IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-003054

First-tier Tribunal No: HU/57860/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

6th December 2024

Before

UPPER TRIBUNAL JUDGE HOFFMAN

Between

MOHA SHAHIN MIAH
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Z Malik KC of Counsel, instructed by Chancery Solicitors
For the Respondent: Mr E Terrell, Senior Home Office Presenting Officer

Heard at Field House on 27 November 2024

DECISION AND REASONS

1. The appellant appeals under s.82(1)(b) of the Nationality, Immigration and Asylum Act 2002 the decision of the respondent dated 17 June 2023 refusing his application made on 18 May 2022 for leave to remain on human rights grounds.

2. The appellant's appeal was originally allowed by First-tier Tribunal Judge Reed in a decision promulgated on 21 May 2024. However, I set aside that decision on the basis that it contained a material error of law on 17 October 2024. A copy of my error of law decision is appended to this decision. Having set aside the decision of the First-tier Tribunal, I adjourned the remaking hearing to the first available date.

Background

3. The appellant is a citizen of Bangladesh. He entered the UK on 26 February 2010 with a Tier 4 student visa valid until 27 August 2012 which was subsequently extended until 30 November 2014. On 17 April 2012, the appellant claims to have taken a Test of English for International Communication ("TOEIC") at Synergy Business College of London. The TOEIC test was administered by a company called ETS Global. It is a matter of dispute between the parties whether the appellant used a proxy to take that test, but it is agreed that the appellant relied on the certificate to obtain further leave to remain in the UK.

4. On 24 April 2013, the appellant's student visa was curtailed to 24 June 2013 after his college had its sponsor licence revoked, although his leave to remain was subsequently extended again until 6 June 2015. However, on 26 February 2014 the appellant's visa was again curtailed, this time to 27 April 2014 after his new college also had its sponsor licence revoked.

5. On 26 April 2014, the appellant applied to extend his leave as a Tier 4 (General) Student under the points-based system, but his application was refused on 7 August 2015 on the basis that the appellant's TOEIC test was deemed to be invalid and the certificate fraudulently obtained. That decision was sent to the appellant's home address; however, by then he had moved house and failed to update the respondent. The decision was therefore served to the appellant's Home Office file. The appellant made no attempt to find out the outcome of his 26 April 2014 application until 26 June 2020 when he made a subject access request to the Home Office. He was provided with a copy of the 7 August 2015 decision on 23 July 2020 and, thereafter, appealed out-of-time to the First-tier Tribunal. However, in a decision dated 2 July 2021, First-tier Tribunal Judge Landes refused to extend time. Despite having no leave to remain, the appellant failed to leave the UK and he continued to remain here unlawfully.

6. On 18 May 2022, the appellant applied for leave to remain on private life grounds.

The respondent's decision

7. In her decision dated 17 June 2023 [consolidated hearing bundle ("HB")/315], the respondent refused the appellant's human rights claim on the basis that he did not meet the requirements for leave to remain on private life grounds under paragraph 276ADE of the Immigration Rules. In particular, the respondent found that there were no very significant obstacles to the appellant reestablishing his private life in Bangladesh so as to engage subparagraph (1)(vi).

8. The respondent then went on to consider whether there were any exceptional circumstances to the appellant's case that would qualify him for a grant of leave to remain outside of the Rules. The respondent took into account that the appellant's claim that the accusation of deception had affected his reputation amongst his family and friends but she found that this did not constitute an exceptional circumstance.

The appellant's appeal

9. The appellant denies that he engaged in deception in order to obtain his TOEIC certificate. He claims that he took the tests himself as a genuine student. He therefore argues that the respondent's decision amounts to a disproportionate interference with his right to a private life under Article 8 of the European Convention on Human Rights.

Documents

10. I had before the following documents:

    a. The 363-page optimised hearing bundle prepared by the respondent, which includes both parties' evidence from the First-tier Tribunal;
    b. A witness statement made by Alex Sansom, a Home Office senior caseworker, dated 9 February 2024;
    c. A Project Façade report on Synergy Business College, London dated 5 May 2015; and
    d. The appellant's skeleton argument dated 21 November 2024.

