In the Upper Tribunal (Immigration and Asylum Chamber) Judicial Review

JR-2021-LON-001739

In the matter of an application for Judicial Review

The King on the application of

MOHAMMAD SHOHEL UDDIN

Applicant

versus

Secretary of State for the Home Department

Respondent

ORDER

BEFORE Upper Tribunal Judge Canavan

HAVING considered all documents lodged, and having heard Mr Z. Malik and Mr S. Karim of counsel, instructed by Legit Solicitors, for the applicant, and Mr R. Harland of counsel, instructed by GLD, for the respondent, at a hearing on 12 September 2022

IT IS ORDERED THAT:

(1) The application for judicial review is dismissed for the reasons given in the attached judgment.

(2) The applicant shall pay the respondent's reasonable costs to be assessed if not agreed.

(3) No application has been made for permission to appeal to the Court of Appeal. Pursuant to rule 44(4B) of The Tribunal Procedure (Upper Tribunal) Rules 2008 permission is refused because the Upper Tribunal decision does not disclose any arguable error of law.

Signed: M.Canavan
Upper Tribunal Judge Canavan

Dated: **15 March 2023**

The date on which this order was sent is given below

For completion by the Upper Tribunal Immigration and Asylum Chamber

Sent / Handed to the applicant, respondent and any interested party / the applicant's, respondent's and any interested party's solicitors on (date): *15 March 2023*

Solicitors:
Ref No.
Home Office Ref:

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a point of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3).

Case No: JR-2021-LON-001739

IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Field House,
Breams Buildings
London, EC4A 1WR

15 March 2023

Before:

UPPER TRIBUNAL JUDGE CANAVAN

- -

Between:

THE KING
on the application of

MOHAMMAD SHOHEL UDDIN

Applicant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- -

Mr Z. Malik KC & Mr S. Karim
(instructed by Legit Solicitors), for the applicant

Mr R. Harland
(instructed by the Government Legal Department) for the respondent

Hearing date: 12 September 2022

- -

J U D G M E N T

- -

Judge Canavan:

1. The preparation of this judgment has been delayed in part by a period of illness. For that I apologise because I know that the applicant will have been anxious to know the outcome of the decision.

2. The applicant seeks to challenge the respondent's decision dated 20 September 2021 to refuse Indefinite Leave to Remain on grounds of long residence and to refuse to treat the application as a fresh human rights claim.

Background

3. I have summarised the background from the statement of facts contained in the grounds, although many underlying documents from the earlier stages of the applicant's immigration history are not contained in the bundle.

4. The applicant entered the UK on 03 April 2008 with entry clearance as a student, which was valid until 28 February 2011. He was granted further leave to remain as a Tier 1 Post-study Migrant, which was valid until 10 December 2012. On 07 December 2012 the applicant applied to vary his leave to remain to the Tier 1 Entrepreneur category. In support of that application, he relied on an English language test taken at the Premier Language Training Centre in Barking.

5. The respondent refused the application on 25 April 2013 for reasons apparently unrelated to the English language certificate. The applicant appealed to the First-tier Tribunal. The appeal was dismissed on 15 November 2014. The applicant's appeal rights became exhausted on 09 April 2014 and at this date any leave that had been extended by virtue of section 3C of the Immigration Act 1971 came to an end. He has remained in the UK without lawful leave from this point on.

6. On 01 May 2014 a second application for leave to remain as a Tier 1 Entrepreneur was made. It was initially said that a decision was prepared and served to file on 23 September 2014 although the respondent later admitted that there was no record of a decision having been made in relation to this application.

7. The applicant was served with a notice of removal (IS151A) on 17 March 2015. The respondent asserted that he had used deception in a previous immigration application. The respondent alleged that the applicant obtained an English language certificate, which was used in an earlier application, by fraud.

8. No copy of the IS151A notice appears to be included in the bundle, but it is reasonable to infer from the chronology that it was likely to be an 'old style' administrative removal decision made under section 10 of the Immigration and Asylum Act 1999, which gave rise to an out of country right of appeal. An application for permission to judicially review the decision was refused on 05 February 2016. The applicant was detained on 05 April 2016, but released on 21 April 2016. There appears to be no record of any removal action being taken even though the applicant was liable to removal subject to the decision taken on 17 March 2015.

9. On 18 August 2016 the applicant applied for leave to remain outside the immigration rules. He denied that he had used deception in an earlier application. The application was refused on 02 March 2017. The application was treated as a human rights claim, which attracted a right of appeal.

