IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-000487
First-tier Tribunal Nos:
HU/56534/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 31 May 2023

Before

UPPER TRIBUNAL JUDGE KEITH

Between

MR MD SAHARIAZ ALAM
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Karim, Counsel, instructed by Liberty Legal Solicitors LLP
For the Respondent: Ms A Ahmed, Senior Home Office Presenting Officer

Heard at Field House on 4 May 2023

DECISION AND REASONS

Background

1. These written reasons reflect those that I gave in full to the parties orally, at the end of the hearing.

2. At the core of this appeal are two distinct issues. The first was whether the appellant had participated in a fraud using a proxy to take an English language test. Such frauds are commonly referred to as TOEIC frauds relating to tests administered by a third party, ETS, and have been the subject of extensive litigation, with guidance given most recently by the Upper Tribunal in DK and RK (ETS: SSHD evidence, proof) [2022] UKUT 00112. Part of that evidence includes what is referred to as a "lookup" tool and a result based on investigation of ETS records, which state whether a particular test was "questionable" or "invalid". That tool in turn is based on an automatically generated record, linked to a

unique identification number which shows the test location and which part of the test has been taken. That much is clear from DK and RK.

3. In a decision of the First-tier Tribunal following a hearing on 2nd September 2022, Judge Shore dismissed the appellant's appeal. In doing so, he considered a decision of an earlier judge, Judge Grant, promulgated on 23rd January 2017 which similarly rejected the appellant's appeal. He reminded himself of the well-known authority of Devaseelan (Second Appeals – ECHR – Extra-Territorial Effect) Sri Lanka* [2002] UKIAT 702. He considered at §34 those previous findings, including that the appellant was not a credible witness, could not correctly recall the name of the college where he said he took his test, and that his sponsoring wife had sought to mislead the Tribunal about her alleged health condition. The Judge also found that the appellant's ties to Bangladesh, his country of origin, meant that there were not very significant obstacles to his integration on return. The Judge considered new evidence that included an email chain to ETS requesting a copy of a speaking test and their response, and at the core of that appeal was correspondence from ETS in which they appeared to accept the appellant's claim to have taken the test at a different college from that specified in the lookup tool. The appellant had always claimed to have taken the test at Charles Edward College, whereas the lookup tool refers to an entirely different college, Westlink College.

4. The second issue was the impact, for the purposes of Article 8 ECHR, on the appellant and his spouse in the event that refusal of leave to remain was maintained and the appellant would have to return to his country of origin.

5. The Judge heard witness evidence from appellant, his wife, and friends Ms Shipley, and a Mohammed Faruk.

6. The Judge went on to make a number of findings, about which the appellant complains. The Judge commented, at §36.5, about an email dated 21st October 2020 between the appellant and ETS, which he found to be set out in a curious mixture of fonts and text sizes. Ms Ahmed contends that this is merely an observation, whilst Mr Karim says that this was an implicit doubting as to the email's authenticity. I pause at this stage only to add that it does not appear that any issue was taken previously with the genuineness of the documentation. There was a subsequent letter also referred to at §37 and §38, and in particular at §36.7 where ETS referred to the test taken on 14th December 2011 at Charles Edward College. At §36.9 the Tribunal continued:

> "The appellant produced no written or oral evidence or any document that suggested he had ever sent in response to the ETS letter or asked for a copy of the recordings. He has been represented by solicitors throughout and there is no evidence or document that suggests they have chased a response or a copy of the recordings".

7. At §36.10, the Judge attached limited weight to the email in which ETS appeared to accept that the appellant had taken the test at Charles Edward College. The Judge concluded that the methodology appeared to be one of delay and obfuscation by ETS, rather than addressing queries and did not remove the possibility of the appellant pressing for an answer. Put simply, the appellant had not chased ETS. At §36.13, (and on which the appellant places particular emphasis), the Judge went on to state:

> "I place little weight on the appellant's letter to Charles Edward College dated 28 October 2020, as a perfunctory internet search reveals that the company that operated the college was dissolved in 2012. I regard the letter as a 'box ticking exercise' by the appellant".