The hearing

11. It was agreed between the parties that the sole issue for consideration in this appeal is whether the appellant did participate in the TOEIC fraud and that my findings on this will be determinative of whether the appellant's removal from the UK would amount to a disproportionate interference with his right to a private life under Article 8 ECHR.

12. Mr Malik also confirmed that he would not be asking me to consider the expert report of Mr Christopher Stanbury in the light of the findings of the presidential panel in Varkey & Joseph (ETS – Hidden rooms) [2024] UKUT 00142 (IAC).

13. The appellant gave oral evidence before the tribunal and was cross-examined by Mr Terrell, on behalf of the respondent. His evidence is set out in the record of proceedings and is not rehearsed unless it is necessary to do so.

Findings – Remaking

Whether the respondent has provided *prima facie* evidence of fraud

14. The respondent relies upon the witness statement of Mr Sansom and the Project Façade report.

15. The Project Façade report relates to the criminal inquiry into the abuse of the TOEIC. At paragraph 10 it says the a criminal inquiry into Synergy Business College revealed that between 24 November 2011 and 15 January 2013 the college undertook 4,894 TOEIC speaking and writing tests of which ETS identified 2,410 as being invalid and 2,484 as being questionable. Therefore, 49% of tests were found to be invalid. In contrast, an audit of tests taken between 11 April 2011 and 9 February 2014 at public tests centres in Bloomsbury and Westminster identified only 0.28% of tests to be invalid: see paragraph 6.

16. Attached to Mr Sansom's witness statement are the following:

    a. A look-up tool entry relating to the appellant that shows his test taken on 17 April 2012 was found to be invalid.
    b. A look-up tool entry regarding Synergy Business College that says that of 153 tests taken there on 17 April 2012, 50% were found to questionable and 50% were found to be invalid.

17. I am satisfied from reading these documents that the respondent has discharged the burden of proof, on the balance of probabilities, to show that the issue of fraud arises in this case.

Whether the appellant has provided an innocent explanation

18. The appellant denies that he took part in any fraud. He claims that, despite living in Luton, he chose to take his TOEIC test at Synergy Business College in London because he could not at the time find any local test centres with vacancies. In his witness statement dated 8 March 2024 [HB/291], the appellant sets out his academic background in relation to his English studies in Bangladesh and the UK and his recollection of the tests he claims to have undertook at Synergy, including how he travelled there and how he prepared.

19. I accept that the appellant's explanation meets the minimum level of plausibility.

Should the appellant's explanation be rejected?

20. Having found that the first two stages of the test have been met, I proceed to consider whether the respondent has demonstrated, on the balance of probabilities, that the appellant's innocent explanation should be rejected.

21. Mr Malik, on behalf of the appellant, submitted that the respondent had failed to challenge the appellant's evidence in his witness statement dated 8 March 2024. There, the appellant had provided an explanation as to how he chose Synergy Business College, how he travelled there, how he prepared for the exams and his recollections of the day. Mr Malik said that the appellant had provided evidence of his qualifications in Bangladesh [HB/111-117] and the UK and that he had obtained his Level 4 diploma in administrative management the same year he is alleged to have cheated in his TOEIC test. Mr Malik submitted that this did not suggest that the appellant is someone who would need to cheat. Furthermore, he said that the respondent had failed to provide evidence to show that the appellant could have taken the exam at a centre closer to his home in Luton. Mr Malik also argued that despite having cross-examined the appellant, Mr Terrell had not identified any discrepancies in his evidence apart from his ties to Bangladesh. However, Mr Malik said, just because the appellant may have lied in relation to his family in Bangladesh, that did not mean he had lied about anything else and a witness may lie for many reasons: see Uddin v Secretary of State for the Home Department [2020] EWCA Civ 338, at [11].

