Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/12694/2019 (V)

THE IMMIGRATION ACTS

Heard at Field House by video conference on 03 June 2021	**Decision & Reasons Promulgated On 10 August 2021**

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

SAYED ABU MUCA NUMAN
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr S. Karim, instructed by Liberty Legal Solicitors
For the respondent: Mr T. Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appealed the respondent's decision dated 10 July 2019 to refuse a human rights claim.

2. The appellant entered the UK on 29 November 2009 with entry clearance as a Tier 4 (General) Student Migrant that was valid until 31 July 2012. He was granted an extension of leave to remain in the same category until 31 July 2014. However, on 12 December 2012 he applied to vary his leave to remain to that of a Tier 1

(Entrepreneur) Migrant. It is said that he withdrew the application on 29 May 2013. On 15 February 2014 a decision was made to curtail his existing leave as a Tier 4 migrant so that it expired on 18 April 2014. The decision did not attract a right of appeal.

3. The appellant made an in-time application for further leave to remain as a Tier 4 migrant on 31 March 2014, which was refused with a right of appeal. While the appeal was pending, he was served with an IS151A notice of liability to removal and IS151A Part 2 notice of a decision to remove on 30 September 2014. The notice of removal was served just before the changes to section 10 of the Immigration and Asylum Act 1999 made by the Immigration Act 2014 came into force i.e. it was an 'old style' section 10 decision attracting an out of country right of appeal. Although there does not appear to be a copy of the decision contained in the evidence before the Upper Tribunal a letter from the appellant's solicitors to the respondent dated 23 April 2019 indicates that the decision was likely to have been made with reference to section 10(1)(b) (leave obtained by deception) on the ground that it was asserted that the appellant produced a TOEIC certificate in support of a previous application which had been obtained by the fraudulent use of a proxy test taker.

4. The appellant applied to revoke the section 10 decision on 09 October 2014 and served a pre-action protocol letter on 19 November 2014. On 09 December 2014 his appeal against the decision to refuse leave to remain as a Tier 4 migrant was dismissed. A renewed application for permission to appeal to the Upper Tribunal was refused on 22 May 2015 and the appellant's appeal rights became exhausted. The appellant remained in the UK without leave from this point onwards.

5. In the meantime, the appellant had filed an application for judicial review of the section 10 removal decision on 29 December 2014. It is unclear from the respondent's summary of the appellant's immigration history what happened in the judicial review proceedings. The summary merely describes the application being 'closed by the court' on 26 November 2015.

6. The appellant made a further application for leave to remain, this time as a Tier 2 (General) Migrant, on 17 June 2015. This was refused and an Administrative Review upheld the decision. The respondent's chronology indicates that a further judicial review was filed to challenge these decisions, which was refused. While renewing the application for permission to bring judicial review proceedings it seems that the claim was settled. The respondent invited the appellant to complete a Statement of Additional grounds under section 120 of the Nationality, Immigration and Asylum Act 2002. On 23 April 2019 the appellant made further submissions on human rights grounds. The respondent refused the human rights claim in a decision dated 10 July 2019, which is the decision that is the subject of this appeal.

7. First-tier Tribunal Judge R. Cooper ('the judge') dismissed the appeal in a decision promulgated on 04 March 2020. The judge set out the issue for determination in the appeal, summarising at [21] that the legal burden of proof was on the respondent to show that the appellant had been dishonest. She made clear that the initial evidential

burden was on the respondent to show that the appellant used fraud to obtain a TOEIC certificate. The evidential burden then shifted to the appellant to provide an innocent explanation. She noted that if he was able to provide one, then the burden shifted back to the respondent to show why the explanation should be rejected. She cited the decision in *SM & Qadir (ETS – evidence – burden of proof)* [2016] UKUT 229. The judge went on to summarise the evidence and submissions before making her findings [24-34]. She began by considering the allegation of fraud and made her findings in the same order in which she had set out the relevant legal framework. She began by considering the evidence produced by the respondent about high levels of fraud at Elizabeth College (which issued the TOEIC certificate) in general but also on the day that the appellant claimed to take the test [36-41]. Having concluded that the evidence met the initial evidential burden she moved on to consider the appellant's explanation in response [42-62]. She made clear that she understood that that the account only needed to satisfy a 'minimum level of plausibility' [42]. Having considered all the evidence in the round she did not accept the appellant's response met that minimum level of plausibility [62] and concluded at [63] that the respondent had discharged the overall burden of proving the allegation of dishonesty.