10. First-tier Tribunal Judge Pooler dismissed the appeal in a decision sent on 14 May 2018. The judge concluded that the applicant did not meet the requirements contained in the immigration rules for 10 years continuous lawful residence (paragraph 276B). The judge went on to find that the applicant did not meet the private life requirement contained in paragraph 276ADE(1)(vi) of the immigration rules because he had failed to show that he would face 'very significant obstacles' to integration if he returned to Bangladesh.

11. In considering the general grounds for refusal relating to the allegation of ETS fraud, the judge considered a range of evidence including the respondent's 'generic' evidence, the look-up tool records, a Project Façade report relating to a criminal investigation into Premier Language Training College, and oral evidence from the applicant. At [28] the judge found that the applicant's claim that he contacted ETS after learning that his scores had been invalidated was undermined by a lack of documentary evidence to support his statement. The judge noted the applicant's oral evidence. The applicant said that he had taken two English language tests, the first of which he did not pass, yet ETS had cancelled both sets of scores. The judge observed that there was no reference to this in his witness statement. Having considered the evidence in the round the judge concluded that the respondent had discharged the overall burden of proving that the applicant used deception in an earlier application [31].

12. The Upper Tribunal refused permission to appeal on 19 December 2018, at which point the applicant's appeal right became exhausted. An application for permission to bring a '*Cart*' judicial review was refused.

13. On 23 May 2019 the applicant applied for leave to remain on grounds of long residence. If the application was made pursuant to legal advice, it was poor advice. It was clear that the applicant did not qualify for leave to remain on grounds of 10 years continuous lawful residence. The First-tier Tribunal decision had already explained why. The application was refused with no right of appeal.

Further submissions (18/08/21)

14. On 18 August 2021 the applicant made further submissions to the respondent. At this stage he had remained in the UK without leave for seven years and it was over three years since the second First-tier Tribunal decision.

15. The further submissions acknowledged that Judge Pooler's decision would form the starting point. The applicant produced further evidence, which was said to address the reasons the judge gave for placing little weight on his oral evidence i.e. that it was unsupported by documentary evidence that could have been provided.

16. Attached to the further submissions was a copy of an email said to have been sent to TOEIC addresses on 04 June 2016 asking for the organisation to 'provide me the TOEIC exam (Speaking, Writing, Listening

and Reading module) evidence for Immigration purpose' and again providing the relevant reference numbers. The documents included a response from an address entitled 'TOEIC@ets.org' dated 06 June 2016. The response is phrased in what appears to be a generic form of words, asking the applicant to provide the name of the test, the city, and country and they 'will investigate this further'. In response, the applicant has produced a copy of a reply to the same address providing his name, date of birth, the place where the test was taken as 'Barking, London, UK'. In response to this information, the TOEIC representative replied on 08 June 2016 asking him to contact their ETS representative in the United Kingdom and provided the contact details (contact-emea@etsglobal.org).

17. The documents also included a thread of emails sent by the applicant to what I infer to be his lawyers at the time. The thread showed three emails, all headed 'Forwarded message'. The first was dated 05 June 2016 from an email address in the applicant's name to what appear to be ETS email addresses. One of those addresses was the one given by the TOEIC representative a few days later. The request was made using the same rather vague phrase in the email to TOEIC (see [16] above). The applicant provided his date of birth, registration number, and identification number. He also attached a copy of the TOEIC test certificates. There is no evidence to show that ETS replied to this correspondence nor that the applicant chased it up if there was no response.

18. The second email in the 'forwarded' thread is dated 10 December 2020. It appears to be forwarding the original email to ETS to a lawyer at Jones Day [Solicitors] and a lawyer at the Government Legal Department. It is unclear in what context the email was forwarded to these lawyers. The chronology outlined in the statement of facts or in the further submissions made to the respondent does not indicate that any legal action was being taken at the time. The third email in the 'forwarded' thread is dated 14 December 2020, again addressed to lawyers at Jones Day Solicitors, forwarding the original email to ETS dated 05 June 2016.

19. The evidence also included a copy of an email from the Home Affairs Select Committee date 05 June 2016 confirming receipt of an email from the applicant. The preceding email correspondence from the applicant does not appear to be included in the bundle, although there is a copy of an undated letter said to be from the applicant to the Home Affairs Select Committee asserting that he had not been involved in any deception. The applicant said: 'If you arrange an interview I will be able to prove it by my English skills and efficiency. Moreover I contact with ETS (TOEIC services) UK and USA officers to provide evidence for immigration purpose.' No clear request appears to have been made. If this is the correspondence referred to, the Home Affairs Select Committee confirmed that they could not investigate individual cases but would include the documents in its inquiry into the problems with English language testing.