22. I take into account the factors identified in the case of Majumder and Qadir v Secretary of State for the Home Department [2016] EWCA Civ 1167 at [18]:

    a. What the appellant had to gain from being dishonest?
    b. What the appellant had to lose?
    c. What is known about the appellant's character?
    d. What is the cultural environment in which the appellant operated?
    e. How they performed under cross-examination?
    f. Whether the assessment of their English language proficiency is commensurate with their TOEIC scores?
    g. Whether the appellant's academic achievements are such that it was unnecessary or illogical for him to have cheated?

23. First, it is difficult for me to say with any certainty what the appellant had to gain by being dishonest. Clearly, he was required to pass the TOEIC in order apply for further leave to remain as a student. In that regard, there are many possible reasons why he may have decided to cheat, including a lack of proficiency in English, a lack of self-confidence or even laziness, and I do not wish to speculate. I also take into account my findings below that there is a lack of evidence to satisfy me that the appellant was sufficiently proficient in the English language when he took the test in 2012 or that he has been able to demonstrate particularly strong academic achievements.

24. Second, question of what the appellant had to lose by cheating is easier to answer given the obvious effects of the respondent's decision of 7 August 2015. It cost him his ability to continue with his education in the UK, the career prospects that would follow and the loss of the money he had invested in this. The appellant also claims that the accusations have damage his reputation with his friends and family. I bear in mind that this state of affairs would likely apply to many, or even most, students taking part in fraudulent TOEIC exams.

25. Third, I accept that outside of the allegation that he cheated in his TOEIC test, there is no suggestion that the appellant is otherwise not of good character. The exception to this is the point Mr Terrell made that the appellant had either lied or provided highly misleading information in his application for leave to remain dated 18 May 2022 that he did not have contact with his family in Bangladesh [HB/323]. As Mr Terrell pointed out, what is said in that form is contradicted by the appellant's GP, who says the appellant misses his family [HB/180], and what the appellant said in cross-examination that he missed his siblings and that it was his father and stepmother who he was not in contact with. I am satisfied, on balance, that the appellant did seek to misstate his ties to his family in Bangladesh when he made his application on 18 May 2022. While I accept Mr Malik's submission that I should give myself a Lucas direction, and while I accept that a witness may have many reasons for lying and that this is not determinative of the TOEIC point, I do attach some weight to this as it indicates that the appellant is willing to provide untruthful or misleading information in support of an application for leave to remain.

26. I have also taken into account the letters of support [HB/159-168] and find that while these paint a positive picture of the appellant, I note that none the people who wrote them knew the appellant at the time of his TOEIC tests, which lessens the weight I attach to them.

27. Fourth, I have little evidence before me regarding the cultural environment in which the appellant operated. I therefore make no findings on this point.

28. Fifth, I find that the appellant generally performed well under cross-examination and that his oral evidence was consistent with his written evidence, which weighs in the appellant's favour.

29. Sixth, regarding the appellant's English language proficiency, I take into account that he was able to give evidence before me without the aid of an interpreter and he clearly had some proficiency in the English language. However, I find that I can attach only limited weight to this given that the TOEIC test took place over 12 years ago and the appellant's proficiency in English can only be expected to have improved over time. Furthermore, for the reasons set

out in the following paragraphs, I do not accept that the evidence of the appellant's academic achievements in Bangladesh or the UK provides much assistance in determining his proficiency in English in 2012.

30. Seventh, and the question of whether the appellant's academic achievements are such that it would have been unnecessary or illogical for him to cheat, while there is evidence before me of the appellant's educational certificates from Bangladesh, I find that these are of limited assistance. While a study certificate from M.C College, Sylhet has been provided dated 5 December 2009, this says that he "is a student of 1st year B.A (Pass) class bearing class roll no. 3705 of this college during the academic session 2008-2009" [HB/108]. It goes on to say that his subjects of study are "English, Political Science, Islamic Studies, Islamic History" but no grades are provided. A testimonial from Biswanath College dated 20 October 2008 says that the appellant scored at GPA of 3.20. However, it is unclear what subject or subjects this was for [HB/109]. Finally, a secondary school examination certificate from 2006 says the appellant secured a GPA of 3.13 out of 5.00 in the month of March to April 2006 in humanities. I have no way of knowing whether that made him a good, bad or average student. Taking them in the round, I do not find these certificates to be particularly helpful in ascertaining the appellant's proficiency in English in 2012 and I therefore attach limited weight to them in that regard. Furthermore, I do not find that these certificates demonstrate that the appellant's academic achievements were such that it would be unnecessary or illogical for him to cheat in his TOEIC exam.

