IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-004599

First-tier Tribunal No: HU/59752/2021
IA/17669/2021

THE IMMIGRATION ACTS

Decision & Reasons Promulgated
On 13 March 2023

Before

UPPER TRIBUNAL JUDGE CANAVAN
DEPUTY UPPER TRIBUNAL JUDGE SHEPHERD

Between

MUHAMMAD AHMAD
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R Sharma, counsel (instructed by Shah Law Chambers Ltd)
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

Heard at Field House on 14 February 2023

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge N. Aldridge promulgated on 18 July 2022, in which Judge Aldridge dismissed the appellant's appeal against a decision of the respondent made on 26 November 2021 refusing the appellant's human rights claim.

The Appellant's Case

2. The appellant is a national of Pakistan, born on 7 September 1983. He applied on 14 September 2020 for leave to remain on the basis of his private life in the UK.

3. The appellant's claim was refused by a letter dated 26 November 2021 ("the Refusal Letter") giving the following (summarised) reasons:

    a. The Appellant had been without leave since 2014. His application for leave in October 2012 attached a TOEIC certificate from Educational Testing Services ("ETS"). There was significant evidence to conclude this was fraudulently obtained by the use of a proxy test taker. The appellant's scores from the test taken on 26 September 2012 at New College of Finance had been cancelled. As the appellant had used deception in his 2012 application, his presence in the UK was not conducive to the public good. The application was refused under S-LTR1.1-3.1 of the immigration rules. He did not meet the suitability requirements in S-LTR.2.2(a).

    b. He also did not satisfy rule 276ADE(1)(vi) as there was no evidence of there being any very significant obstacles to his reintegration into Pakistan.

    c. No evidence had been provided to show he had any significant family ties to the UK or that his private life consisted of anything other than friendships and a degree of integration.

    d. No claim was made out under article 3 ECHR on the basis of the appellant's alleged ill mental health.

4. The appellant appealed the decision. The appeal was heard by First-Tier Tribunal Judge Aldridge ("the Judge") on 30 June 2022. The appellant did not give oral evidence due to his alleged incapacity as a result of his medical conditions (anxiety and depression) and the hearing proceeded by way of submissions only. Counsel Mr Sharma represented the appellant and counsel Mr Hussain represented the respondent. Mr Sharma asked that the Judge refuse to allow the 'late' submission of evidence by the respondent, namely the 'look up tool' showing the appellant's test result to be invalid. He invited the Judge, in the alternative, to treat the appellant as a vulnerable witness. The Judge allowed the evidence to be adduced and noted the appellant's vulnerability and the recommendation of his expert in that respect.

5. With reference to the relevant paragraph numbers of his decision, the Judge's main findings were as follows:

    [21] As regards the ETS certificate, the respondent relied on the generic evidence of Rebecca Collings and Peter Millington which had been exhaustively analysed in the case authorities, as well as the report of Professor French. This evidence was designed to establish

that, notwithstanding its generic nature and the absence of anything directly from ETS, it could safely be found that an invalid test result meant deception had been employed; “As said, it has been analysed by the Upper Tribunal and the higher courts so there is no reason to elaborate on it here”.

[22]-[25] The respondent had also provided a witness statement made by a senior caseworker, Mr Sanjay Vaghela, on 24 June 2022, and Excel spreadsheet by which ETS notified the Home Office that the appellant’s test results were invalid. As the Upper Tribunal found in SM and Qadir (ETS- Evidence -Burden of Proof) [2016] UKUT 229 (IAC) (“SM”) the initial evidential burden on the respondent had been discharged by these documents and so it must be determined whether the appellant had discharged the burden of showing an innocent explanation, by showing a minimum level of plausibility, and then whether the respondent has discharged the legal burden to show the appellant had used deception.

[28]. The appellant had not provided an innocent explanation of even the most basic type. The denial contained within his witness statement was not an explanation. The appellant indicated that he was going to provide further evidence but had failed to do so. He had not met his evidential burden and, as such, it was found that he had acted fraudulently in respect of the language test.