20. The application also included correspondence from the applicant to the Home Affairs Select Committee dated 03 September 2016 stating that he

sat the exam himself and did not commit fraud. The applicant said that he would not 'fight with the Home Office' if he had been involved in deception. It is unclear whether this correspondence was sent by post or was attached to an email. If it was the latter, no evidence of sending is included. Despite what was previously said by the Home Affairs Select Committee, the applicant repeated his request for an interview to prove his English language skills and asked the Committee to write to the Home Office on his behalf.

21. The further submissions also included a witness statement made by the applicant. Although the statement says that it attached a copy of the respondent's decision dated 25 April 2013 refusing the initial application for leave to remain as a Tier 1 Entrepreneur it was either not included with the further submissions or the documentation contained in the bundle for this hearing is incomplete. Nevertheless, the applicant said that the application was refused on the ground that he failed to provide an acceptable third-party declaration letter and the full contact details of his business client.

22. The applicant went on to say that he had a legal representative on record when he made the second application for leave to remain as a Tier 1 Entrepreneur on 21 May 2014. He did not receive the decision. The applicant said that the Home Office Presenting Officer at the hearing before Judge Pooler conceded that the respondent had not made a decision to refuse the application. He said that a subject access request made to the Home Office did not reveal a decision on file. The applicant only became aware of the allegation of fraud relating to the TOEIC certificate when he was served with an IS151A notice on 17 March 2015. The applicant said that it was humiliating for such an allegation to be made against him and to be asked to report to the immigration office. He felt like he was being treated like a criminal when he was detained for 17 days in April 2016.

23. The applicant appealed the decision dated 18 April 2018 to refuse a human rights claim. He said that his representatives at the time did not ask him whether he had contacted ETS to enquire about evidence. When Judge Pooler asked him about it at the hearing, he was unable to find the emails at that point. The statement went on to say: 'My representatives didn't ask me to provide the emails after the hearing. My new representatives asked me to provide copies and obviously I was able to give these as I had never deleted them…. I am attaching it here and I can produce the same in any future hearing.' It is not clear from this exactly when the applicant was advised to produce copies of the correspondence making enquiries, but his witness statement was signed and dated 08 March 2021, nearly three years after Judge Pooler's decision. There is slightly earlier evidence from December 2020 to suggest that the applicant forwarded a copy of the email he sent to ETS to lawyers who might have been representing him at the time.

24. The witness statement went on to say that the applicant felt nervous and confused at the First-tier Tribunal hearing. The judge misunderstood the explanation that he tried to give about the two tests. The applicant said

that he had been educated in English and had no need to cheat in the test. He had never cheated in an exam in his life. He said that he chose Premier Language Training Centre because it was within walking distance of his house in Barking, where he was living at the time.

25. The applicant said that he was unprepared for the first test and did not get a good enough score, this is why he went back a month later to retake the test. The look-up tool information produced by the respondent does not record a score for a speaking test on 27 June 2012, but does record scores for speaking and writing tests taken on 18 July 2012.

26. The applicant's statement went on to point out that both tests were cancelled by ETS. He said that it would not make sense for him to take a second test if he had used a proxy for the first. The applicant went on to describe details about what happened when he got to the test centre and what he remembered about the procedure for the tests. The applicant said that he was earning a relatively low income working part-time at that time, so it would make no sense for him to pay someone to do the test if he could pass it himself. He referred to his academic qualifications as evidence of his ability to speak English.

27. In the statement dated 08 March 2021, the applicant went on to say that he had 'recently' asked for CCTV footage of the exam to show that he was at the test centre, but it had not been provided. His photograph was taken at the centre for the certificate.

Decision letter (20/09/21)

28. In a decision dated 20 September 2021 the respondent refused to treat the further submissions made on 18 August 2021 as a fresh human rights claim.

29. The respondent concluded that the applicant could not show that he had 10 years' continuous lawful residence for the purpose of paragraph 276B of the immigration rules. He had not had lawful leave since 09 April 2014.

30. The respondent noted that the records showed that the applicant took two TOEIC tests on 27 June 2012 and 18 July 2012 at the Premier Language Training College, which he relied upon in the applications made on 07 December 2012 and 01 May 2014. The scores had since been cancelled by ETS due to evidence to show that the certificate was likely to have been fraudulently obtained using a proxy test taker.

