Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/09663/2019
HU/09665/2019
HU/09667/2019

THE IMMIGRATION ACTS

Heard at Field House
On the 9 June 2022

Decision & Reasons Promulgated
On the 19 July 2022

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

R S
S P (A MINOR)
R R P (A MINOR)
[ANONYMITY ORDER MADE]

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellants: Mr Taj Shah, solicitor with Taj Solicitors
For the respondent: Mr Tony Melvin, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants, a mother and her two minor children, appeal with permission from the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision on 17 May 2019 to refuse them leave to remain on human rights grounds, pursuant to paragraph 276ADE of the Immigration Rules HC 395 (as amended). The appellants are citizens of Bangladesh.

2. The position of the second and third appellants is dependent on that of the principal appellant ('the appellant' unless the context requires otherwise). The principal appellant's husband, who is also Bangladeshi, is not a party to this appeal. He, and the second appellant (who has now been in the UK for over 7 years and is a qualifying child) had separate pending applications outside the present proceedings.

3. **Anonymity order.** Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellants are granted anonymity. No-one shall publish or reveal any information, including the name or address of the appellants, likely to lead members of the public to identify the appellants. **Failure to comply with this order could amount to a contempt of court.**

4. **Mode of hearing.** The hearing today took place face to face, with oral evidence from the principal appellant.

Background

5. The principal appellant entered the UK as a Tier 4 (General) Student Migrant on 30 January 2011, and with extensions, was granted leave up to 19 March 2016, the last grant being on 13 May 2013.

6. On 29 August 2014, the respondent cancelled the extant leave served notice of the appellants' liability to detention and removal, following her discovery of deceit in the ETS/TOEIC certificate submitted with her application. There followed a judicial review process, with the application being reconsidered and the original decision upheld on 27 October 2014.

7. The second appellant was born in January 2015 and the third appellant in March 2017. The appellant's husband is also a citizen of Bangladesh and has no lawful basis of stay in the UK.

8. The judicial review proceedings were settled by a consent order on 17 January 2019 in which the respondent agreed to make a new decision. There were no fresh representations: the applications were reconsidered on the basis of information already held by the respondent.

Refusal letters

9. The respondent refused the principal appellant's application on grounds of suitability, with reference to section S-LTR.2.2.(a) of Appendix FM. The appellant had submitted a ETS/TOEIC certificate from a test taken at Queensway College on 27 March 2013. ETS subsequently declared the certificate to be invalid because it considered, having listened to the speaking test, that the appellant's test had been taken by a proxy test taker.

10. The respondent was not satisfied that there would be very significant obstacles to the appellants reintegrating in Bangladesh if returned: see paragraph 276ADE(1)(iv). Nor did she consider that exceptional

circumstances had been shown which would render return unjustifiably harsh for these appellants or another family member. The appellants' family life together and with the principal appellant's husband, the father of the second and third appellants, could be continued in Bangladesh.

11. The appellants appealed to the First-tier Tribunal, which dismissed their appeals. They then appealed with permission to the Upper Tribunal.

Error of law decision

12. The decision of the First-tier Tribunal was set aside on 13 November 2020, with remaking directed to be retained in the Upper Tribunal. In my decision, I said that 'as the principal appellant's credibility remains in issue, this is not an appeal which can be decided on the papers without a further hearing'. I gave directions, including an opportunity to adduce further evidence if so advised, pursuant to rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended). No findings of fact or credibility in the First-tier Tribunal decision were preserved.

13. At a hearing on 15 February 2021, the substantive remaking hearing was adjourned to await the promulgation of what became *DK and RK (India) (ETS:SSHD evidence, proof)* [202] UKUT 00112 (IAC). That decision was promulgated on 25 March 2022.

14. On 17 May 2022 the Upper Tribunal sent out a notice of hearing for 9 June 2022, which stated (as normal) that the Upper Tribunal would not consider evidence which was not before the First-tier Tribunal 'unless the Upper Tribunal has specifically decided to admit that evidence'.

15. No new evidence has been adduced on the appellants' behalf and no application was made at any time for the admission of additional evidence.

16. That is the basis on which these appeals now come before me for remaking afresh.

Upper Tribunal hearing

17. The appellant gave oral evidence, adopting her witness statement prepared for the First-tier Tribunal hearing, which was undated, but which she signed and dated at the hearing. In that witness statement, the appellant 'vehemently reject[ed]' the assertion of deception. She had provided evidence of her academic achievements before the TOEIC test and contended that she had no need or incentive to cheat in her ETS test. I will deal with those when assessing the evidence.

