IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No.: UI-2022-006283

First-tier Tribunal No: HU/52928/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

18th September 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

MD MUJIBUR RAHMAN
(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Noor Mohammad, Legal Representative, Taj Solicitors Ltd
For the Respondent: Mr Alain Tan, Senior Home Office Presenting Officer

Heard at Field House via Teams on 4 September 2023

DECISION AND REASONS

1. The appellant appeals to the Upper Tribunal from the decision of First-tier Tribunal Sarwar promulgated on 6 December 2022 ("the Decision"). By the Decision, Judge Sarwar dismissed the appellant's appeal against the decision of the respondent made on 1 November 2021 to refuse his application for leave to remain the UK on the ground that he had previously sought leave to remain in the UK by deception; that there would not be very significant obstacles to his integration into Bangladesh; and

that there were not exceptional circumstances in his case which would render a refusal a breach of Article 8 of the ECHR.

Relevant Background

2. The appellant is a national of Bangladesh, whose date of birth is 27 July 1988. On 19 January 2010 the appellant entered the UK as a Tier 4 (General) student migrant with leave which was valid until 14 March 2013. On 5 December 2012 the appellant applied for leave to remain as a student, and on 26 September 2013 the appellant was granted leave to remain until 28 November 2015. On 5 June 2014 the appellant's leave was curtailed to 10 August 2014 on the ground that he had used deception in his application for leave to remain made on 5 December 2012.

3. In the submissions that were made on his behalf on 1 November 2021 and 21 February 2022, the appellant's representatives submitted that the allegation of deception was baseless and should be withdrawn.

4. In the refusal decision made on 25 April 2022, the respondent said that she was satisfied from the information provided that he had made false representations for the purpose of obtaining leave to remain in an application dated 5 December 2012. In his application he had used an ETS certificate dated 18 April 2012 which, upon checking, ETS had confirmed was invalid. On the basis of the information provided to her by ETS, the Secretary of State was satisfied that the certificate was fraudulently obtained and that he had used deception in his application of 5 December 2012. ETS had a record of his Speaking test on 18 April 2012 at Colwell College. Using Voice-Verification software, ETS was able to detect when a single person was undertaking multiple tests. ETS had undertaken a check of his test and had confirmed that there was significant evidence to conclude that his certificate was fraudulently obtained by the use of a proxy test-taker, and ETS had informed the Home Office that his scores were cancelled.

5. There were no exceptional circumstances which made it appropriate to exercise discretion in his favour. He did not meet the requirements for leave to remain because paragraph S-LTR.4.2 of Appendix FM of the Immigration Rules applied.

The Hearing Before, and the Decision of, the First-tier Tribunal

6. The appellant's appeal came before Judge Sarwar sitting in the First-tier Tribunal at Manchester Piccadilly on 22 November 2022. Both parties were legally represented, with Mr Mohammad of Taj Solicitors appearing on behalf of the appellant. The Judge received oral evidence from the appellant, who gave his evidence in English.

7. The respondent's evidence filed in support of the allegation of deception included: (a) an ETS Lookup tool excerpt showing that the appellant's Speaking test score of 200 in respect of a test taken at Colwell College on 18 April 2012 had been declared invalid; (b) a College Lookup tool excerpt

showing that a total of 125 tests had been taken at the College on that day, of which 72 (58%) had been declared invalid - and that the average test score achieved on that day for Speaking was 182.9; (c) the generic witness statements of Rebecca Collings and Peter Millington; (d) the report of Professor Peter French on ETS tests; and (e) an Operation Facade report on Colwell College which reported that the criminal enquiry at the college in Leicester had revealed that between 18 October 2011 and 15 January 2013 the college had undertaken 2,901 TOEIC Speaking and Writing tests, of which ETS had identified 53% as being invalid.