8. The judge went on to determine the human rights claim. She concluded that she did not go on to consider the rest of the requirements of the immigration rules under paragraph 276ADE if the appellant did not meet the 'Suitability' requirement. She conducted a balancing exercise with reference to the five-stage approach in *Razgar v SSHD* [2004] UKHL 27 and took into account the public interest considerations outlined in section 117B NIAA 2002. Having weighed the factors in favour of the appellant with the factors relating to the public interest, she concluded that the appellant's removal would not amount to a disproportionate breach of his right to private life under Article 8 of the European Convention.

9. The appellant's grounds of appeal to the Upper Tribunal only seek to appeal the judge's findings relating to the allegation of dishonesty and do not seek to challenge the substantive findings relating to the underlying human rights claim. The appellant appealed the First-tier Tribunal decision on the following grounds:

   (i) The judge applied the wrong standard of proof because at [61] she said: 'On balance, I infer from the Appellant's failure to obtain the recording that he knew the voice on the recording would not be his/ I have given this significant weight in my assessment of the evidence as a whole.' The judge should only have considered whether the appellant's explanation reached a minimum level of plausibility. At [38] she also referred to the civil standard.

   (ii) Failure to address the All Party Parliamentary Group (APPG) report.

   (iii) The judge unduly speculated about the appellant's potential motivations for cheating and did not put several points that she relied on in her decision to the appellant to answer at the hearing.

   (iv) The fourth ground sets out a series of disagreements with various findings made by the First-tier Tribunal and asserts that the judge failed to make findings relating to relevant considerations.

(v) The last ground asserted that the decision was promulgated more than three months after the hearing and therefore could not stand.

10. Due to the continued need to take precautions to prevent the spread of Covid 19 the hearing took place in a court room at Field House with the legal representatives appearing by video conference and with the facility for others to attend remotely. I was satisfied that this was consistent with the open justice principle, that the parties could make their submissions clearly, and that the case could be heard fairly by this mode of hearing. There was no objection to the case proceeding by this mode of hearing.

Decision and reasons

11. Having considered the grounds of appeal and the oral submissions made by the parties at the hearing I conclude that the First-tier Tribunal decision did not involve the making of an error of law.

Ground 1 – burden and standard of proof

12. The judge clearly had in mind the relevant burden and standard of proof throughout the decision. She set out the issues for determination in the appeal, and at [21], made clear that she understood that the burden was on the respondent to show that it was more likely than not that the appellant had been dishonest. The judge made clear that the respondent bore the initial evidential burden. If that was made out, the burden then shifted to the appellant 'to provide an innocent explanation'. If he was able to, then the overall burden shifted back to the respondent to show on the balance of probabilities that the appellant was dishonest. The judge cited the relevant decision in *SM & Qadir (ETS – evidence – burden of proof)* [2016] UKUT 229. The judge repeated the test at [36] when she began her assessment of the evidence. She referred to the shifting burden on the appellant 'who must provide a plausible innocent explanation'. She reiterated that the overall legal burden of proof was on the respondent.

13. The judge then considered the evidence in a logical order, starting with the evidence produced by the respondent, which included 'look up tool' information relating to the cancellation of the appellant's test as well as information about the number of other tests from Elizabeth College cancelled on that day. She also had regard to a Project Façade report, which indicated the Elizabeth College was on of 21 colleges subject to criminal investigation due to 'high test volumes, audits indicating cheating and other intelligence and information that indicated widespread abuse of the exam' [39].