31. I accept Mr Terrell's submission that while the appellant achieved a Level 4 diploma in the UK, there is no evidence of strong academic performance on his part. First, for the same reasons given above, I find that the evidence of the appellant's Bangladeshi educational achievements are of only limited assistance. Second, I take into account the appellant's module marks for his Level 4 diploma are not particularly impressive. For example, while he scored 63% for his professional administration module, he only scored 52% for information for decision making and 51% for project report 1 [HB/114-116]. While I do not have the percentage scores for the other two modules ("people in organisations" and "administrative systems and processes") before me, I note that the appellant obtained a pass in the first and a credit in the second [HB/112]. Judging by the grades he obtained for the other three modules, that suggests that he likely obtained a score in the 50-60% range for people in organisations and above 60% for administrative systems and processes. I therefore find that his educational achievements do not make it unnecessary or illogical for him to have cheated.

32. I accept Mr Malik's submission that the respondent has not sought to argue that the appellant had provided inconsistent evidence and that beyond the point about the appellant's family, for which there may be many reasons for him not telling the truth, there is no evidence to show the appellant is not otherwise of good character. Those points are clearly deserving of weight. However, having considered the appellant's evidence (including contents of his witness statements) in the round with my findings on the Majumder points and the respondent's evidence, I am satisfied that it is more likely than not that the appellant did cheat on his TOEIC exam.

33. Put simply, the evidence in support of the respondent's case is more compelling than the appellant's explanation. First, the Project Façade report makes clear that Synergy Business College was a fraud factory, as demonstrated by the disparity in the percentage of invalid tests identified at that college between 24 November

2011 and 15 January 2013 (49%) and the number of invalid tests identified at two public test centres (0.28%). Second, the look-up tool documents exhibited to Mr Sansom's witness statement show that on the day the appellant sat his test, 50% of tests were found by ETS to be invalid (including the appellant's) and 50% were found to be questionable. I have no reason to doubt those figures. Third, the appellant's voice is not on the audio-recording of his test. There is no satisfactory evidence before me as to why that would be the case if the appellant had genuinely sat the exam himself. While Mr Malik raises a valid point in asking why the appellant would obtain that recording if he knew had cheated, ultimately, I am satisfied that, taken in the round, the audio recording does add weight to the respondent's case.

Proportionality

34. As it was agreed by the parties that my findings on fraud would be determinative of the appellant's Article 8 ECHR appeal, I therefore find that the appellant's removal to Bangladesh would not amount to a disproportionate interference with his right to a private life.

Notice of Decision

The appeal is dismissed.

M R Hoffman

Judge of the Upper Tribunal
Immigration and Asylum Chamber

5th December 2024

Annex: The error of law decision

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-003054

First-tier Tribunal No: HU/57860/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

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Before

UPPER TRIBUNAL JUDGE HOFFMAN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MOHA SHAHIN MIAH
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr N Wain, Senior Home Office Presenting Officer
For the Respondent: Mr R Halim of Counsel, instructed by Chancery Solicitors

Heard at Field House on 8 October 2024

DECISION AND REASONS

Introduction

1. I will refer to the parties as they were before the First-tier Tribunal even though it is the Secretary of State who is the appellant before the Upper Tribunal. Therefore, Mr Miah will be referred to as the appellant and the Secretary of State as the respondent.

2. The respondent appeals with permission against the decision of First-tier Tribunal Judge S J Reed promulgated on 21 May 2024 allowing the appellant's appeal against the respondent's decision dated 17 June 2023 refusing to grant him leave to remain on human rights grounds.

