected.

8. The judge found that the respondent had discharged the initial evidential burden. She then turned to consider the appellant's "innocent explanation". The judge found the appellant to not be a credible witness. The following reasons were given for finding him to not be credible:

    a. The appellant stated that he did not make enquiries as to whether there were locations closer to his home to take the test and chose Queensway College because it was recommended by a friend whose younger brother took a test there. In paragraph 25, the judge found damaging to the appellant's credibility that (a) he did not make enquiries about other potential colleges, in particular to see if there was one closer to where he lived; and (b) he did not speak to his friends brother who took the test at Queensway to see if his test had also been cancelled.

    b. In paragraph 26 of the decision, the judge found it damaging to the appellant's credibility that he waited a week after discovering his test had been cancelled to visit Queensway College to ascertain what had happened (his telephone call, made after two or three days, not having been answered).

    c. In paragraph 27 the judge found damaging to the appellant's credibility (a) that he did not express shock or alarm at having been accused of deception; and (b) that he did not contact ETS to question why his test result was cancelled. The judge stated that it was reasonable to expect him to do this even if, as the appellant claimed, he was depressed and his grandfather in Bangladesh was in hospital.

    d. In paragraph 28 the judge found damaging to the appellant's credibility that he did not contact solicitors until six – eight weeks after being notified that his test had been cancelled.

    e. The judge also found, in paragraph 28, that the appellant's evidence about preparing for the English-language test was vague as he did not refer to any specific material that he used or to the length of time he prepared and studied for the test. The judge also found that his evidence about the classroom where the test took place was vague.

9. The judge concluded at paragraph 29, having given the reasons summarised above, that the appellant's explanation was "implausible."

10. In paragraphs 30-32 the judge summarised recent reports about ETS allegations of cheating by the National Audit Office, the All-Party Parliamentary Group (APPG) and the House of Commons Committee of Public Accounts.

11. In paragraphs 32-35 the judge considered a report (Project Façade- criminal enquiry into abuse of the TOEIC) about fraud at Queensway College. Amongst other things, this report stated that 70% of tests taken between 20 March 2012 and 5 February 2014 at Queensway College were found to be invalid. Based on this report, the judge found that there was cogent evidence of fraud being perpetrated at Queensway College.

12. The judge concluded that the appellant committed fraud in respect of the test taken on 21 August 2012. The judge stated that no test result was submitted by the respondent in respect of the test taken on 23 August 2012 and therefore he did not make a finding of deception in respect of that test. In paragraph 39 the judge stated that the appellant did not meet the suitability requirements under the immigration rules in respect of paragraphs 276B and 276ADE.

13. The judge then considered article 8 ECHR outside the Immigration Rules. The judge found that the appellant would not face obstacles integrating in Bangladesh and that his partner (and her son), who are of Bangladeshi heritage, could accompany him if they wished to do so.

The grounds of appeal

14. Ground 1: Not adjourning the appeal. The grounds submit that both parties sought an adjournment pending the Upper Tribunal's decisions in *RK and DK* but this was refused without explanation at the hearing (and the application was not even mentioned in the decision). The grounds argue that this was erroneous because (a) *RK and DK* would give guidance on the weight to give to the APPG and other reports; (b) it was unfair to not adjourn pending *RK and DK* and (c) the judge was required to give reasons for not acceding to the (joint) application.

15. Ground 2: Applying the wrong suitability test. Relying on the recent decision of the Upper Tribunal in *Mahmood (paras. S-LTR.1.6. & S-LTR.4.2.; Scope)* [2020] UKUT 00376 (IAC), the grounds submit that the judge failed to address the appellant's argument that the respondent should not have relied upon S-LTR1.6 when finding that the suitability requirements were not met.

16. Ground 3: Flawed credibility assessment. The grounds take issue with various aspects of the credibility assessment. It is argued that (a) the judge did not adequately (or at all) consider the appellant's detailed witness statement which gave a comprehensive account that showed why he did not engage in fraud; (b) the judge imposed his own view of credibility without having regard to differences in culture; (c) the judge failed to have regard to the consistency of the appellant's evidence; (d) the judge drew an adverse inference from the appellant waiting a week to visit the college after finding out he had been accused of cheating without the concern being put to the appellant; (e) the judge did not take into account the appellant's evidence that he did not know how to challenge ETS; and (f) the judge did not explain why he found the appellant's evidence to be vague or why more detail about how

he studied for a test (which he found very easy) would be expected when over eight years had elapsed since the test.

Analysis

17. I reserved my decision after hearing submissions from Mr Clarke and Mr Slatter on the three grounds summarised above. Having carefully considered these submissions alongside the evidence that was before the First-tier Tribunal, I have reached the conclusion, for the reasons set out below, that the judge materially erred by failing to adequately explain the basis upon which she concluded that the appellant had given an implausible account of taking the English language test on 21 August 2012. As I have allowed the appeal on this basis, I do not need to consider grounds 1 and 2.

18. With respect to ground 3, Mr Slatter reiterated the points made in the grounds.

19. Mr Clarke argued that the judge's assessment of the appellant's plausibility must be considered in the context of the judge having directed herself accurately to the legal issues to be determined (including the three stage shifting burden of proof) and of having considered all of the material evidence. He submitted that the judge correctly recognised that the respondent had discharged the initial evidential burden and that it fell to the appellant to give an innocent explanation. He argued that the judge considered the evidence in the round and was entitled to place weight on the vagueness of the evidence given by the appellant. He also made the point that the judge was plainly entitled to place significant weight on the respondent's Project Façade report on Queensway College which identified that 70% of tests taken between 20 March 2012 and 5 February 2014 were found to be invalid. Mr Clarke maintained that the evidence strongly pointed to the appellant having engaged in fraud, as found by the judge. Mr Clarke also emphasised that I should be slow to overturn findings of fact and allow perversity/irrationality challenges to a decision.