8. The report dated 15 May 2015 went on to give specific information in support of, and to corroborate, the analysis completed by ETS, and to show the "*organised and widespread*" abuse of the TOEIC that took place at the test centre. The report concluded with a notification that there was an ongoing criminal investigation and to reveal further information regarding it might prejudice future prosecutions.

9. The appellant's bundle for the hearing contained a skeleton argument settled by Mr Mohammad in which he submitted that the respondent had not discharged the initial evidential burden, in that she had failed to provide sufficient evidence to support the allegation that the appellant had used a proxy test-taker.

10. He relied on the APPG report on TOEIC, in which one of the key findings was that the experts all agreed that the respondent's generic evidence was questionable. He submitted that the applicable principles were explained in *SM and Qadir* [2016] UKUT 00229. It was accepted in *SM and Qadir* that the respondent's generic evidence narrowly discharged the initial evidential burden, but this was at a time when the APPG report was not before the Tribunal. In light of the fresh evidence of the APPG, he submitted that the generic evidence no longer discharged the initial burden of proof.

11. However, if the Tribunal accepted that the respondent had discharged the initial evidential burden, he submitted that the appellant had provided an innocent explanation demonstrating that he did take his test, and that it would be unreasonable or unnecessary for him to cheat, considering his strong academic background and the other evidence in the bundle. He submitted that in his witness statement the appellant had provided a detailed explanation regarding taking the TOEIC test by himself, and there was no reason to reject his evidence as being incredible.

12. In his witness statement, the appellant said that since arriving in the UK he had been living in Stoke-on-Trent, and that he had been commuting to London for his studies. He sometimes stayed in London at his relatives' home and joined classes from there. He was attending classes at least three days a week.

13. On the topic of his TOEIC test, the appellant said that there were a number of providers. His intention was to sit for the IELTS exam, but

having spoken to fellow students and an education consultancy firm, they all advised him that the TOEIC test was a good option. He had booked his TOEIC test at Colwell College. He remembered that he undertook solid preparation for around two weeks before taking the test. He had taken the Listening and Reading part of the test on 17 April 2012, and the Speaking and Writing components of the test the following day.

14. He said that he had always maintained that he sat his own Speaking test, as he had always been competent in speaking English. The Home Office had not provided any explanation or evidence in support of their allegation. He maintained that ETS or a particular test centre might have mishandled his voice files and wrongly accused him of cheating. He had taken all reasonable steps that an innocent victim would take to clear his name.

15. In the Decision, the Judge summarised the closing submissions made by the Presenting Officer and Mr Mohammad. He then went on to make his findings. He held that, as per the case of *DK and RK*, the respondent had provided the necessary documents from pages 106 to 153 to establish the allegation that the appellant had used deception to obtain leave to remain, on the balance of probabilities.

16. The Judge did not accept Mr Mohammad's submission that the appellant would not need to hire a proxy, given his own command of the English language, citing the following extract from *MA (ETS - TOEIC)* [2016] UKUT 00450 (IAC):

> "In the abstract, of course, there is a range of reasons why persons proficient in English may engage in TOEIC fraud. These include, not exhaustively, a lack of confidence, fear of failure, lack of time and commitment and contempt for the Immigration system."

17. The Judge addressed Mr Mohammad's submission that if he accepted the evidence of the respondent, this must have been a false positive case. The Judge said that he had considered in detail the report prepared by Professor French at pages 135 to 149, and his conclusions about false positives being substantially less than 1%. He therefore did not accept Mr Mohammad's submission.

18. The Judge went on to find that there would not be very significant obstacles to the appellant's integration into life and society in Bangladesh, and that would it not be unduly harsh for the appellant to be required to return to his home country.