[37]. As regards Article 3, expert Dr Mehrotra, in writing his reports, had not been furnished with GP records to enable him to confirm the claims of the appellant in respect of his contact with the health services. There was a real possibility that the appellant had motivation to fabricate or exaggerate symptoms of mental illness in order to defeat the respondent’s attempts at removal. The expert appeared to rely on the word of the appellant. The unexplained lack of provision of medical records significantly detracted from the strength and weight that could be attached to both medical reports of Dr Mehrotra; they did not provide adequate indication that the appellant was a ‘seriously ill person’ in accordance with the case authorities.

[38]. Expert Ms Shaanak Raeoef, in her report, only referred to sight of the first report of Dr Mehrotra and does not appear to have had sight of the medical records of the appellant. Her report also did not provide adequate indication that the appellant is a seriously ill person. It was accorded limited weight due to the failure of the author being supplied with medical records.

[39]. Expert Dr Latifi, in his report dated 16 March 2022, relied upon the reports provided by Dr Mehrotra and Ms Raeoef. There was no consideration of either the Home Office Bundle or the appellant medical records. The conclusions drawn from the report were that the appellant suffers from severe depression and anxiety and presented as a medium to high risk of suicide. A further letter produced by Dr

Latifi indicated that he had since been provided with medical records by the appellant's representatives but these records had not been provided to the Tribunal. Neither the Tribunal or respondent had been able to scrutinise the medical records to confirm that they were in accordance with the instructions given to Dr Latifi. This significantly reduced the weight that was attached to Dr Latifi's report. There was a lack of adequate evidence to indicate that the appellant is a seriously ill person.

[40] There was a lack of witness evidence in respect of the help and assistance that is claimed in respect of the appellant's needs and in respect of his claimed suicidal tendencies. There was no suitable and reasonably expected evidence provided from the appellant's cousin or friends that were referred to. This reduced the credibility of the appellant's purported difficulties dealing with his mental illness and their role and necessity as a protective factor.

[41] The undated country expert report of Dr Holden appeared to have been drawn from consideration of the reports of Dr Malhotra and Ms Raeoef which had been given limited weight as explained. Due to the lack of consideration of other evidence, this report was also given limited weight. It was not accepted that the report demonstrated the appellant would be unable to access any required medication on return.

[42] The appellant's claim under article 3 had not been made out in terms of demonstrating that he would be at risk of a serious, rapid and irreversible decline in his state of health resulting in intense suffering or a significant reduction in life expectancy.

[43] – [44] The primary evidence as regards suicide risk was the expert reports which, as found, were given limited weight. The appellant appeared to engage with health professionals, and was taking medication. The risk of suicide had not been shown to be sufficiently high on return so as to mean article 3 is engaged.

6. On 27 July 2022 the appellant sought permission from the First -tier Tribunal to appeal to the Upper Tribunal on five grounds which may be summarised as follows:

    a. Ground 1: Admission of evidence served in breach of directions. The Judge should not have allowed service of the 'look up tool' or further respondent's evidence; by doing so he caused the appellant extreme prejudice because this was the respondent's only real evidence by the time of the appeal and should have been served earlier in accordance with directions. By the time of the hearing, the appellant had lost the capacity to engage in the hearing. This was, in effect, discriminatory as it affected him more than it would have affected someone without his disability.

b. Ground 2: Misdirection as to the term ‘innocent explanation’. The Judge incorrectly elevated the term ‘innocent explanation’ beyond the meaning ascribed to it in Shen (paper appeals: proving dishonesty) [2014] UKUT236 (IAC) which required only an explanation that met ‘a basic level of plausibility’. The appellant’s response in his witness statement met this test, which survives DK and RK (ETS: SSHD evidence, proof) India [2022] UKUT 112 (IAC) (“DK (2)”). The Judge failed to apply that test.

c. Ground 3: insufficient reasons and conclusion. Multiple submissions were made at the hearing concerning inconsistencies within the Respondent’s ETS evidence, including with relation to the look up tool, and the Judge did not resolve these, despite being under a duty to do so as it was source of material conflict between the parties.

d. Ground 4: Accommodation of mental health difficulties. The Judge failed to sufficiently modify the guidance given in DK (2) and SM to sufficiently accommodate the appellant’s mental health difficulties. This could have resulted in the look up tool not being admitted by the Tribunal, or the Tribunal altering its approach as to whether or not the allegation had been sufficiently proven.

e. Ground 5: Misdirection as regards 276ADE requirements. There is a typographical error at [47] in stating the appellant lived in India. Notwithstanding this, the conclusion at [48] is not supported by evidence, namely that absent his adverse immigration litigation, the appellant’s health could stabilise to the point where he could have a meaningful private life. It was unclear how the Judge reached this conclusion having noted, at [49] that there was a gap in the evidence.