18. The appellant said that she chose to sit a TOEIC test, instead of IELTS which she had taken previously, because she was running out of time to make a timely application to extend her student leave, and friends recommended TOEIC as likely to give a good result and a quick turn round for the certificate she needed.

19. The appellant was living in London. Friends referred her to an examination booking agent, Study Concept, which was based in East London. Following a telephone call to Study Concept, she was advised that they provided English language examinations through affiliated colleges, and specifically, Queensway College in Walthamstow, East London.

20. Study Concept had examination slots available on 27 and 28 March 2013 at Queensway College. The appellant was advised to attend on 27 March with her passport and pay the fee. The appellant says there were no available ETS/TOEIC dates in Birmingham before the expiry of her visa, so she decided that she would go to London to sit the examination.

21. She went to Queensway College and paid £170 for the examination, which she sat by logging in to an assigned computer. She was directed to click the 'enter' key on the keyboard and begin. The test took about an hour, including reading a piece of text, emphasising pronunciation, describing a picture and expressing an opinion on a given topic. She was able to collect her certificate after a couple of weeks. On 21 April 2013, the appellant made her application for a Tier 4 extension, attaching the Queensway College ETS/TOEIC certificate.

22. The appellant contends that her academic background meant that she had no need to cheat. She argued that the respondent had adopted ETS' findings without question, and provided only generic evidence to explain to her why that was so. It was entirely possible that invalidation of her test might have been due to an irregularity at the testing centre, and not by her dishonesty.

23. The appellant said she had integrated well into British society and its way of life, spending a significant amount of money and time, to enable her to enter the graduate job market in Bangladesh. She wanted to complete her qualification and clear her name: without that, she had no hope of securing a graduate post in Bangladesh.

24. The appellant asserted that she and her husband would find it difficult to replicate the elements of their UK private life (job, ability to find work, and their network of friends and relationships) should they be returned to Bangladesh.

25. No proper section 55 assessment of their children's best interests had been carried out. The elder child had started nursery at the local Primary School in Birmingham, was well settled there, and ready to start in reception class in September 2019. His home was here. English was his first language and British culture his way of life. He would struggle to cope in a Bengali-language state school, and English medium schools there were fee paying, which the appellant and her husband could not possibly afford.

26. In addition, the boy was on a waiting list to be assessed for a possible autism diagnosis. A letter from the Child Development Centre dated 5 March 2019 confirmed the referral.

27. The appellant asserted that she had made a private life with her husband in the UK and was of good character, having 'carried out a peaceful and happy life' here. She asked the Tribunal to 'eliminate me from such a baseless allegation' and allow the appeal.

28. The appellant adopted her witness statement and was tendered for cross-examination. She said that travelling to London had been 'not that expensive' as she travelled by train the previous day, staying overnight with her sister-in-law, who lives in Plaistow in East London. The appellant had no evidence from her sister-in-law.

29. One of her friends had referred her to Study Concept, who arranged everything. There was no evidence from Study Concept. The appellant said that because she went through a friend, they had not asked her for any money. She had tried to contact Study Concept after her visa was cancelled, but all lines were unavailable.

30. She also had no evidence from Queensway College: they did give her a receipt, but it was a long time ago, and she had since lost it.

31. She had not attempted to obtain her voice file from ETS. Another friend had told her not to bother: many students had already contacted ETS for their voice files, but not received them.

32. Mr Melvin asked the appellant about the Home Office evidence: on the day that the appellant said she had taken the test at Queensway College, ETS had subsequently invalidated 76% of the tests taken. She was asked if she had seen proxy test takers there: the appellant said she was so nervous, she just went and did the test, then came back.

33. Mr Melvin asked why the appellant was nervous, since she had scored 100% on the test, and the appellant said everyone who takes an examination is nervous. She had taken many examinations in Bangladesh before coming to the UK.

34. In re-examination, the appellant confirmed that she had paid £170 to the Queensway College reception but had lost the receipt. She put it in her bag and honestly, she had no idea where it had gone now.