The Grounds of Appeal to the First-tier Tribunal

19. Ground 1 was that the Decision contained significant and multiple procedural errors. The first procedural error identified was that the Decision had not been set out in sequentially numbered paragraphs. The second procedural error was that, in addition to the stitched bundle of 153 pages that was uploaded on 16 November 2022, an Addendum bundle of

32 pages had been uploaded on 21 November 2022. Although the Judge at the hearing had granted permission for the Addendum bundle to be admitted into evidence, despite its late service, the Judge had erred in stating in the Decision that there were no further documents to consider beyond the 153 pages of the stitched bundle.

20. Ground 2 was that the Judge had erred in law in adopting a hypothetical, non-factual and speculative approach to the TOEIC issue.

21. Ground 3 was that the Judge had failed to assess the appellant's evidence about the possible persecution he would face on return to his country of origin in the light of the case of *Tanveer Ahmed* [2002] UKIAT 00439. He had also failed to make a rounded assessment on proportionality, and in particular had failed to follow the guidance given in *Rhuppiah -v- SSHD* [2018] UKSC 58.

The Reasons for the Grant of Permission to Appeal

22. On 5 January 2023 First-tier Tribunal Judge Roots granted permission to appeal primarily on the basis of Ground 2, relating to the TOEIC issue, but the Judge said that the grant was not limited. The Judge's reasoning was as follows:

> 3. The ground relating to the format for determination does not raise any arguable error of law. It is notable that the determination is not numbered and also does contain various unfortunate typos and omissions etc which at least indicate a lack of care in proof-reading. As regards the supplementary bundle, it is true that the Judge does not deal with this. However, the grounds fail to make clear how this resulted in an error of law on a material issue.
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> 4. Ground 2 relates primarily to the appellant's evidence in relation to the TOEIC issue. The consideration of the TOEIC issue is very brief (as is the determination generally in most respects). It is arguable that the Judge did not give adequate consideration to the appellant's evidence, or make adequate findings on this issue, as it submitted. The statement "*I do not believe that these impact …*" is unclear, and it is arguably not appropriate in a judicial determination, and raises an arguable error of law as it relates to a material issue in the appeal.
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> 5. Ground 3 is not arguable. It refers to protection issues, but this was not a protection claim. It also refers to the "*very significant obstacles*" test, but fails to particularise any challenge. The Judge's assessment of Article 8 outside the Rules is very brief, but again the grounds lack any real substance.

The Rule 24 Response

23. In a Rule 24 response dated 13 January 2023, Chris Avery of the Specialist Appeals Team gave the respondent's reasons for opposing the appeal. In summary, he submitted that the Judge of the First-tier Tribunal had directed himself appropriately. He had properly applied the current case law, and he had properly considered the case advanced by the

appellant. The main thrust of the appellant's argument was that he was competent in English and had no reason to cheat. This was specifically addressed by the Judge in the determination. There was no error of law.

The Hearing in the Upper Tribunal

24. At the hearing before me to determine whether an error of law was made out, I reviewed the contents of the bundles that had been placed before the Judge with the assistance of the Representatives. Mr Mohammad confirmed that the Addendum bundle had been dealt with as a preliminary issue. The Presenting Officer had no objection to it, and so the Judge had allowed it in. Mr Tan referred to an attendance note that had been prepared by the Presenting Officer who had presented the respondent's case at the hearing. The note recorded that he had made submissions about the probative value of the witness statement in the Addendum bundle from Abdul Ashraf: he had submitted that the witness statement added nothing to the appellant's case, and also that the witness was not an expert.

25. Mr Mohammad, in reply, confirmed that there had been a discussion at the hearing about the competency of Abdul Ashraf to give evidence about the appellant's command of English. Because the witness had been born in the UK, he had submitted to the Judge that the witness was competent to comment on the appellant's English language ability.

26. Mr Mohammad submitted that the main defect in the Decision was that the appellant was not cross-examined on his innocent explanation, and the Judge had not given an adequate reason for rejecting it.