20. There are, as noted by Mr Clarke, numerous Court of Appeal case reminding judges to exercise restraint when examining reasons given by First-tier Tribunal judges. It is also well established - and in considering this case I have kept at the forefront of my mind - that caution must be exercised before interfering with findings of fact as well as inferences drawn from facts. See *Lowe v The Secretary of State for the Home Department* [2021] EWCA Civ 62. I have also kept in mind that "perversity" represents a very high hurdle. For a finding of fact to be perverse it must be a finding that, on any legitimate view, was not open to the judge. In other words, it must be wholly unsupported by the evidence.

21. It is also the case that even if some reasons given by a judge for finding an appellant not credible do not withstand scrutiny the overall conclusion

should stand if there are adequate reasons to support it. As stated in *HK v Secretary of State for the Home Department* [2006] EWCA Civ 1037:

> "Where a fact-finding tribunal has decided to reject evidence for a number of reasons, the mere fact that some of those reasons do not bear analysis is not, of itself, enough to justify an appellate court setting the decision aside. In such a case, the appellate court has to decide whether it would be just to let the tribunal's decision stand. That question will normally be answered by considering whether one can be tolerably confident that the tribunal's decision would have been the same on the basis of the reasons which have survived its scrutiny."

22. The judge gave several reasons for not believing the appellant. I consider each in turn, recognising the restraint/caution that I must exercise but also noting that this does not mean the judge's reasoning can escape any scrutiny.

    a. *Reason 1 (paragraph 25): The appellant relied on a friend's recommendation to take the test at Queensway College (where his friend's younger brother had taken a test) without making his own enquiries about other potential colleges, particularly those located close to him.* Queensway College is located close to where the appellant lived and was easily accessible by public transport (as set out in paragraph 25 of the appellant's witness statement). There was no reason for the appellant to search for a test centre closer to his home. I therefore do not accept that it was open to the judge to find it damaging to the appellant's credibility that he did not search for a test centre closer to his home.

    b. *Reason 2 (paragraph 25). The appellant did not contact his friend's younger brother to ask him whether his test results has also been cancelled.* It is not obvious why this is damaging to the appellant's credibility but I do not consider it to reach the threshold of irrationality. The appellant's evidence was that he was extremely upset by the allegation of fraud and it might be expected that he would reach out to a person he knew took a test at the same centre to see if they had had a comparable experience. The judge was therefore entitled to consider this as a factor undermining the appellant's account.

    c. *Reason 3. The appellant waited a week before attending Queensway College to investigate why he had been accused of fraud (paragraph 26).* I do not accept that there is a rational basis to treat this as damaging to the appellant's credibility. The appellant's evidence on this point, which it appears the judge accepted, is that a few days after receiving the removal notice in 2014 he tried to contact the test centre by phone and a few days thereafter (which was about a week after receiving the notice) he went in person to the centre where he spoke to someone in security who told him that the centre was now closed. This is not a significant delay: within a week of receiving the notice the appellant telephoned the centre and visited the site. It was not, in my view, rational to find that he delayed visiting the

centre at all, and certainly not that he delayed doing so to an extent that it was damaging to his credibility.

d. *Reason 4. The appellant never expressed in his evidence shock or alarm at being accused of deception (paragraph 27).* I do not accept that this conclusion was open to the judge because in his witness statement the appellant stated (in paragraph 41 of the statement) that he was "shocked, disappointed and offended" by the accusation that he cheated.

e. *Reason 5. The appellant gave no credible explanation as to why he did not contact ETS, and why he did not contact solicitors until 6-8 weeks, after he received the notice (paragraphs 27 and 28)*. The judge was, in my view, entitled to take this into account. The appellant claimed that he was depressed but there was no medical evidence before the First-tier Tribunal to support the contention that he was suffering from a depression that would impact his ability to take steps to uncover why he had been accused of cheating. Given the appellant's evidence as to how devastating the accusation was, it was open to the judge to find the appellant's account was undermined by his inaction.

f. *Reason 6. The appellant's oral evidence was vague about how he prepared for the test and the classroom where the test took place.* The judge noted in the decision that the appellant stated that he used "a couple of books" and looked online to prepare for the test and that the test took place in a medium sized room where he sat 3 metres from the next person. Whilst it is not clear to me how these answers are vague, it is not for me to replace my impression with that of the judge, who had the benefit of hearing oral evidence. I am not persuaded that the judge's findings about the vagueness of the appellant's evidence should be disturbed.

23. Although several of the judge's reasons for finding the appellant's account implausible survive scrutiny and are sustainable – including that the appellant's oral evidence was in parts vague (a point highlighted by Mr Clarke) - several other reasons, which appear to have been given significant weight by the judge, are not sustainable. I am not confident that the judge would have reached the same conclusion about the appellant's plausibility if she had only based her assessment on the reasons which have survived scrutiny. I therefore find that the decision cannot stand due to the unsustainability of the rationale for finding the appellant's account implausible.

24. As the appeal will need to be considered afresh with no findings preserved, having regard to paragraph 7.2(b) of the Practice Statements of the Immigration and Asylum Chambers of the First-tier Tribunal and Upper Tribunal, I have decided that the appeal should be remitted to the First-tier Tribunal.

Notice of Decision

The appeal is allowed.

The decision of the First-tier Tribunal involved the making of an error of law.

The decision is set aside and remitted to the First-tier Tribunal to be made afresh by a different judge.

Signed

D. Sheridan
Upper Tribunal Judge Sheridan
Dated: 3 June 2021