Background

3. The appellant is a citizen of Bangladesh. He entered the UK on 26 February 2010 with a Tier 4 student visa valid until 27 August 2012 which was subsequently extended until 30 November 2014. On 17 April 2012, the appellant claims to have taken a Test of English for International Communication ("TOEIC") at Synergy Business College of London. The TOEIC test was administered by a company called ETS Global. It is a matter of dispute between the parties whether the appellant used a proxy to take that test, but it is agreed that the appellant relied on the certificate to obtain further leave to remain in the UK.

4. On 24 April 2013, the appellant's visa was curtailed to 24 June 2013 although it was subsequently extended again until 6 June 2015. However, on 26 February 2014 the appellant's visa was again curtailed, this time to 27 April 2014. On 26 April 2014, the appellant applied to extend his leave under the points-based system, but his application was refused on 7 August 2015. (It is unclear from the papers before which of those decisions was taken on the basis that the appellant had practiced deception in his TOEIC test.) While the appellant was granted a right of appeal against that decision, he failed to exercise it in time. Despite having no leave to remain, the appellant failed to leave the UK and he remained here unlawfully.

5. On 18 May 2022, the appellant applied for leave to remain on private life grounds. That application was refused by the respondent on 17 June 2023 on the basis that the appellant did not meet the requirements of the Immigration Rules. The respondent also considered that there were no grounds to grant the appellant leave outside of the Rules.

The appellant before the First-tier Tribunal

6. The appellant exercised his right of appeal against the respondent's decision to the First-tier Tribunal where his case was heard by Judge Reed ("the judge"). Having found that the appellant did not cheat on his ETS test and that he had therefore been subject to an historic injustice, the judge allowed the appellant's appeal on human rights grounds on 21 May 2024.

7. The respondent was subsequently granted permission to appeal by Deputy Upper Tribunal Judge Wilding on 6 August 2024 on the following grounds:

    (1) The judge made a material misdirection in law in finding that the appellant had not used deception because the judge took irrelevant evidence into account and by failing to have proper regard to the decision in Varkey & Joseph (ETS – Hidden rooms) [2024] UKUT 00142 (IAC).

    (2) The judge took irrelevant evidence into account when attaching "limited weight" to character evidence relied upon by the appellant when the witnesses did not know the appellant at the time of his TOEIC test.

Findings – Error of Law

Ground 1: Failure to have proper regard to the caselaw

8. In finding that the appellant had not cheated on his TOEIC test, the respondent argues that the judge failed to have regard to the case law including Varkey &

Joseph which upheld the findings in DK and RK (ETS: SSHD evidence; proof) India [2022] UKUT 00112 (IAC). In DK and RK, the Upper Tribunal reiterated that the burden of proof is on the Secretary of State to prove fraud or dishonest on the balance of probabilities. It also found that the evidence currently being tendered by the Secretary of State in ETS cases is amply sufficient to discharge the burden of proof and so requires a response by the appellant whose test entry is attributed to a proxy.

9. In the present case, the respondent provided the First-tier Tribunal with evidence to show that the appellant's TOEIC results were found to be invalid as well as evidence to show that on the day the appellant took his tests, 100% of the candidates' results were found to be either invalid or questionable. The evidence was supported by witness statements from various Home Office officials. In accordance with DK and RK, the judge was required to find that the respondent's evidence was sufficient to discharge the burden of proof, thereby necessitating the appellant to provide a credible explanation. In the present case, the judge makes no express findings about the weight he attaches to the respondent's evidence.

10. Importantly, the appellant had obtained an audio-recording of his TOEIC test and he accepted that it was not his voice on the recording. The appellant conceded that he was unable to provide an explanation for this: see [19]. However, the judge placed weight on the evidence of Mr Christopher Stanbury, a specialist in computing, to find that the use of hidden rooms, whereby a genuine candidate might be unaware that other candidates were cheating, is a "possible" explanation for the appellant's test being invalidated: see [47] and [48]. The judge said that he was "fortified in the possibility of a hidden room explanation due to the statistical evidence" that 50% of the candidates' tests were found to be invalid and 50% were found to be questionable:

> "Given it appears unlikely that such a high percentage of candidates would have cheated, the hidden room explanation, where the fraud could be conducted on mass without all the candidates being aware, remains possible".