31. The decision went on to consider the findings made by Judge Pooler. Having heard from the applicant, and considered the available evidence, the judge concluded that he had used deception in relation to previous applications. The judge recorded the applicant's claim that he had sent correspondence to ETS but found that he had failed to produce copies as evidence.

32. The respondent went on to consider the further evidence produced by the applicant and came to the following conclusions:

> 'You have provided emails from yourself to the ETS organisation and the Home Affairs Committee dated 04th & 05th June 2016 regarding information about your ETS certificates. It is noted that it is accepted you were made aware of this aspect upon service of the IS151a on 17 March 2015, which you state yourself in your representations, however your emails are dated over 1 year after the service of the IS151a. Your evidence shows ETS responded to you on 08th June 2016 and directed you to contact the ETS UK Office. You have not provided any evidence to show that you followed this direction.
>
> Your evidence shows your next correspondence in relation to this email chain was in December 2020, over 4 years since your initial attempted contact and 2 years since your lack of evidence about this communication was highlighted at your appeal, where you forwarded it to the Government Legal Department and to persons within "Jones Day". You also sent this email chain to a "Md T Islam" in February 2021.
>
> These communications do not provide any new information for consideration or provide evidence to disregard the findings of your previous appeal given that no meaningful responses or actions have been provided as evidence.
>
> The Immigration Judge questioned why you would have participated in 2 TOEIC tests and you stated at the appeal this was because on the date of the first test, you felt unwell and you hadn't prepared properly. You have further repeated these reasons in your representations made in this application, however nothing further has been provided to discharge the findings made at your appeal in respect of this matter.
>
> You have provided a range of education certificates obtained both in the UK and in Bangladesh to demonstrate that you would not have participated in deception to fraudulently obtain a TOEIC certification. Your previous qualifications were considered by the Immigration Judge and were not deemed sufficient to have enabled you to pass the ETS at the relevant level.
>
> You have not provided any further information regarding your qualifications which would warrant moving away from the findings made at your appeal.'

33. The respondent concluded that the submissions made in the current application were not significantly different from the evidence that had previously been considered and did not amount to a fresh claim. The decision did not attract a right of appeal.

The applicant's case

34. The applicant applied and was granted permission to bring judicial review proceedings on the following grounds:

    (i) The decision failed to have regard to all relevant evidence. The first ground argued that there was evidence relating to flaws in the ETS fraud-detection process, including the APPG report, and that the respondent's policy wrongly treated the ETS decision to cancel the result as conclusive.

(ii) The decision was irrational because:

(a) the applicant's English language ability was evident from his prior studies and relied solely on the unreliable system of voice-matching. The applicant's account of the two tests should be preferred; and

(b) the inadequacy of ETS voice matching was not previously given sufficient emphasis. Judge Pooler did not have the benefit of the more recent evidence.

35. By the time the skeleton argument was drafted by counsel who appeared at the hearing, the two points had been reformulated into the following questions:

(i) Whether the respondent failed to take into account material matters in assessing the question of fraud. The respondent erred in treating the ETS cancellation as determinative of fraud without taking into account the criticisms of the procedures outlined in a series of cases.

(ii) Whether it was open to the respondent to hold that the applicant had no realistic prospect of success in a hypothetical appeal to the First-tier Tribunal. The applicant had provided evidence to address the three concerns Judge Pooler raised about the credibility of his oral evidence. The respondent did not properly engage with the evidence and submissions, which was capable of creating a realistic prospect of success on an appeal to the First-tier Tribunal.

36. At the hearing, Mr Malik took me through a series of cases relating to allegations of ETS fraud. The cases included *Majumder & Qadir v SSHD* [2016] EWCA Civ 1167, *Ahsan v SSHD* [2017] EWCA Civ 2009, *DK & RK (ETS: SSHD evidence; proof) India* [2022] UKUT 00112 (IAC) ('*DK (2)*'), and *SSHD v Akter* [2022] EWCA Civ 741. These cases reflect ongoing developments in the litigation in this area and are well known to an expert immigration tribunal.

37. Mr Malik went through Judge Pooler's decision, the further evidence, and the decision letter in some detail. He submitted that the respondent treated the evidence from ETS as determinative when it simply met the 'initial evidential burden'. He argued that the respondent was obliged to adopt 'the three-stage approach' and to consider the factors outlined by the Court of Appeal at [18] of *Majumder & Qadir*. There was evidence to show that the applicant contacted the ETS office in the UK. This evidence could address one of the reasons Judge Pooler gave for rejecting that part of his oral evidence. There was also evidence of the applicant's academic qualifications to support his claim that he spoke sufficient English and therefore had no reason to cheat. The respondent failed to consider whether the evidence could create a realistic prospect of success before another judge.