8. The Judge went on to criticise the appellant's ability, but failure to have identified in his bank statements the payment of £175 to the college in question. The Judge regarded the evidence of the route that the appellant said he took to travel to Charles Edward College and the methodology of the testing process were of little probative value, as both details were easily available online. He attached little weight to the evidence of Mohammed Faruk as at its height he was remembering how the appellant before his English language test used to study and ask for advice about his preparation.

9. At §36.19, the Judge went on to refer to "no new evidence" in order to overturn the findings of Judge Grant that the sponsor was an unreliable witness on issues concerning her health. At §36.21, the Judge said that this was not "one of the occasional cases" where the circumstances surrounding the first appeal were such that it would be right for him to look at the matter as if the first determination had never been made, and that the findings of Judge Grant should be treated as settled.

10. At §37, the Judge referred to Tanveer Ahmed IAT [2002] UKAIT 00439, which stated that it is for an individual claimant to show that a document on which he sought to rely could be relied upon. After looking at the documents produced by the appellant, the Judge did not accept the reliability of the email chain between the appellant and ETS, the letter to Charles Edward College, and the evidence from "associates" who could have given evidence at the first appeal.

11. The Judge concluded that the findings of Judge Grant should not "be aside", (§38) and in support of that he relied upon the case of DK and RK. There was sufficient evidence to meet the burden of the first of the three tests and the appellant had failed to provide an innocent explanation that switched the "boomerang test" back to the respondent. The Judge went on at §40 to consider paragraph 276ADE(1)(vi), and as the appellant did not face very significant obstacles to his integration, the Judge rejected his article 8 ECHR appeal._

12. The appellant appealed and was granted permission, on six grounds, each of which I come on to discuss and resolve. I deal with the grounds out of order, as some have connected themes, while others are discrete. I address ground (2) first.

Ground (2)

13. Mr Karim argued that the errors were at §36.13 and §36.15. From §36.13 it was clear that the FtT had carried out an internet search after the hearing and in circumstances where the appellant had never been given the opportunity to respond. Whilst §36.15 did not make an express reference it went on at the end to refer to both details being "easily available online". Mr Karim relied upon the two well-known authorities of AM (fair hearing) [2015] UKUT 656 (IAC) and EG (post-hearing internet research) Nigeria [2008] UKAIT 00015 as authority for the proposition that independent judicial research is not appropriate, not least as Mr Karim points out that it is not the function of this Tribunal to carry out an inquisitorial role, and also that that additional evidence should be brought to the

attention of the parties at the earliest possible stage. Ms Ahmed suggested that these findings are severable from the remainder, as they were in the context of a number of findings and concerns about the appellant's credibility.

14. I accept Mr Karim's submission that the Judge materially erred procedurally for the two reasons he urges me to accept. The guidance could not be clearer that Judges should not carry out their own internet research, as it may deprive a party of an ability to respond and risks giving the impression of bias. The assessment of credibility requires an analysis of the evidence in the round, so that this error cannot be isolated from the remainder of the analysis. This error was sufficiently serious to render the Judge's decision unsafe, by itself.

15. The Judge erred on ground (2).

Grounds (1) and (4)

16. Ground (1) challenges the Judge's criticisms at §34.1 that before Judge Grant, the appellant had been unable to name the correct college, and at §36.10, the ETS correspondence merely showed ETS repeating what the appellant told them. I accept that the Judge failed to engage with the evidence that the lookup tool referred to one location, while the location at which the appellant had always claimed to have taken his test was another. As Mr Karim says, if the lookup tool, a source of evidence from ETS was compelling, it begged the question of why the email from ETS was not. It also ignored the point made on DK and RK that ETS has, in its records, the unique identification number on which the lookup tool is based, which shows the location. In speculating on whether the email correspondence was simply repeating the appellant's assertions, the Judge had failed to resolve the appellant's case as to where he had taken the test.

17. Ground (4) asserts that the Judge had erred at §36.9 when he said that the appellant had produced no evidence that he had asked ETS for a recording. I accept Mr Karim's point that this was simply incorrect, in light of the emails at pages 170 to 172 of the appellant's bundle, before the Judge. The email at page 170 was entitled "request for record of speaking test."