14. The judge summarised the account given by the appellant [40]. He denied using a proxy test taker and claimed that he took the exam himself on 20th and 22nd March 2012. He said that he needed an English language certificate to apply to extend his leave to remain, which was due to expire on 31 July 2012. He said that he applied for an IELTS course, but could not get a 'near date'. Although he lived in Plaistow he chose to do the TOEIC test a Elizabeth College because it was near where he worked

in Kennington. He outlined how he travelled to the test centre and described the process of taking the test.

15. The judge noted that the appellant's representative accepted that the evidence produced by the respondent met the initial evidential burden [41]. This was consistent with a number of cases, which had concluded that the 'generic evidence' produced in such cases was likely to discharge the initial burden. At [42] the judge went on to state:

> '42. The evidential burden therefore shifts to the Appellant to raise an innocent explanation, namely an account which satisfies the minimum level of plausibility set against the backdrop of the evidence of fraud being perpetuated at Elizabeth College. In determining whether he has provided a credible and plausible innocent explanation, I have assessed the reliability of the Appellant's evidence itself as well as considering what he had to gain from cheating, what he had to lose, whether it was unnecessary or illogical for him to have cheated, his character, the cultural environment in which he operated, how he performed under cross-examination and whether his proficiency in English matched his TOEIC proficiency score (following *SM & Qadir*).'

16. In considering whether the appellant had provided a credible and plausible explanation in response to the respondent's allegation, the judge went on to consider a range of evidence that went both for and against the appellant. She made detailed findings with extensive reference to the evidence. After having considered what impact the appellant's failure to obtain the voice recording might have on her decision, and having recognised that even if he had obtained it, and it did not include his voice, 'that would not necessarily be conclusive proof of deception', she concluded:

> '61. … However, when looking at the circumstances and evidence in this case in the round I find the Appellant's failure to request the voice recording from ETS undermines his account and the innocence of his explanation, when set against the evidence of cheating at Elizabeth College. On balance, I infer from the Appellant's failure to obtain the recording that he knew the voice on the recording would not be his. I have given this significant weight in my assessment of the evidence as a whole.
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> 62. When looking at all of these matters in the round and having applied a balance sheet approach (weighing up those matters falling in his favour against those undermining the plausibility of his account) I have reached the conclusion that the Appellant has not provided an innocent explanation that meets a minimum level of plausibility that he personally took the TOEIC test at Elizabeth College in 2012.
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> 63. For that reason I find the Respondent's grounds for refusing his human rights application on the grounds that the suitability requirements were not met (S-S-LTR.1.6) are made out. …'

17. Mr Karim submitted that it mattered not if the judge set out the correct burden and standard of proof if, as a matter of fact, she did not apply it. He submitted that the wording used by the judge in those final paragraphs indicated that she applied a

balance of probabilities test rather than assessing whether the appellant's evidence met a minimum level of plausibility. Whilst I accept that a judge could err in practice despite a correct exposition of the relevant burden and standard of proof, I do not accept that it happened in this case. The judge repeatedly set out the correct legal framework and having conducted a careful analysis of the evidence that went both for and against the credibility of the appellant's explanation, came full circle to the correct test of 'an innocent explanation that meets a minimum level of plausibility' [62]. Her reference to having considered matters 'on balance' in [61] and to a 'balance sheet approach', when placed in the context of the totality of her findings, were merely descriptors of the process of weighing the evidence and did not purport to have any legal meaning in relation to the burden or standard of proof. It was open to the judge to assess the credibility of the appellant's explanation in the context of the respondent's evidence, which showed widespread fraud at Elizabeth College at the time the appellant claimed to have taken the test. Having found that the appellant had failed to provide an innocent explanation that met a minimum level of plausibility, she concluded that the respondent had discharged the overall legal burden of proof [63].