7. The application did not challenge the Judge’s findings on Articles 3 and 8.

8. Permission to appeal was refused by First Tier Tribunal Judge Lester on 7 September 2022, stating that:

> “In a well reasoned and extensive decision the judge gave adequate reasons for their findings [17-62]. The grounds amount to little more than a disagreement with the findings of the judge. Findings which were properly open to the judge on the evidence before them. They disclose no arguable error of law and permission is refused.”

9. On 20 September 2022, the appellant sought permission from the Upper Tribunal on the same grounds.

10. On 11 November 2022 Upper Tribunal Judge O’Callaghan granted permission to appeal, stating as follows:

> "3. I observe that the test to be applied at this stage is one of arguability. I am satisfied that ground 1 is arguable, though it will be for the appellant to establish materiality.
>
> 4. Grounds 2, 3 and 4 are connected to ground 1 and permission should properly be granted.
>
> 5. I consider ground 5 to be weaker, but I am satisfied that the appellant should properly be permitted to advance all grounds relied upon.
>
> 6. Postscript: The appellant contends that he has lost the capacity to engage with proceedings. Reliance is placed upon the report of Dr Abdul Hameed Latifi, dated 16 March 2022. It may be appropriate for the parties to address whether a litigation friend was required during proceedings before the First-tier Tribunal, and if so, whether one is required in relation to proceedings before this Tribunal."

The Hearing

11. The appeal came before us on 14 February 2023.

12. It serves no purpose to recite the submissions here at length as they are a matter of record. Essentially, Mr Sharma expanded on the grounds of appeal, and made the further submissions of note:

    a. Ground 1: When preparing his bundle, the appellant was proceeding on the basis that only a bare assertion of cheating had been made by the respondent. Had the case of Denton v White [2014] EWCA Civ 906 been followed, there should have been an explanation for the delay in service and there was none. By the time the respondent served the evidence, the appellant lacked the capacity to address it in oral evidence. No adjournment was sought on the day. The prejudicial effect was that the Judge took the respondent's evidence to be determinative in what the Judge considered to be the absence of an innocent explanation. Mr Sharma confirmed, however, that the evidence was served prior to the hearing. He said he had not seen any of the previous judicial review papers in the bundles that were before the Judge and that he did not have any instructions on the refusal and certification of the appellant's previous article 8 claim in 2017 as clearly unfounded. He confirmed the Judge had not been supplied with the appellant's GP records but said that the appellant's medical situation and the discreet point about his being a vulnerable witness was not in dispute.

    b. Ground 2: nothing in the appellant's rebuttal was implausible; he confirmed in his witness statement that he sat the test. Mr Sharma admitted that the rebuttal amounted to a bare assertion. The respondent appeared to say that Shen did not survive DK (2) but this was incorrect as DK (2) applied the Shen test at para 136 of the judgment. Had the Judge accepted the appellant's explanation,

it would have shifted the burden of proof back on to the respondent.

c. Ground 3: An example of one of the fallibilities in the respondent's evidence highlighted in submissions was that para 6 of Mr Vaghela's statement said the look up tool was how the Home Office was notified of the relevant entry, having come from ETS, but para 12 of SM says that the look up tool is a Home Office document extracting evidence from the ETS, which is different. This, and other fallibilities were not resolved by the Judge.

d. Ground 4: The Judge's answer to this was that the appellant could be treated as a vulnerable witness. Mr Sharma confirmed that he was the one who suggested this as an alternative to prohibiting the look up tool being adduced, but his suggestion was that the appellant was also treated differently as regards the Shen test; simply treating the appellant as a vulnerable witness was not enough; the Judge ought to have gone further and made a finding as to whether he could treat what the appellant had said as sufficiently rebutting the respondent's allegation given that he could not provide any further evidence. He was not saying that a finding should have been made in his favour simply because he was vulnerable, but that it was a factor that should have been taken into account in the overall assessment.