11. The judge goes on to say at [50] that Varkey & Joseph confirms that hidden rooms can involve a genuinely innocent candidate and that the probability of an event occurring should be reached on the evidence as a whole. While the judge does not explain which passage of Varkey & Joseph he was relying on to make his finding that hidden rooms can involve genuinely innocent students", he may have been referring to headnote (4) which says that the "parallel test" method of committing the fraud "can operate so that the test can be taken by a genuine candidate who is unaware of any fraud, or by a candidate complicit in the fraud". However, the judge appears to have overlooked headnote (5) which says that there was widespread cheating using less sophisticated methods of manipulating test results, in collusion with the candidate. Headnote (5) goes on to say:

> "It is possible another more sophisticated method was adopted by a test centre such as 'parallel testing' (cloned manager PC) but an appeal is not determined by what is possible. That something is possible is not to say that it is probable".

12. The Upper Tribunal found in Varkey & Joseph that while there was evidence of the use of hidden rooms at some test centres, there was less evidence about how the fraud operated ([97]) and, as Mr Stanbury himself accepted, "much is speculation" ([96]). The Upper Tribunal found that just because certain systems for cheating,

including those suggested by Mr Stanbury, might be possible did not equate to evidence that it was in fact happening ([98] and [100]). At [107] and [108], the Upper Tribunal said the following:

> "107. Mr Stanbury's evidence that the test centre would only upload the tests completed by the proxies taking the test in a hidden room without a genuine candidate being aware, so that all the candidates would pass the test regardless of whether they were paying extra or not, is again, nothing more than speculation. In fact, it is contrary to the evidence. Mr Stanbury relies upon the email sent by Riaz Ashfaq to Richard Shury on 16 July 2013, regarding Queensway College that supports his claim that 'hidden rooms' are used. However in that email, Mr Ashfaq states that he had taken his nephew to do the test but his nephew was not allowed to take his own test. He provided the names of those responsible for maintaining the system and marketing, and again confirmed that "They do not allow anyone to take exam on their own". What this evidence demonstrates is that where the use of a hidden room is operated, whatever sophisticated method is devised to avoid detection, the candidate is likely to be aware that they will be unable to complete a genuine test, and a candidate who proceeds to take a test at such a test centre is likely, as a starting point, to be as complicit as if there were simple 'direct substitution'. It is evidence of the operation of a 'fraud factory', where the test centre has no interest in allowing genuine candidates to sit the test themselves.
>
> 108. Standing back, we ask ourselves whether the generic evidence relied upon by the SSHD is undermined by the evidence we now have, and is so tenuous, that taken at its highest, a Tribunal could not be satisfied on a balance of probabilities that an individual has dishonestly cheated. The general conclusions reached by the Tribunal in *DK and RK* are not in our judgment in any way undermined by the evidence of Mr Shury and Mr Stanbury. We are left in no doubt that in general, there was widespread cheating and test centres adopted the less sophisticated methods available of manipulating test results, working in collusion with candidates. It is possible that another method was adopted by a test centre but an appeal is not determined on what is possible. That something is possible is not to say it is probable. The question for a Tribunal is whether it is more likely than not, that the particular appellant they are considering in the case before them cheated." [Underling added]

13. There was no evidence before the judge in the present case that the use of a hidden room in conjunction with the parallel testing method was anything more than a hypothetical possibility. As the Upper Tribunal made clear at [107] and [108] in Varkey & Joseph, there was no evidence to prove that hidden rooms were used in such a way that a genuine student would pass a test even if they were not involved in the fraud. In fact, the evidence showed that when hidden rooms were operated, the candidate was likely to be aware that they would be unable to complete a genuine test. Therefore, in suggesting that the use of a hidden room is "a possible explanation" as to why the appellant's test was found to be invalid, the judge failed to consider on the evidence whether it was probable as he was required to do.