Ground 2 – APPG report

18. Although Mr Karim did not formally withdraw the second ground, he did not pursue it orally at the hearing. He did not explain why, but it is likely that the second ground was not argued following the recent findings made by the Upper Tribunal in *DK and RK (Parliamentary privilege; evidence)* [2021] UKUT 00061 (IAC). In any event, the ground makes general assertions about the observations made by the APPG about the reliability of the 'look up tools' and the chain of custody of evidence without particularising how or why this evidence would have made a material difference to the outcome of the appeal in circumstances where it had apparently been conceded on behalf of the appellant that the body of specific and generic evidence produced by the respondent did at least meet the initial evidential burden of proof [29].

Grounds 3 & 4 – procedural unfairness, failure to make findings & 'erroneous' findings

19. The third and fourth grounds make several points arguing that the judge speculated and made findings without giving the appellant a fair opportunity to answer. The grounds go on to set out a series of disagreements with the findings made by the First-tier Tribunal and to argue that other matters were not given sufficient consideration.

20. The judge noted that the appellant 'was not robustly cross-examined as regards his witness statement' and found his oral evidence to be broadly consistent with the contents of his statement [45]. However, it is clear that the respondent had not withdrawn the allegation of deception and that question of whether the appellant genuinely sat the test was at the heart of the appeal. It was open to the judge to consider whether the appellant's account met the minimum level of plausibility in light of all the evidence, including the evidence of widespread fraud at Elizabeth

College during the period when he claimed to take the test. The mere fact that he was not 'robustly cross-examined' does not lead to the inevitable conclusion that his evidence was or should be accepted. It is clear that the Home Office Presenting Officer submitted that weight should be given to the evidence of widespread fraud and argued that the appellant had not provided a plausible explanation in response beyond a bare denial that a proxy test taker was used to obtained the required test score [32].

21. The judge considered the plausibility of the appellant's explanation and noted points that went for and against him. She found that the explanation as to why he chose to do the test at Elizabeth College was plausible. Although it was some distance from his home in Plaistow, the college was close to the place he claimed to work in Kennington. The judge noted that an inconsistency in his evidence as to whether he attended the test straight from home or from work was put to him at the hearing. It was open to her to note that the appellant did not produce any evidence from the college to show that he booked the test. It was also open to her to note that the mere fact that the appellant was able to provide a description of the test was not necessarily evidence to show that he did not use a proxy test taker. It was open to her to find that such information was readily available in the public domain, and indeed, appeared to be contained in information provided in the appellant's bundle [48]. The judge took into account the appellant's description of the test and gave adequate reasons for her findings.

22. The judge went on to consider other evidence that might go to the plausibility of the appellant's explanation. She considered the appellant's English language ability. Whilst not purporting to be an expert, the judge noted her observations about the appellant's level of communication at the hearing, including misunderstandings in English with reference to direct quotes [51]. The judge also noted that his 'stilted spoken English' was also reflected in his witness statement. She concluded that the appellant spoke 'reasonable English' during the hearing, but it was open to her to note that this did not necessarily reflect what his level of English might have been when he took the test in 2012, some seven years earlier [53]. The judge went on to consider the evidence produced by the appellant of earlier English language ability including English language certificates and educational certificates from the UK, which post-dated the test. She accepted that the evidence showed that the appellant might not have had a motive to cheat solely on account of a lack of English language ability [55]. In light of that finding it is difficult to see how her failure to mention educational certificates from Bangladesh could have made any material difference to the outcome of the appeal.

23. However, in light of the decision in *MA (ETS – TOEIC testing)* [2016] UKUT 00450 (IAC) it was open to the judge to consider whether the evidence disclosed any other potential motives for the appellant to cheat even if he spoke a reasonable level of English [56]. She noted that there was no evidence to suggest that the appellant had taken an English language test before coming to the UK and found that it was reasonable to infer that he may have been unfamiliar with the process. She observed that there was little evidence relating to his circumstances during those early years in

the UK to show whether he had made progress on the course he followed. She also noted that the appellant appeared to be under pressure to get a 'short booking date' for the test and had been unable to get a 'near date' for the IELTS test.