e. Ground 5: The Judge's finding at [49] (that in the fullness of time the appellant would be able to reintegrate into Pakistan and removal would remove the stress and uncertainty of his current situation) is counter to the medical evidence recorded in the previous paragraph; as such it was a finding not open to the Judge on the evidence or it was insufficiently reasoned. He confirmed this ground was only directed towards 276ADE; article 3 was not being argued. He said article 8 could still succeed even if article 3 fails, albeit no freestanding article 8 claim was being made aside from the medical basis. The point was that the appellant would deteriorate on return which would prevent him from re-integrating and having a private life. He considered the suitability rule under discussion was discretionary, not mandatory (S-LTR.2.2 rather than S-LTR.1.6), such that the appellant could fulfil the requirements of 276ADE and the rules as a whole.

13. As regards what to do if an error were found, Mr Sharma said this would depend on which grounds were found to be made out.

14. Ms Everett responded to ask us to find there was no material error in the Judge's decision and made the following main points:

a. Ground 1: the appellant was on notice of the ETS allegation since 2015 and further details were provided in the Refusal Letter; the look up tool was served on 28 April 2022, the appellant had until 19

May 2022 to respond and the hearing was not until 30 June 2022. The look up tool was better evidence and added the test score but it merely confirmed what was said in the Refusal Letter, being the test centre and date. It was not clear from the medical evidence that the appellant's cognitive decline occurred between February and April such that he could not instruct his solicitors about the look up tool at that point. But previously he managed to instruct lawyers and lodge the judicial review so was in a better position to provide an innocent explanation at a much earlier date.

b. Ground 2: There was nothing irrational about the Judge's findings in [27] and [28], and the reasons given are cogent; the argument about plausibility is to slightly misunderstand the Shen case; the facts there were quite different as the respondent had not discharged the burden despite the opportunity to do so. Whether someone has provided a sufficient explanation depends on each case and the evidence relies on by the Secretary of State. Here, the appellant clearly instructed lawyers when he had capacity but chose to make a bare assertion rather than provide an explanation. The Judge's findings were plainly open to him; it is not clear what further explanation it is being said the appellant can offer in the future.

c. As regards 276ADE, the Judge did not accept the appellant had no family and friends left in Pakistan; it was the doctor's observation that part of the appellant's illness was due to the uncertainty over his status and the medical reports do not address whether this would be dealt with by return to Pakistan. The Judge's findings were not irrational; he looked at the situation in Pakistan and came to reasoned findings.

15. Ms Everett said she was unsure what to say in terms of suitability, she accepted the Refusal Letter had somewhat of a scattergun approach. She agreed that the ETS aspect only went to suitability under the immigration rules. She said were an error to be found, it was not clear what would be gained by remitting the matter to the First Tier for remaking given the appellant's position is that he cannot provide further evidence as to an innocent explanation.

16. Mr Sharma replied to say the previous evidence of the ETS point was insufficient for the appellant to do any more than he did, which was to say he sat the test. The appellant's lack of capacity was known when he drafted the skeleton, Dr Latifi discussed it in his report of 16 March; the Refusal Letter is not evidence, so the look up tool was the only, not better, evidence; his characterisation of the Shen test is not wrong; he had nothing to say about whether the appellant could have had a litigation friend as he had no information.

17. At the end of the hearing, we reserved our decision.

Discussion and Findings

Ground 1 and 4

18. We shall start by dealing with grounds 1 and 4 together as they both hinge on the appellant's mental health.

19. The appellant's immigration history, as set out in [3] of the Judge's decision, has not been challenged and is as follows:

    a. He came to the UK on 28 June 2011 with valid entry clearance as a student with leave to enter until 29 October 2012.

    b. On 25 October 2012 he applied for leave to remain as a Tier 4 student and this was allowed until 17 May 2014.

    c. On 26 June 2013, his leave was curtailed to expire on 25 August 2013. The appellant submitted a Tier 4 application on 16 May 2014 which was refused with no right of appeal on 14 November 2014.

    d. On 23 May 2015 he was served with a notice informing him of liability to detention and removal.

    e. On 11 April 2016 an application for Judicial Review was refused and absconder action was taken on 24 May 2016.

    f. He made an Article 8 claim on 31 July 2017 which was refused and certified on 31 August 2017.

    g. On 7 December 2017 he applied for FLR which was rejected, and absconder action was taken on 28 September 2018.

    h. On 14 September 2020 the current submissions were received.