The respondent's case

38. Mr Harland argued that the applicant's skeleton argument diverged from the original grounds and the arguments travelled in a different direction again at the hearing. The original pleadings did not argue that there was a failure to consider the factors mentioned in *Majumder*. The first ground of challenge was originally confined to submissions about the APPG report, but the emphasis changed in the skeleton argument. The second ground, as argued at the hearing, amounted to submissions on the evidence produced by the applicant, which was different to the point made about the APPG in the original pleadings.

39. Mr Harland disputed that there was significant doubt about the ETS evidence. He relied on the analysis in *DK (2)*. The Upper Tribunal accepted that cancellation of tests was not determinative but made clear that, subject to credible evidence to the contrary, it was usually 'amply sufficient' to prove the allegation of fraud on the balance of probabilities. He argued that dogged reference to the 'three stage test' set out in previous case law is not helpful in the light of what was said in *DK (2)*.

Decision and reasons

40. This is an application to challenge a decision to refuse to treat further submissions as a fresh claim with reference to paragraph 353 of the immigration rules. The relevant test is well-known: see *WM (DRC) v SSHD (Afghanistan)* [2006] EWCA Civ 1495. The respondent's task in assessing further submissions under paragraph 353 of the immigration rules is two-staged. First, to consider whether the new material is 'significantly different' to the previously considered material. If it is not, the respondent need go no further. Second, if the material is significantly different, the respondent goes on to consider whether the new material, taken together with the previously considered material, would create a 'realistic prospect of success' in a hypothetical appeal. In relation to both stages, it is necessary to consider the background to earlier applications, including relevant evidence that was previously considered by the respondent or the First-tier Tribunal.

41. Courts and tribunals have repeatedly emphasised the need for procedural rigour in judicial review proceedings: see *R (Spahiu) v SSHD* [2018] EWCA Civ 2604; [2019] 1 WLR 1297, *R (Talpada) v SSHD* [2018] EWCA Civ 841, *R (AB) Chief Constable of Hampshire Constabulary* [2019] EWHC 3461 (Admin) and *R (Dolan) v SSHSC* [2020] EWCA Civ 1605; [2021] 1 WLR 2326. The reason for procedural rigour is to ensure that justice is done, to ensure fairness to the parties, and because it is in the wider public interest.

42. I find that there is force in the submission that there have been shifting sands of argument in this case. The above summary of the pleadings and submissions shows that the applicant's case has changed in emphasis in material ways from the pleadings formulated in the original grounds. This was done without an application to amend the grounds and without

permission being granted. It is unfair on the other party and is unhelpful to the tribunal tasked with determining the application.

43. It might be argued that the essence of the first ground was broadly reflected in the skeleton argument i.e. a general assertion that the process of identifying fraud by ETS is unreliable. However, the emphasis of the arguments, with reference to numerous cases considering general matters relating to ETS cases, rather than the APPG report, which formed the focus of the original pleading, was quite different. By the time the argument was put forward orally, it took on a quite different gloss, seeming to formulate a reasons challenge by way of the reference to factors that it was claimed should have been taken into account by the respondent when she considered the further submissions.

44. The second ground, as formulated in the skeleton argument, bore little resemblance to the original ground save for the broad assertion that the conclusion that the further submissions would have 'no realistic prospect of success before a the First-tier Tribunal' was outside a range of reasonable responses to the evidence. The second ground originally relied upon the applicant's English language ability, and continued to rely on the APPG report, as evidence to argue that the decision was irrational. The submissions made in the skeleton argument and in oral submissions referred to evidence that was not relied upon in the original pleadings. The oral arguments tended towards substantive submissions on the merits.

45. I recognise that counsel might sometimes be faced with the difficult task of presenting a case at a substantive hearing when they did not draft the original grounds. It is legitimate to draw out what one can to improve the strength of the original grounds, but counsel must be careful not to stray into reformulating the arguments in a way that departs from the essence of the original pleadings upon which permission was granted.

46. If later counsel considers that it is in the interest of their client for a better point to be argued, an application should be made to amend the grounds with reference to rule 32 of The Tribunal Procedure (Upper Tribunal) Rules 2008. An opportunity should be given to the respondent to address the point before the Upper Tribunal decides whether permission should be granted for it to be argued: see also *Keep Bourne End Green v Buckinghamshire Council* [2020] EWHC 1984 (Admin) at [40].

