IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003550
First-tier Tribunal No:
IA/02764/2021
HU/51044/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 19 April 2023

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

MD ASHRAFUL ALAM
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr P Georget, Counsel, instructed by eLiberty Legal Solicitors
For the Respondent: Mr Melvin, Senior Home Office Presenting Officer

Heard at Field House on 6 February 2023

DECISION AND REASONS

Introduction

1. This is the re-making of the decision in the Appellant's appeal following the conclusion of a panel of the Upper Tribunal (comprising Upper Tribunal Judge Norton-Taylor and Deputy Upper Tribunal Judge Mailer), promulgated on 1 December 2022, that the First-tier Tribunal had erred in law when allowing the Appellant's appeal and that its decision had to be set aside. The full error of law decision is annexed to this re-making decision. In summary, the panel concluded that:

a) the judge had failed to address the assessment and findings of the decision in DK and RK (ETS: SSHD evidence; proof) India [2022] UKUT 00112 (IAC), as it related to the issues in the present case;

b) the judge had failed to give adequate reasons for revisiting a previous adverse decision of the First-tier Tribunal from 2017; and

c) that the overall conclusions were, as a result, unsustainable.

2. The remaining live issues are:

a) whether the Appellant could provide a sufficiently cogent response to the evidence of deception put forward by the Respondent in respect of the English language test certificates obtained in 2011; and

b) an assessment of the Appellant's case under Article 8.

The 2017 First-tier Tribunal decision

3. It is worth re-stating the conclusions reached by the First-tier Tribunal in 2017. Judge Lewis had had regard to a variety of evidential sources including the Appellant's own evidence. The judge found that the Appellant had "failed to provide any adequate explanation or basis to reject the evidence relied on by the Respondent" [13]. The judge satisfied that the Respondent had discharged the legal burden of proving that the Appellant had obtained the English language test certificates (specifically in relation to the speaking test) fraudulently, namely by the use of a proxy test-taker. Judge Lewis' decision was appealed to the Upper Tribunal but that appeal was dismissed by Upper Tribunal Judge Chalkley in a decision promulgated on 21 December 2017.

4. A subsequent application for permission to appeal to the Court of Appeal was ultimately refused in November 2018. In line with the Devaseelan principles, Judge Lewis' findings are a stating point for my assessment of the evidence as it now stands. They do not of course represent an evidential straightjacket. I am bound to consider all of the evidence, in particular any which post-dates Judge Lewis' decision. I am bound to say, however, that in the particular circumstances of this case, Judge Lewis' findings represent what may properly be described as a firm starting point.

The evidence

5. In re-making the decision in this case I have had regard to the following evidence:

(a) the Appellant's bundle which was before the First-tier Tribunal at the hearing in April 2022;

(b) the Respondent's original appeal bundle (incorporating supplementary evidence relating to the ETS issue);

(c) the Appellant's new supplementary bundle, indexed and paginated 1–6, which I admitted in evidence without objection; and

(d) the Appellant's oral evidence at the hearing.

6. In respect of (d), the Appellant adopted his witness statements dated 23 December 2021 and 3 February 2023. He confirmed that he took one of the speaking tests on 15 November 2011 and had failed it for a second time. He then passed the speaking test on 14 December 2011. Under cross-examination from Mr Melvin, the Appellant told me that he had sought to obtain the voice recordings of his speaking test from ETS in January 2023 following the promulgation of the error of law decision. He suggested that he had spoken about trying to obtain this evidence in 2017, but had apparently been informed by his then solicitor that that may not have been possible. The Appellant told me that the voice on the recordings recently obtained was his. He accepted that there was no expert or other source of evidence (apart from what he told me) in support of the assertion that the voice was his. He said that he had not sought to obtain the recordings in advance of the First-tier Tribunal hearing in 2022 because he had been very confident that he would have obtained his visa then. He confirmed that there was no new evidence since 2017 (I put that in the context that he had provided a recent witness statement, which itself constituted evidence for me to consider).

7. The Appellant said that his wife and child had made separate applications for leave to remain (Mr Melvin informed me that there was no record of this, but it has no material bearing on my analysis and conclusions).

The parties' submissions

8. I do not propose to set these out in any detail. In essence Mr Melvin submitted that there was nothing of any substance in the Appellant's evidence and no basis on which to go behind the findings made by Judge Lewis in 2017. He submitted that without at least being able to listen to the voice recordings, it was not accepted that the voice on those recordings was that of the Appellant. There were no other factors on which the Appellant could succeed in his appeal.