27. Mr Mohammad confirmed that he had not provided to the Judge an updated skeleton argument which took into account the guidance given in *DK and RK.*

28. I asked Mr Mohammad to explain the significant inconsistencies in the respondent's evidence that the Judge recorded him as having asserted orally, there being no reference to such alleged inconsistencies in the skeleton argument that was before the Judge. He drew my attention to the internal minutes that had been disclosed as a result of a Subject Access Request. He submitted that these minutes showed that the appellant had been interviewed in English while in detention in 2014. His case before the Judge was that the allegation that the appellant had used a proxy test-taker to obtain his Speaking test was inconsistent with the Subject Access Request material, the witness statement from Abdul Ashraf, and various educational certificates, all of which showed that he was a competent English Language speaker, and therefore did not need to cheat.

29. On behalf of the respondent, Mr Tan adopted the Rule 24 response and expanded upon it. The appellant had not given a detailed explanation about taking the test. What he had said in his witness statement was in effect no more than an assertion of honesty. Although the Judge had not addressed any of the material in the Addendum bundle, there was no error

in law, as the material was either irrelevant (applying *DK and RK*), or - in the case of the witness statement from Mr Ashraf - it was covered by the Judge's finding that the appellant's command of the English language was irrelevant, applying *MA*. He added that his interpretation of the Subject Access Request material was that the appellant had been interviewed in English in 2019, not in 2014.

30. In reply, Mr Mohammad disputed that the interview in English referred to in the Subject Access Request disclosure was an interview conducted in 2019, as opposed to in 2014. Mr Mohammad reiterated the appellant's case that there was no specific evidence that he had cheated.

Discussion and Conclusions

31. *DK and RK (ETS: SSHD evidence, proof) India* [2022] UKUT 112 (IAC) – also referred to in the authorities as *DK and RK (2)* - was promulgated on 25 March 2022. As set out in para [4] of the introduction to *DK and RK (2)*, the task which the Presidential Panel set themselves was to examine the evidence on which the Secretary of State currently relies to establish fraud in individual cases. Their conclusion was that, despite the general challenges made (both in judicial proceedings and elsewhere) there was no good reason to conclude that the evidence did not accurately identify those who cheated. It was amply sufficient to prove the matter on a balance of probabilities. The Panel went on to highlight at para [128] that in using the phrase "*amply sufficient*" they were expressly differing from the conclusion of the Presidential Panel in *SM and Qadir*, that the then Secretary of State's evidence only discharged the evidential burden by a narrow margin. They said that the conclusion in *SM and Qadir* was based on different evidence, explored in a less detailed way.

32. In *SSHD -v- Halima Akter & Others* [2022] EWCA Civ 714, published on 24 May 2022, giving the leading judgment of the Court (with which the other Judges agreed), Lady Justice Macur said, at [29]:

> "I do not accept Mr Wilcox's initial submission that *DK and RK (2)* has not precedential authority in establishing that the "generic" evidence relied upon by SSHD in the 'fraud factory' cases is sufficient to satisfy the evidential burden, because it is neither a 'starred' nor a Country Guidance case. The cases arise from the same factual matrix, "such as the same relationship or the same event or series of events'. (See AA (Somalia) -v- SSHD [2007] EWCA Civ 1040, [69]). The judgment in *DK and RK (2)* includes a comprehensive account of the evidence which the UT heard in its analysis of the same and upon which it based its decision. That is, the UT in *DK and RK (2)* demonstrably undertook the forensic examination and reached the definitive conclusions that were not open to Dove J upon the evidence before him in *Alam*. There would need to be good reason, which would inevitably mean substantial fresh evidence, for another UT to re-visit and overturn the determination. This is not a situation (as Mr Wilcox suggested on behalf of HA), in which different tribunals could reasonably reach different conclusions upon the same factual matrix."

Ground 1

33. I accept that the Judge's failure to set out his reasons in sequentially numbered paragraphs is a breach of the President's Practice Statement No.1. of 2022. While this is regrettable, the Decision is otherwise clearly laid out and otherwise easy to follow, not least because the lack of sequentially numbered paragraphs is partially mitigated by the occasional deployment of sequentially numbered sub-paragraphs.