47. The fact that there might be a challenge to a decision on the broad ground of 'irrationality' might allow for some flexibility but does not permit substantially different arguments to be made simply by reference to the same head of challenge. If, as a matter of fact, the arguments being put forward are materially different to the original pleadings, an application should be made to amend the grounds.

48. I have made findings about the lack of rigour in the way the pleadings have been presented. In light of those findings, it is not necessary to address the specific arguments put forward in the skeleton argument and

in oral submissions at the hearing where they depart in a material way from the grounds as originally pleaded. No application was made to amend the grounds nor permission given to argue materially different points. To engage too fully with them would be to acquiesce to a *de facto* amendment.

49. Counsel for the applicant were placed in some difficulty by the recent decision in *DK (2)*. The decision in *DK (2)* makes clear that, whilst there has been evidence casting some doubt on the reliability of certain aspects of the procedures for cancelling ETS certificates, those doubts go no way to undermining the overall strength of the evidence relating to widespread fraud which underpinned decisions to cancel test results. Having considered a full range of evidence, including a transcript of the evidence before the APPG, the Upper Tribunal concluded:

> '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.
> ....
> 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.'

50. I turn to the grounds as originally pleaded. The first ground argued that the respondent's reliance on voice-matching analysis, without more, to conclude that the applicant obtained the English language certificate by fraud, failed to take into account the 'significant volume of evidence attesting to significant flaws in both ETS's fraud-detention process'. At [27] of the grounds the APPG report was the main document cited. As originally pleaded or on the basis argued at the hearing, this ground has now been overtaken by the findings made in *DK (2)*.

51. The second ground argued that the decision was irrational because the applicant had given cogent reasons to explain why he had no reason to cheat. His English language ability, evidenced by his educational certificates, supported this. The fact that he had taken two tests was 'best explained' by his narrative rather than the respondent's. It seems that the applicant reiterated the explanation he had already given to Judge Pooler in more detail in the witness statement sent with the further

submissions, but no further evidence appears to have been produced to show whether two speaking tests were taken or whether the first test result was inadequate as claimed.

52. The fact that the applicant has studied in English and might speak the language to a practical level is not a matter that would be given much weight in rebuttal. The Upper Tribunal in *MA (ETS) – TOEIC testing)* [2016] UKUT 450 made clear that a person might have other motives to cheat in an English language test such as 'lack of confidence, fear of failure, lack of time and commitment or contempt for the immigration system.'

53. The latter part of the second ground related largely to criticisms of the voice matching analysis in the APPG evidence, which has also been overtaken by the findings made in *DK (2)*.

54. Both the original grounds and the reformulated grounds purported to challenge the respondent's conclusion that the further submissions did not give rise to a 'realistic prospect of success' on appeal as irrational and one that was not open to her to make on the new evidence. However, I note that the decision letter dated 20 September 2021 did <u>not</u> refuse the application on that basis. The respondent was satisfied, for the reasons quoted at [32] above, that the further submissions were not 'significantly different from the evidence that has previously been considered.'

55. Even if I were to trespass into considering some of the arguments that were materially different to those raised in the original pleadings, they would not disclose any arguable public law errors in the decision. The applicant's academic history had already been considered by the First-tier Tribunal. The further explanation provided by the applicant in his witness statement about the two tests trod similar ground to the evidence he gave before the First-tier Tribunal and was not supported by any new evidence. The email to ETS in 2016 and correspondence to the Home Affairs Select Committee seemed to be the only new evidence. However, it is not likely that much weight could be placed on that evidence given the vague nature of the request and the absence of any evidence to show that the request made in 2016 was followed up with ETS. In a hypothetical appeal, where the starting point would be Judge Pooler's credibility findings, it is highly unlikely that a properly directed judge would consider such evidence to be sufficient to justify departing from the original credibility findings.

56. I find that it was within a range of reasonable responses for the respondent to conclude that the email correspondence to ETS was rather belated and did not add any new information that was significantly different to that which had been considered previously. It was reasonable for the respondent to conclude that the applicant's explanation about the two tests and his educational history had already been considered and that no further evidence had been produced that was significantly different to the evidence considered by the First-tier Tribunal.

57. For the reasons given above, I conclude that the respondent's decision dated 20 September 2021 to refuse to treat the further submissions as a fresh human rights claim does not disclose any public law errors. The application for judicial review is dismissed.

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