35. The appellant had been under pressure to get a test: she only had about two weeks left on her visa and was trying hard for an appointment. Friends gave her the name of Study Concept, who had been really helpful. In Birmingham, where she had tried, nobody had any places at all.

36. The speaking test had been taken in the afternoon on 27 March 2013. There was just one examiner, and the appellant was asked to describe a

picture and speak on her favourite topics. She did not see a proxy test taker or anything suspicious at the test centre.

37. The appellant had not asked for her voice recording because so many people already wrote and did not get them back; she had been really shocked when her visa was cancelled, and those were the two reasons why she did not ask for it.

38. The appellant had tried contacting the College. She telephoned and spoke to the receptionist, who said that the College could not help her with the problem. She really needed an English examination.

Other evidence

39. A letter dated 14 January 2020 regarding the second appellant confirmed the diagnosis of autism spectrum disorder, following a referral in December 2018. There is nothing more recent about his progress in the last two years. There is no evidence in the bundle regarding the family's social circumstances or from friends of the principal appellant or their children.

40. Academic transcripts from Bangladesh show the appellant achieving a B in English in her business studies course at secondary school in 2001; a C in 2003 in her Higher Secondary Certificate; a second class B.Com. degree from Eden Mahila College in 2007; and in the UK, a pass in almost all modules in her Post-Graduate Diploma in Healthcare Management in February 2013 (she had to repeat International Healthcare Policy); a score of 5.5 (level B2 – Modest User) in IELTS in 2010; an IELTS score of 6 in 2014 (level B2 – Competent User); and passes in her CIMA examinations in September and December 2014 (the appellant had copies of all payments made for those examinations).

41. In contrast, the Queensway College TOEIC marks recorded were a speaking score of 200 and a writing score of 190. The TOEIC correlation table with the CEFR levels shows that the points range is between 0 and 200 points. A score of more than 180 points equates to C1, the highest level, and is described as 'Proficient User – Effective Operational Proficiency':

> "Can understand a wide range of demanding, longer texts and recognise implicit meaning. Can express him/herself fluently and spontaneously without much obvx searching for expressions. Can use language flexibly and effectively for social, academic and professional purposes. Can produce clear, well-structured, detailed text on complex subjects, showing controlled use of organisational patterns, connectors and cohesive devices."

42. That is a significant jump from the earlier scores of 'competent user' and 'modest user'. The appellant's score on the written work is a perfect 200/200 and on the speaking test, 190/200.

Appellant's submissions

43. Mr Shah's firm began to act for the appellants at the end of 2017. Mr Shah did not file a skeleton argument: in his cover letter of 11 February 2020, he stated that he would not do so because Mr Melvin for the respondent had confirmed that he would be providing a skeleton argument for the respondent.

44. Mr Shah's letter said that:

> "I have taken [the principal appellant's] final instructions today and her position is that she has no new evidence and attends to adopt her appeal witness statement which was before the First-tier Judge and relies upon her academic records in the UK and in Bangladesh, including 2010 and 2014 IELTS certificates where she has more than pass marks. Also if she had not working knowledge of English it would be impossible for her to pass and study the examinations in the UK which she did upon her arrival."

45. In oral submissions, Mr Shah confirmed that both the appellant's husband and the second appellant in these proceedings had pending applications before the Home Office under paragraph 276ADE(iv), the husband's application depending on that of the second appellant in these proceedings who could not be expected to remain in the UK without a parent. The application made on 17 March 2022 did not include the principal appellant or the third appellant in the present proceedings.

46. On 8 April 2022, the 7-year rule had been amended so that children born in the UK were entitled to indefinite leave to remain. The second appellant had made an application on that basis on 17 March 2022.

47. Article 8 ECHR was not conceded. The family were all living together and the Tribunal was entitled to look at the current situation outside the Rules. There was now a qualifying child in the household.

48. The ETS/TOEIC issue in relation to the principal appellant was the core issue before the Upper Tribunal in these proceedings. Mr Shah accepted that it was for the appellants to disprove the deception, once the Secretary of State had established a prima facie case by reference to the Lookup Tool. This appellant was a person with an exceptional educational track record, in the UK and in Bangladesh. It was unlikely that she would have needed to cheat.

49. Her factual assertions were credible and should be accepted: she had needed to get a test because the Secretary of State had suddenly amended her requirements so that no certificate over 2 years old was acceptable. On checking, Mr Shah accepted that the change occurred in 2012, not in early March 2013 when the appellant was looking for a last minute test centre, with just two weeks before her visa expired.