34. The second error is potentially more significant. At para [12] - adopting the manuscript paragraph numbering helpfully provided by Mr Mohammad - the Judge said that he had the stitched bundle of papers consisting of 153 page and that he had confirmed with the Representatives that this was up to date and that there were no further documents to consider.

35. But in fact, as is agreed by Mr Tan, an Addendum bundle was filed the day before the hearing comprising (1) a witness statement/letter of support from a former work colleague of the appellant, Abdul Ashraf; (2) extracts from the appellant's Home Office file records obtained pursuant to a Subject Access Request; (3) some pages from a report by the National Audit Office; (4) some pages from the APPG report; and (5) a copy of the consent order that was made in another case on 30 July 2020.

36. However, I find that that the appellant has failed to show that the Judge's error at para [12] was material.

37. Firstly, despite the Judge's failure to acknowledge the existence of the Addendum bundle, it is apparent that he considered its contents. It is common ground that the Judge dealt with the question of whether the Addendum bundle should be admitted in evidence as a preliminary issue at the outset of the hearing, and that he granted permission for its admission. Mr Tan confirms that the Presenting Officer referred to the evidence of Abdul Ashraf in his closing submissions. In his record of Mr Mohammad's oral submissions at para [7], the Judge at sub-para (iv) references a submission that the appellant had provided "*further evidence*" to show his command of the English language at the time; and at sub-para [vi] the Judge references Mr Mohammad's submission that the appellant was interviewed in 2014 in English.

38. Secondly, although the Judge did not in his findings expressly comment on any of the evidence in the Addendum bundle, I consider that the Judge adequately addressed the central thrust of the appellant's case that was built in part upon the evidence in the Addendum bundle.

39. It is abundantly clear that the case strategy adopted by Mr Mohammad was entirely based on the assumption that the principles set out by the Presidential Panel in *SM and Qadir* continued to apply. Accordingly, the strategy was to rely on various sources of evidence to establish that the appellant had the requisite command of English at the time of taking the test so as not to need to hire a proxy to take the Speaking test on his behalf

40. The Judge adequately addressed this line of argument at para [27], by referring to the well-known passage in *MA* that I have set out earlier in this decision. The Judge thereby indicated that the appellant's case strategy foundered on the observation of the Presidential Panel in *MA* that there were a range of reasons why persons proficient in English might engage in TOEIC fraud, and hence proficiency in English did not in itself negate fraud.

41. The same point was made more starkly by the Presidential Panel in *DK and RK (2)*, at para [108].

> "… A further possible source of corroboration may be incompetence in English (i.e. English to the lower level than that required for the test); but it must not be thought that the converse applies; as the then President pointed out in SSHD -v- MA [2016] UKUT 450 IAC at [57], there are numerous reasons why a person who could pass a test might nevertheless decide to cheat. This is a point that seems to have escaped Professor Sommer in his comments to the APPG."

42. There was also no error on the Judge's part in failing to engage with the extracts from the APPG report and the National Audit Office report contained in the Addendum bundle.

43. In *DK and RK (Parliamentary privilege: evidence)* [2021] UKUT 00061 ("*DK and RK (1)"*) a presidential panel of the Upper Tribunal ruled on the admissibility of the report of the APPG on TOEIC dated 18 July 2019. The APPG, which comprised 18 MPs, heard evidence, including from Professor French, Dr Philip Harrison and Professor Peter Sommer, who had previously given evidence before the Tribunals upon the reliability of statistical evidence of data supplied by ETS.

44. Aside from the transcript of the evidence given by the experts to the APPG, the Upper Tribunal ruled that the APPG report *per se* was not admissible, as admitting it into evidence would draw the Tribunal into the forbidden area of violating parliamentary privilege.