18. The Judge erred on grounds (1) and (4).

Ground (3)

19. Ground (3) argues that the Judge misdirected himself when considering, in the context of the appellant's wife's health claim, at §36.18, whether there was "cogent and compelling" evidence. I accept Ms Ahmed's submission that that is precisely what was envisaged in Patel. However, I also accept Mr Karim's submission that where the Judge stated at §36.19 that the appellant had produced no new evidence in order to "overturn the findings" of Judge Grant that the sponsor was an unreliable witness on issues concerning her health, this was incorrect, as medical evidence postdating the previous determination was provided and set out at pages 41 to 54 of the appellant's bundle. While Ms Ahmed submitted that §36.19 can be read as meaning that there was evidence, but it was not sufficient to address previous findings on credibility and while the Judge did consider later in the decision at §§40.3.4-6 further medical evidence, the Judge did so through the lens of whether it was one of the occasional cases where it was right for him to look at the matter as if Judge Grant's decision "had never been made". While the Judge had correctly directed himself to Patel, he

then misapplied the law by applying a test of whether the first judgment should be set aside.

20. At §38, the Judge similarly applied a test of "setting aside" in relation to the TOEIC issue. The Judge erred in doing so. The Judge also erred in concluding that the respondent had satisfied the initial evidential burden, in the context that the lookup tool and the appellant's claimed test centre location did not correspond, and ETS had appeared, at least on the face of the email from them, to accept that. Moreover, the Judge also erred at §38, when he said that the appellant had failed to provide an "innocent explanation." In doing so, he had failed to appreciate the circumstances in which he could consider the evidence on the appellant's English language abilities, his Master's degree and his IELTS certificate. This was not, as Mr Ahmed suggested, simply reopening up old evidence but rather was considering the evidence afresh in light of the new evidence, including that of Mr Faruk at §36.16. The latter evidence included not only the appellant asking Mr Faruk about how to take the test beforehand, but the appellant being very pleased after his examination (Mr Faruk's witness statement, §3, page 33 of the appellant's bundle).

21. The Judge erred on ground (3).

Ground (5)

22. I turn to ground (5) and the appellant's challenge that while Mr Karim had made submissions before the Judge on section EX.1(b) of Appendix FM (whether there were insurmountable obstacles to family life with the appellant's spouse continuing outside the UK) the Judge had merely considered very significant obstacles in relation to the appellant's private life under paragraph 276ADE(1)(vi). While the Judge had referred to medical evidence in respect of the appellant's sponsor, as already referred to, he considered whether the sponsor could remain in the UK without the appellant (§40.3.6) rather than whether family life could continue outside the UK. While the Judge considered the evidence, he failed to apply the correct test in making his findings.

23. The Judge erred on ground (5).

Ground (6)

24. This is the one ground which I do not accept discloses an error of law. It challenged the delay in the Judge's decision, which was signed on 12th January 2023, following a hearing on 2nd September 2022, as meaning that the assessment of evidence was unsafe. While Mr Karim relied on Arusha and Demushi (deprivation of citizenship – delay) [2012] UKUT 80 (IAC), and R (SS (Sri Lanka)) v SSHD [2018] EWCA Civ 1391, I do not accept that the defects in the Judge's reasoning were the result of any delay in weighing the appellant's and his witnesses' credibility. Rather, the Judge's errors were in misapplying the law, asking the wrong questions and in one aspect (asking for a recording) failing to consider the documentary evidence adequately. While there was no error of law on ground (6), the Judge's decision remains unsafe, such that it cannot stand.

25. The Judge did not err on ground (6).

Disposal of proceedings

26. I discussed with the representatives how to dispose of the proceedings. Both agreed that as the error undermined the assessment of the appellant's credibility, given the nature and extent of the necessary fact-finding on remaking, it was only appropriate to remit remaking back to the First-tier Tribunal (see paragraph 7.2(b) of the Senior President's Practice Statement).

Notice of Decision

The decision of First-tier Tribunal Judge Shore contains material errors of law and I set it aside.

I remit this appeal to the First-tier Tribunal, without preserved findings of fact.

Directions to the First-tier Tribunal

This appeal is remitted to the First-tier Tribunal for a rehearing, with no preserved findings.

The remitted appeal shall not be heard by First-tier Tribunal Judge Shore.

No anonymity directions apply.

J Keith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

30th May 2023