24. Mr Karim argues that these matters should have been put to the appellant to answer at the hearing, but nothing has been produced to show how he might have responded in order to demonstrate whether his answers would have made any material difference to the outcome of the appeal. It is clear that inconsistencies were put to the appellant to answer. It is not incumbent for every issue considered in a decision to have been put to an appellant. The judge was conducting the task of evaluating the evidence and was entitled to draw conclusions from the evidence or lack thereof. The mere fact that he was likely to be able to speak reasonable English did not necessarily discharge the evidential burden on the appellant in light of the compelling evidence showing, as it was described in *Ahsan & Others v SSHD* [2017] EWCA Civ 2009, that Elizabeth College was an 'established fraud factory'. In assessing the plausibility of the appellant's response to the allegation of deception it was open to the judge to consider whether the appellant may have had other motivations to use a proxy test taker in order to obtain a test certificate in time to support a further application for leave to remain. For these reasons, I conclude that the First-tier Tribunal decision did not involve an error of law on the ground of undue speculation and was not procedurally unfair.

25. At the hearing before the Upper Tribunal a point was made in relation to the judge's findings at [60]-[61] regarding what inference could be drawn from the appellant's failure to obtain the voice recording from ETS. I note that this point was not pleaded in the grounds. Mr Karim, who was the author of the original grounds, argued that the judge failed to take into account relevant evidence, which showed that the voice recording had been requested by the appellant in an email to ETS sent on 28 February 2018 in which he requested a list of information, and at the end, also asked 'to send me the voice recording of my speaking test'. Setting aside the fact that the point was not argued in the grounds, nor permission granted to rely on it, it is clear that the judge cited this email at the beginning of [60]. The point that she went on to make was that the appellant made no further effort to obtain the voice recording following the ETS response to his email dated 15 March 2018. In that letter ETS said:

> 'In view of the number of requests that have been received to provide voice recordings, we have agreed a protocol with the Home Office regarding such matters. If you agree that voice recordings should be provided then ETS Global will provide copies of the same. Once we receive such confirmation we will provide the relevant voice recordings to you and the Home Office.'

26. The judge noted that this was put to the appellant to answer at the hearing. It was open to the judge to reject his explanation for failing to obtain the voice recording on the ground that he misunderstood the letter to mean that the Home Office needed to make the request. It was open to the judge to note that he had legal representation at the time and that he could have sought advice. Consequently, it was not outside a range of reasonable responses to the evidence for the judge to conclude that an inference could be drawn from the appellant's failure to obtain the voice recording

[61]. For these reasons, nothing in grounds 3 or 4 disclose any material errors of law in the First-tier Tribunal decision.

Ground 5 – delay

27. Rightly, Mr Karim did not pursue the fifth ground. The ground asserted that the decision was unsafe because the appeal was heard on 28 November 2019, but the decision was not promulgated until 04 March 2020. Even if the ground was taken at its highest, it cited various cases without identifying how or why the alleged delay might have rendered the First-tier Tribunal decision unsafe. There was nothing on the face of the decision to suggest that the delay might have affected the judge's memory of the evidence or the reliability of her findings. Indeed, the decision made detailed reference to the evidence and included direct quotes from the appellant's oral evidence. The fifth ground is swiftly disposed of by noting that it was based on a mistake of fact. It is clear from the face of the decision that the judge completed and signed it on 05 February 2020 (within 10 weeks of the hearing) and that the delay was in the promulgation of the decision by the court administration.

28. For the reasons given above I conclude that the First-tier Tribunal decision did not involve the making of an error of law.

DECISION

The First-tier Tribunal decision did not involve the making of an error of law

The decision shall stand

Signed M. Canavan Date 03 August 2021
Upper Tribunal Judge Canavan

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email