45. The Presidential Panel also addressed the question of the admissibility of the National Audit Office report ("the NAO report") on TOEIC. At [17] the Panel said:

> "The APPG report also makes reference to the National Audit Office report on TOEIC. The reports of the National Audit Office are documents that attract the protection of the Parliamentary Papers Act 1840. This protects the publisher of any document audited to be printed by either House of Parliament from any legal action that may result from it."

46. As a consequence of the ruling on privilege in *DK and RK (1),* which was upheld by the Court of Appeal in *Akter,* the extracts from the APPG report and the National Audit Office report were not admissible in evidence as they were privileged; and, as a consequence of *DK and RK (2),* they were irrelevant and they had no probative value. So, it follows that the Judge did not err in law in completely ignoring them.

Ground 2

47. Under Ground 2, the only argument that the appellant is left with is an argument that, despite the strength of the respondent's evidence, the Judge did not adequately explain why he rejected the appellant's innocent explanation.

48. It was not the respondent's case that the appellant had not attended the test centre on the days he said he attended, or that he had not genuinely sat for all the other components of the test apart from the Speaking test. Even if the appellant was not cross-examined to the effect that he was not telling the truth about taking the Speaking test himself, it was open to the Judge to reject his innocent explanation for the reason which he gave at para [29], which was that Professor French had concluded that the incidence of false positives was likely to be substantially less than 1%.

49. I accept that there are two respects in which the Judge's line of reasoning on the TOEIC issue is unclear.

50. Firstly, at para [24], he noted that there was an investigation into Colwell College, and he accepted Mr Mohammad's submission that there were no findings before him about the outcome of that investigation. In an apparent non-sequitur, he went on to say that he therefore attached *"due weight"* to that evidence.

51. The Judge's characterisation of the status of the Project Façade report is not entirely accurate. The author of the report states that the criminal investigation is ongoing, but there are clear findings earlier in the report which are not dependent on the outcome of the ongoing criminal investigation. It may that, as submitted by Mr Tan, the Judge attached due weight to the report insofar as it showed that the college was a fraud factory.

52. It is clear that the Judge did not discount the Project Facade report entirely, as otherwise he would have said that he therefore attached no weight to it, rather than attaching due weight to it.

53. Although the amount of weight which the Judge attached to the report is unclear, I do not consider that the lack of clarity is material, as the burden of proof was amply discharged by the other evidence relied on by the respondent, applying *DK and RK (2).*

54. Secondly, in a passage highlighted in the grant of permission, at para [25] the Judge said that he had noted Mr Mohammad's submission that there were significant inconsistencies in the respondent's evidence, and although he found that there had been some minor inconsistencies, he did not believe that these had impacted on his final decision.

55. I accept that on its face para [25] is manifestly unsatisfactory and opaque. However, having drilled down to what the alleged significant

inconsistencies were, I am satisfied that there was no material error in the Judge's line of reasoning.

56. According to the account given to me by Mr Mohammad in the course of oral argument, there were in fact no asserted inconsistencies within the respondent's evidence, significant or otherwise. There was a single asserted inconsistency between the respondent's body of evidence and the body of evidence assembled by the appellant, which was simply that, whereas the appellant had the competence to take a Speaking test on his own, the respondent's evidence was that he had used a proxy test-taker.

57. It remains wholly unclear what were the minor inconsistencies that the Judge purported to accept, but which he believed did not impact on his decision to find against the appellant on the issue of deception. Nonetheless, the case on inconsistencies to which the Judge was alluding in para [25] was adequately addressed by him at para [27].

Ground 3

58. I consider that Ground 3 is no more than an expression of disagreement with findings that were reasonably open to the Judge on the evidence that was before him.

59. In conclusion, I am satisfied that no material error of law has been made out under any of the three Grounds of Appeal.

Notice of Decision

The decision of the First-tier Tribunal does not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

Andrew Monson
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
14 September 2023