20. The Refusal Letter makes clear that the respondent took the view that the ETS test results submitted with the 2012 application for student leave were fraudulently obtained by use of a proxy test taker. The skeleton argument before the Judge stated that "In 2015 the Appellant first became aware of an allegation of use of a proxy in relation to an ETS TOEIC certificate. He has made numerous attempts since to challenge the decision but the current appeal is the first opportunity he has had to challenge the decision in appeal". The appellant's witness statement that was before the Judge says, at para 4, that a refusal dated 23 May 2015 informed him of the allegation of deception.

21. The appellant's position now is that the respondent, prior to serving its look up tool, had not discharged the evidential burden such that the appellant did not have to provide an innocent explanation and by the time the appropriate evidence had been served, the appellant had lost capacity.

22. We accept that the respondent's bundle served prior to the appellant's bundle contained only the 'generic' evidence consisting of the witness statements of Rebecca Collings and Peter Millington dating from 23 June 2014 (found to be insufficient to discharge the burden in SM) and the report of Professor Peter French dated 20 April 2016.

23. The Judge's decision at [8] refers to the respondent filing a review and "an additional bundle of documents relating to ETS source data and look up tool cases". [22] refers to a witness statement dated 24 June 2022 made by a senior caseworker, Mr Sanjay Vaghela, which presumably formed part of this bundle. We agree that the look up tool and witness statement of Mr Vaghela added the individual elements of the respondent's evidence against the appellant in this appeal, which discharged the initial burden borne by the respondent.

24. It is clear that this evidence was filed prior to the hearing; this much was accepted by Mr Sharma. He did not challenge Ms Everett's timeline that the review and look up tool evidence were served on 28 April 2022, after which the appellant had until 19 May 2022 to respond, then the hearing took place on 30 May 2022. So the appellant had around one month to review the evidence and respond accordingly. It is correct that the Refusal Letter is not evidence but it did state the date and location of the appellant's test, being New College of Finance, 26 September 2012.

25. Having said that, the appellant has, on any analysis, known that he was being accused of cheating in his 2012 ETS test for at least the past seven years. We do not have copies of the papers/evidence submitted with the judicial review to know what documents he has seen previously concerning his test, and whether he has previously put forward more of an innocent explanation than he has now.

26. The appellant had sufficient information from at least the Refusal Letter, but likely far earlier, to know what accusation was being levelled against him and to provide a response. There was no good reason to doubt a statement made by a government department to say that the test result had been cancelled by ETS. In the context of ETS cases, the procedure by which that information is recorded by the Home Office through the look up tool has been outlined in numerous cases and should be well known by legal representatives specialising in immigration law. In short, it should have come as no surprise nor created any disadvantage to the appellant or his representatives to receive a copy of the look up tool record that underpinned the statement made in the Refusal Letter.

27. In terms of his response, the appellant's witness statement simply says:

> "I strongly deny any allegation of cheating during the test as I completed the exam honestly and to the best of my ability. I am currently in the process of obtaining evidence to demonstrate this. At present I unequivocally confirm that I did not obtain the TOEIC certificate fraudulently."

28. It has not been explained what further information the appellant intended to provide or how it was that, if he did not have capacity at this point or shortly afterwards, he was going to provide it. All we know is that he did not provide it.

29. Mr Sharma said that, had Denton v White been applied, the Judge may have refused to allow the respondent to adduce the look up tool etc. given that no explanation for its lateness had been provided. However, that case concerns the Civil Procedure Rules applicable to the civil jurisdiction. We are a tribunal with our own procedural rules. Those rules applicable to the First Tier are The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. Rule 14 states:

> "(2) The Tribunal may admit evidence whether or not—
>
> (a) the evidence would be admissible in a civil trial in the United Kingdom; or
>
> (b) subject to section 85A(4) of the 2002 Act, the evidence was available to the decision maker".