14. Mr Halim, however, submitted that TOEIC cases are fact-sensitive and, having heard evidence from the appellant, the judge was entitled to make the positive

credibility findings that he did at [51], which were in accordance with the factors identified by the Court of Appeal in Majunder v SSHD [2016] EWCA Civ 1167 at [18]. While I accept that the judge was entitled to take into account those factors when assessing the appellant's credibility, as the judge then makes clear at [52], his finding that the respondent had failed to prove the appellant's involvement in fraud was reached having taken the evidence before him in the round. That evidence would inevitably have included both his findings at [51] and his findings at [48] about the hidden room being a possible explanation for the appellant's invalid test.

15. I am not satisfied that had the judge not fallen into error in his findings in relation to the hidden room that his conclusion at [52] would have been the same, not least in circumstances where the judge fails to say how much weight he attaches to the respondent's evidence and the appellant had provided no explanation as to why his voice was not on the audio-recording of his test.

16. For the reasons given above, I am satisfied that the judge made a material error of law.

17. Finally, I would also note that the judge's finding at [48] that the high percentage of invalid and questionable test results made it *less* likely the appellant had cheated is insufficiently reasoned and, indeed, irrational. Firstly, the judge fails to take into account that the appellant's own test was found to be invalid and not questionable, which suggests that there was a greater level of confidence by the respondent that he had used a proxy test taker. Secondly, the judge fails to factor in that the appellant conceded that his voice was not on the audio-recording of his test. Thirdly, the judge gives no reasons to support his finding that "it appears unlikely that such a high percentage of candidates would have cheated". Such a finding is contrary to the position taken by the courts and tribunals in several TOEIC cases over the years that there was undoubtedly a high level of cheating occurring in "fraud factories", and this is something Mr Stanbury himself acknowledges at para 6.2.6 of his report (see also [93] and [108] in Varkey & Joseph). Fourthly, it is difficult to rationally discern why statistical evidence of a high level of invalid and questionable results on the day the appellant took his test would make it less, rather than more, likely the appellant cheated. The judge gives no consideration to the more obvious reason why such a high percentage of results were found to be invalid or questionable on the day the appellant took his test, i.e. because the college would likely avoid genuine candidates taking their tests at the same time as those who were cheating.

Ground 2: Taking irrelevant matters into account

18. The respondent also argues that the judge took into account an irrelevant consideration when placing "very limited weight" on 10-character witness letters written by acquaintances of the appellant: see [46]. The respondent says that the judge should have attached no weight at all to those letters because none of the witnesses knew the appellant at the time he took his TOEIC test. However, I am satisfied that the judge was reasonably entitled to place the very limited weight that he did on those letters as evidence of the appellant's good character.

Conclusions – Error of Law

19. For the reasons explained above, I am satisfied that Ground 1 has made out and that the judge's decision is vitiated by a material error of law.

20. At the hearing before me, both parties were agreed that if I was to find a material error of law in the judge's decision, it was appropriate to remit the case to the First-tier Tribunal due to the extent of cross-examination required. However, I do not accept that is a sufficient reason to remit this appeal. This is not a case where the effect of the judge's error has deprived a party of a fair hearing. Nor is it one where the extent of the judicial fact-finding requires the case to be re-heard by the First-tier Tribunal. Therefore, applying paragraph 7.2 of the *Practice Statements of the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal*, I am satisfied that it is appropriate for the appeal to be retained by the Upper Tribunal.

Notice of Decision

The decision of the First-tier Tribunal involved the making of material errors of law.

The decision of the First-tier Tribunal is set aside with no findings preserved.

Directions

1. The remaking of this appeal is to be listed for the first available date at Field House with a time estimate of 3 hours.

2. Any updating evidence either party wishes to rely upon must be electronically filed with the Upper Tribunal and served on the other party 21-days prior to the remaking hearing.

3. The appellant is to file and serve a skeleton argument, if so advised, no later than 14 days before the resumed hearing.

4. The respondent is to file and serve a skeleton argument, if so advised, no later than 7 days before the resumed hearing.

M R Hoffman

Judge of the Upper Tribunal
Immigration and Asylum Chamber

14th October 2024