50. Mr Shah said that he could not explain why Study Concept had not charged the appellant any fee for their assistance. The appellant's evidence that it was because of her friendship with somebody else, who was not named and who gave no evidence, should suffice. The ETS question was a factual assessment for the Tribunal.

51. The appeal should be allowed.

Respondent's submissions

52. For the respondent, Mr Melvin relied on his skeleton argument in which he explained that according to the respondent's records, the appellant's husband had his own litigation on which he became appeal rights exhausted on 14 January 2020. On 28 February 2022, the husband and the second appellant made another application for leave to remain on private and family life grounds, based on the second appellant's status as a qualifying child, which was still pending.

53. The qualifying child point was a 'new matter' and the respondent would not consent to it being introduced into the present appeal at this late stage. Accordingly, the Upper Tribunal was not seised of the issue.

54. Turning to the ETS issue, the respondent was entitled to rely on the invalidation of the appellant's TOEIC test by ETS, as evidenced in the Lookup Tool. The documents submitted by the Home Office (Operation Façade) indicate that all tests at Queensway College on that day were either invalidated (76%) or questionable (24%). That, and the specific identification of the appellant's own test as invalid, should be treated as 'amply sufficient' to prove that she had cheated.

55. It was for the appellant to show that she had in fact sat the test at Queensway College on 27 March 2013 as she claimed and achieved the stunningly high marks of 190/200 for speaking and 200/200 for written English. There was little evidence from the appellant to support her claim. Mr Melvin invited the Upper Tribunal to conclude that the appellant did employ a proxy test taker to take her speaking test.

56. There would be no breach of family life as the family would be removed to Bangladesh together, should the pending application fail. The private life of all three appellants was precarious at best and thus could be given little weight: section 117B of the Nationality, Immigration and Asylum Act 2002 (as amended). The principal appellant and her husband were both educated people and contrary to her assertion, they would be able to find work in Bangladesh and support the family.

57. Bangladesh had a fully functioning education system and the Tribunal should not rely on the appellant's assertion that her children spoke no Bengali language. The best interests of the children were a primary consideration but not a trump card: they were Bangladeshi citizens and it would be in their best interests to remain with their parents, either in the

UK should the husband's application succeed, or in Bangladesh if the family were removed.

58. No exceptional circumstances had been shown, nor any unjustifiably harsh consequences of removal. The elder child was now a qualifying child but applying *KO (Nigeria)* at [16]-[19], it was reasonable to expect him to return to Bangladesh with the rest of the family, having regard to the real world in which the children find themselves. The Upper Tribunal was not seised of the qualifying child issue, which was a 'new matter' and the respondent was not prepared to consent to its being admitted in these proceedings at this late stage.

59. Mr Melvin asked the Tribunal to dismiss the appeals.

DK and RK (India) (ETS: SSHD evidence, proof) **[2022] UKUT 00112 (IAC)**

60. This appeal is one of many which were held back for the latest iteration of guidance by the Upper Tribunal on the ETS evidence and the respondent's use of it. The guidance given is summarised in the judicial headnote:

> *1. 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.*
>
> *2. The burden of proving the fraud or dishonesty is on the Secretary of State and the standard of proof is the balance of probabilities.*
>
> *3. The burdens of proof do not switch between parties but are those assigned by law.*

61. At [67], the Tribunal noted that the evidence of fraudulent activity in a number of ETS centre was overwhelming and that it is 'clear beyond a doubt that these were institutions for the manufacture of fraudulent qualifications'. That was the context in which individual allegations of fraudulent obtaining of ETS/TOEIC certificates fell to be considered.

62. After a careful examination of the evidence before it, the Upper Tribunal summarised its conclusions at [125]-[129]:

> "125. There is no perceptible way in which the proxy test entries could have been inserted in the system after the candidates had taken honest tests; and there is no perceptible reason for anybody to insert or substitute them, except at the instance of the candidate. We are left, therefore, with the time of the taking of the test. The material that achieved notoriety in the Panorama investigation and which was used in the criminal trials as well as in earlier episodes of the ETS litigation in these Tribunals shows what happened there. Two observations need to be made. The first is that it is highly unlikely that any candidate

present on one of the occasions when proxies were being used was not fully aware of what was going on. The second is that it is if anything even more unlikely that such a system would then attribute proxy entries to anybody who had not taken part in the dishonest scheme, making whatever payment or other arrangement was in place.