30. It was therefore open to the Judge to admit the respondent's evidence even though it was filed after the appellant's bundle and even if this was in breach of directions (we have not been provided with any relevant directions so cannot comment on this). We consider his decision to allow it to have been reasonable given it had been provided a month earlier and went to the heart of the matter.

31. In addition, Mr Sharma confirmed he presented the Judge with the choice in the alternative of noting the appellant to be a vulnerable witness, which the Judge duly did. As the Judge followed Mr Sharma's own alternative option, we consider it somewhat in the nature of seeking a 'second bite of the cherry' to raise the issue again now.

32. We conclude that the Judge was entitled to admit the respondent's further evidence. Having done so, his finding at [25] was correct i.e. that

> "As the Upper Tribunal found in SM and Qadir, the initial evidential burden on the respondent has been discharged as a result of the provision of these documents and therefore it must be determined whether the appellant has discharged the burden of showing an innocent explanation."

33. Whilst DK (2) did not accept the analysis of a burden of proof 'boomerang', we agree the effect of the Judge admitting this evidence was to then consider whether the appellant had provided an innocent explanation.

34. In terms of this effect, and whether it was discriminatory and/or unfairly prejudicial, this turns both on whether the appellant had seen the evidence before, at a stage when he did have capacity, and on the appellant's alleged lack of capacity at the time of the hearing on 20 June 2022.

35. As to the first question, as we have not been provided with the documents concerning the appellant's previous applications and judicial review, we cannot make a finding that the appellant had or had not previously seen the look up tool or other 'individualised' evidence concerning his test results. If he had, and this was at a time when he had the capacity to provide an innocent explanation, this would obviously undermine his position on grounds 1 and 4. We note the appellant has not made a statement to the effect that this was the first time he had seen this evidence; we leave it there.

36. As to the second question, of capacity as at the hearing, we note that the appellant provided a very detailed witness statement dated 2 February 2022. Whilst we accept that such statements can often be more articulate than the person said to have given them, due to being drafted by legal professionals, we have nothing before us to suggest that the content was not gleaned from the appellant himself at the time. At this point, then, on the face of it, he had capacity to both instruct his solicitors and understand the case being made against him. It is notable that the statement goes into a lot of detail concerning his mental health, and the impact of being returned to Pakistan, including the treatment there of those with mental health issues. This is in sharp contrast to his brief discussion of the ETS aspect of his case, which we discuss further below.

37. As discussed at the hearing before us, noting someone to be a vulnerable witness does not mean their evidence has to be accepted without question, rather it still has to be assessed but bearing in mind the witness's vulnerability and the impact this may have. We find this is what the Judge did. We do not see that finding the appellant to be vulnerable meant the Judge had to modify the test set out in Shen which we discuss further below. Mr Sharma was unable to explain what modification should have been applied beyond saying allowance should have been given to the appellant for giving a poor explanation. We do not see that this follows. It is not being said that the appellant lacked capacity at the time the explanation in his statement was given or before that, so it is unclear why later incapacity, in itself, should be used to turn a previously poor explanation into a good one when the nature of the explanation itself has not changed.

38. As far as we can see, Dr Latifi's report is the only report which addresses the question of the appellant's capacity. Dr Latifi assessed the appellant on 6 March 2022, just over a month after the appellant's witness statement, and opines in his report dated 16 March 2022 that the appellant currently does not have a mental capacity to understand court proceedings or to instruct a solicitor and is unfit to face cross-examination or give any oral evidence. As Ms Everett pointed out, it is unclear when exactly the appellant's cognitive decline is said to have taken place and we agree the evidence is far from clear.

39. The Judge's decision at [39] questions the reliability of Dr Latifi's report given it relies upon the reports provided by Dr Mehrotra and Ms Raeoef, and for Dr Latifi not having had sight of either the Home Office Bundle or the appellant's medical records. He said Dr Latifi later provided a letter saying he had seen the medical records and they confirmed the appellant had been suffering from depression and anxiety. The Judge noted that the Tribunal had not been provided with these records and there had been no explanation for this. We also do not know why Dr Latifi was instructed in preference to the appellant's own GP, who would have been in a better position to comment on the appellant's cognitive decline over time. We note Dr Latifi does not say in his letter that he had since also been provided with the Home Office bundle, so he still did not have the full picture of the appellant's circumstances.

40. We observe that Dr Latifi's opinion that the appellant lacked the capacity to give evidence or to instruct solicitors was brief and rather generalised. The report did not give a formal opinion with reference to the relevant criteria contained in the Mental Capacity Act 2005. There is a meaningful difference between a person being too unwell to give evidence and lacking the capacity to give instructions to their legal representatives.

41. The appellant's solicitors could not comply with their professional duties if their client did not have capacity to instruct them. If he really did lack capacity to give instructions, it is difficult to see how his solicitors could have proceeded with the hearing in the First-tier Tribunal or the Upper Tribunal without an application to appoint a litigation friend. It is reasonable to infer that despite his vulnerabilities, the appellant did in fact have sufficient capacity to instruct his solicitors for the purpose of this appeal.

42. Overall, we consider the Judge's assessment of the medical evidence before him to be sound and properly reasoned, as were his findings that none of the reports were adequate evidence that appellant was a seriously ill person. The Judge stops short of making a finding about capacity, but notes at [7] the appellant to be vulnerable, takes account of the guidance in this respect and notes there may be gaps in evidence to the Tribunal.

43. In terms of those gaps, it can be seen from the Judge's decision at [11] that the problems with the medical reports were not the only reason why he found against the appellant, referring also to the lack of evidence from the appellant's cousin and friends, as well as a lack of evidence to show whether the appellant has followed the recommendations of the experts and undertaken therapy. So, even if the Judge had found the appellant lacked capacity, it is difficult to see that the allowance of the additional evidence, even if it was 'late' (which it was not, and we do not know if it had already been seen in any case) was unfairly prejudicial and a determinative factor. The appellant had other factors to overcome.

44. For our part, given we have found the Judge's assessment of the medical evidence to be sound, we do not consider it proved that the appellant did lack the capacity to provide more in the way of an innocent explanation after having received the respondent's further evidence.

45. It follows that we do not consider grounds 1 and 4 to be made out; we find no errors disclosed.

Ground 2

46. We accept that Shen provides that once the Secretary of State has shown a prima facie case of dishonesty, the appellant may proffer an innocent explanation, which is "one that meets a basic, minimum level of plausibility". The term is not given any further explanation.

47. We also accept that DK (2), at paragraph 36, confirms this test as still applicable. Notably, paragraph 129 of DK (2) in its conclusions states that, if an appellant has a case to answer, then:

> "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."

48. Such is the case here. We have found the Judge was right to conclude the respondent had made out its case such that it was up to the appellant to proffer an innocent explanation. As above, his witness statement merely asserts his honesty. On this point, the Judge states at [28] that:

> "Whilst I note the doctors report indicating that the appellant was unable to engage and the decision of the appellant to not give evidence accordingly, I am unable to find that the appellant has provided an innocent explanation of even the most basic type. The denial contained within the statement is not and cannot be described as an explanation. The appellant indicated that he was going to provide further evidence in respect of his truth. He has failed to do so. In such circumstances, I do not conclude that the appellant has met his evidential burden and, as such, I do find that he has acted fraudulently in respect of the language test."

49. We see no error in this reasoning. It is clear the Judge applies the correct test and finds that an explanation "of even the most basic type" was not provided. These are equivalent words for "a basic, minimum level of plausibility" as per Shen. As the appellant's statement did not explain anything, it could not be found to be plausible or not. We note the Judge's decision at [12] states that "Mr Sharma acknowledged that the appellant is in some difficulties as he has not provided an answer". As above, the Refusal Letter stated the test centre and date such that a

response to these details was needed and the appellant does not even acknowledge them.

50. It follows that we find this ground is not made out.

Ground 3

51. The appellant says the Judge did not resolve submissions made at the hearing concerning inconsistencies within the Respondent's ETS evidence. Mr Sharma gave us one example of such an inconsistency, as to whether the look up spreadsheets came from the ETS itself, or was a spreadsheet created by the Home Office using ETS's evidence. He did not elaborate on the particular difference this would have made. We note that [12] of the Judge's decision discusses the submissions in this regard.