GENERAL CONCLUSIONS

126. The two strands, therefore, amount respectively to the virtual exclusion of suspicion of relevant error by ETS, and the virtual exclusion of motive or opportunity for anybody to arrange for proxy entries to be submitted except the test centres and the candidates working in collusion.

127. Where the evidence derived from ETS points to a particular test result having been obtained by the input of a person who had undertaken other tests, and if that evidence is uncontradicted by credible evidence, unexplained, and not the subject of any material undermining its effect in the individual case, it is in our judgment amply sufficient to prove that fact on the balance of probabilities.

128. In using the phrase "amply sufficient" we differ from the conclusion of this Tribunal on different evidence, explored in a less detailed way, in SM and Qadir v SSHD. We do not consider that the evidential burden on the respondent in these cases was discharged by only a narrow margin. It is clear beyond a peradventure that the appellants had a case to answer.

129. In these circumstances the real position is that 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 remain not merely the probable fact, but the highly probable fact. Any determination of an appeal of this sort must take that into account in assessing whether the respondent has proved the dishonesty on the balance of probabilities."

Analysis

63. The respondent was entitled, applying *DK and RK,* to rely on the evidence of ETS available through the Lookup Tool, that this appellant's test result of 100% on the speaking test was invalid. The respondent has discharged the primary evidential burden upon her and it is therefore for the appellant to rebut her conclusion that this was a fraudulent test result, as were 76% of the tests taken at Queensway College on that day.

64. The appellant's rebuttal evidence is sparse, given the length of time that she has been challenging the respondent's 2013 decision. She did not update her witness statement for the Upper Tribunal rehearing. She instructed her solicitors not to advance any new evidence.

65. The appellant denies having seen anything odd going on at the Queensway College test centre on a day when 76% of the tests taken, including her own, were found to be invalid, obtained by impersonation of the candidate by a proxy test taker. That runs contrary to the finding in

DK and RK that it was highly unlikely that anyone present at a test centre when proxy test takers were being used would not have noticed what was going on.

66. The appellant's lack of curiosity about her voice tapes is the more surprising in those circumstances: even if there had been a delay in responding, there has been ample time for her previous solicitors, or her present representatives who have been on the record since 2017, to contact ETS' solicitors and obtain the voice files which would prove that her spoken English was almost perfect at 190/200 marks.

67. Other relevant evidence, some at least of which would have been easily available, is not before me. In particular:

    (i) The appellant has not produced evidence that she tried to find a test centre in Birmingham, where she was living at the time;

    (ii) There is no evidence that Birmingham test centres were particularly busy in the last two weeks of her previous leave;

    (iii) There is no evidence from the friends who recommended Study Concept to the appellant, nor from her sister-in-law confirming that the appellant stayed with her overnight on the night before the test;

    (iv) There is no confirmation from Study Concept that they waived their fees for arranging the Queensway College test for the appellant;

    (v) There is no evidence from Queensway College of the appellant's payment of a fee of £170 or her attendance at the test centre;

    (vi) The appellant claims to have decided that there was no point asking for her voice tapes to enable her to prove that it was indeed she who took the test;

    (vii) The appellant relies on unconfirmed conversations with unnamed friends (who also have provided no witness statement) to the effect that lots of people had made a request and not received the voice files.

68. On the basis of all the evidence before me and having regard to the paucity of evidence which could have been obtained, together with the appellant's oral evidence at the rehearing, I am not satisfied that she did take the test that she said she took. The appellant has failed to discharge the burden of proving that she did not use deception.

69. As regards Article 8 ECHR, within and outwith the Rules, and excluding the qualifying child issue of which I am not seised, as it is a 'new matter' and the respondent has not consented to its being admitted, I have considered carefully all the evidence before me.

70. I find that there is nothing in the evidence which supports the appellants' assertion that there are significant obstacles to their reintegration in Bangladesh as a family, or exceptional circumstances making their removal disproportionate or unreasonable.

71. Accordingly, this appeal is dismissed.

DECISION

72. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of an error on a point of law.

I set aside the previous decision. I remake the decision by dismissing the appellants' appeals.

Signed Judith AJC Gleeson Date: 4 July 2022
Upper Tribunal Judge Gleeson