52. We find the Judge undertook a detailed analysis of the applicable case authorities in [18]- [29] of his decision. It is clear from [21] that the issues with the generic evidence had been noted and the Judge deals with this by saying (our emphasis in bold):

> "This evidence is designed to establish that, notwithstanding the generic nature of the evidence and the absence of anything directly from ETS, it can safely be found that an invalid test result meant deception had been employed. **As said, it has been analysed by the Upper Tribunal and the higher courts so there is no reason to elaborate on it here**".

53. We cannot see anything in the submissions which was not dealt with sufficiently by the case authorities reviewed by the Judge. It was open to the Judge to avoid reiterating the detail in those cases given its length and complexity, especially in light of the lack of explanation provided by the appellant to counter it. The submissions were just that, submissions, and the appellant had not produced any of its own expert evidence to challenge that produced by the respondent. There was therefore arguably nothing to resolve but in any case, we consider [21] dealt with this adequately.

54. It follows that we find this ground is not made out.

Ground 5

55. We consider the mention of India in [47] to be a simple typographical error; there is no other reference to India and no indication that the Judge was considering anywhere other than Pakistan in his decision.

56. The appellant takes issue with the Judge's conclusion at [48] that, absent the uncertain situation with his immigration status, the appellant's health could stabilise to the point where he could have a meaningful private life, saying this is not supported by the evidence.

57. We consider this to be a misreading of the Judge's findings. In [48] the Judge is referring to the expert reports saying that, by removing the uncertainty over his immigration status in the UK, the appellant would be

able to recover such that his prognosis would be satisfactory. i.e. if he were granted leave to remain *in the UK*, he could recover. This leads to the Judge's subsequent comments about understanding the appellant would have been disappointed by being refused leave previously, and that, having grown to feel hopeless, his health had declined such that the Judge accepted the appellant is depressed and anxious to some extent.

58. The Judge comments on removal to Pakistan and the impact on the appellant's mental health in [49]; specifically noting that the expert reports do not deal with this scenario. He states:

> "None of them addresses the obvious point that removing the appellant to Pakistan, whilst not the outcome he desires, would also remove the stress and uncertainty of his current situation. His recovery might not be so quick but there is no reason I can see that the appellant would not in the fulness of time be able to reintegrate effectively in Pakistan. I find he would be able to do so and therefore the rule is not satisfied".

59. This followed his findings in [47] that the appellant will still be familiar with Pakistani society and that it was not accepted he had lost all ties there.

60. We consider these findings were open to the Judge to make. It is reasonable to have concluded that the uncertainty in status had led to a decline, and that were this to be removed, that decline may be reduced or reversed. This is what the medical evidence says, albeit with regard to the appellant remaining in the UK. The Judge sufficiently explains that this is not what is said in the medical reports about return, and that they do not address this issue, but he finds it could be the case anyway, given the appellant was familiar with Pakistan, had not lost all ties there and could access medical treatment.

61. The appellant has not explained in any clear way what significant obstacles he would face on return to Pakistan, aside from finding it difficult to re-integrate due to his mental health. The appellant is not challenging the Judge's findings that the article 3 medical claim was not made out. It is therefore unclear what is left of the appellant's claim under 276ADE if he accepts he can access sufficient treatment on return to treat his mental health, and that he will not be at high risk of suicide. Without the expert reports properly addressing the position, and given the Judge's findings concerning their reliability in what they did say (which we find he was entitled to make), it is unclear what the extent of any deterioration would be.

62. We therefore do not find this ground to be made out.

63. As such, we need not address which particular part of the suitability requirements that the respondent says the appellant did not meet by reason of his ETS test. It is immaterial whether that requirement was discretionary or mandatory if the Judge's findings relating to 'very significant obstacles' are sustainable

Conclusion

64. As no material, or any, legal errors have been established, we dismiss the appeal.

Notice of Decision

65. There is no material error of law in the Judge's decision. The determination of First Tier Tribunal Judge N Aldridge promulgated on 18 July 2022 shall stand.

Signed: L. Shepherd

Date: 22 February 2023

Judge of the Upper Tribunal
Immigration and Asylum Chamber