9. Mr Georget submitted that there was a reason why the Appellant had not sought to obtain the voice recordings earlier and that was because the issue was only properly raised in the error of law decision. The Tribunal was entitled to find the Appellant credible as regards the voice on the recordings and the assertion that the Appellant had not in fact cheated. Although the child was not a qualifying child, nor the partner a qualifying partner, their presence was relevant to the Article 8 assessment.

10. At the end of the hearing I reserved my decision.

Findings of fact and conclusions

11. I have considered all of the evidence in the round. I have not taken the findings of Judge Lewis as precluding a consideration of the evidence which post-dates his decision. However, as stated earlier, his findings were clear and based on a careful consideration of the evidence at that time.

12. What do I make of the evidence which post-dates that decision? The 2021 witness statement sets out in some detail the Appellant's overall immigration history together with his circumstances in the United Kingdom relating to his own ties and the presence of the couple's daughter, born in April 2018. However, in respect of the allegation of deception made by the Respondent, there is, I find, relatively little of any substance. The relevant passages are contained in only three paragraphs of the statement (6–8). There is no detail about why the particular college was chosen, methods of payment, the setup of the room, the particular format of the tests, or such like. Indeed, paragraph 7 contained an error which the Appellant had to correct at the hearing before me. I note that even on his own evidence the Appellant had failed two speaking tests before eventually apparently being successful on the third. Whilst not of great significance the two failures did not bode particularly well in respect of his English language abilities at that time (although of course it is possible that a person initially fails for a variety of reasons and then does better at a subsequent attempt).

13. The Appellant explained that he had obtained his IELTS score some four years before the language test in 2011 and that he had apparently scored 5.5 in the speaking element. He asserted that his English language ability would have improved over the subsequent four years. That assertion does not take his explanation much further. As a general proposition, it is possible that an individual's language abilities might have improved: yet it is equally possible that they may not have. I note that the initial IELTS test was taken in November 2007 and the Appellant did not come to the United Kingdom until January 2010; thus for some two years he had not been residing in the United Kingdom and this does not assist the assertion that his English language would necessarily have improved, as he was still residing in Bangladesh and it is, I find, highly likely that he would have been predominantly communicating in Bengali.

14. Taking everything into account, I find that the 2021 witness statement evidence does not of itself provide a sufficiently plausible explanation for the alleged deception and does not come close to undermining the findings reached by Judge Lewis in 2017.

15. The 2023 witness statement is very brief. I accept that following the error of law decision the Appellant contacted ETS representatives and sought to obtain the relevant voice recordings. The timing is perhaps questionable in that I can see no credible reason why he had not sought those recordings at an earlier stage and, at the latest, in preparation for his appeal before the First-tier Tribunal in April 2022. In any event, even if that point were put to one side, there is a conspicuous problem with the

Appellant's case here. Even assuming that he had in fact obtained the voice recordings (no such recordings had actually been put in evidence for the resumed hearing), there is nothing apart from the Appellant's word to support the contention that the voice contained therein is in fact his. There is no expert evidence, nor has there been any application for an adjournment in order to seek such evidence. The potential import of the voice recording evidence for the Appellant's case is obvious: if indeed the voice was his and that ETS had correctly attributed the recording to the test taken in 2011, it might well have supported the Appellant's contention that he did indeed take the test in question. However, I am satisfied that the Appellant's word is not reliable. Essentially, this is so because:

a) he has been found to have used deception by Judge Lewis;

b) his 2021 witness statement lacks detail which could readily have been included, or at least there has been no credible reason for its absence;

c) he has failed to adduce the voice recordings in evidence for the resumed hearing. In so doing, he has effectively declined the opportunity to provide what might have been corroborative evidence (even in the absence of expert evidence).

16. Having regard to the evidence as a whole and the detailed analysis set out in DK and RK (with particular reference to the judicial headnote and paragraphs 70-76,103-117, and 126-131), I make the following core findings:

a) the voice on the recordings was not in fact that of the Appellant;

b) the Appellant has entirely failed to put forward a reasonably plausible explanation in response to the Respondent's allegation of deception;

c) the Appellant did in fact resort to the use of a proxy test-taker in 2011 in the full knowledge that he was seeking to deceive the Respondent;

d) the Respondent has discharged the legal burden of proving that the Appellant was dishonest in respect of the English language test certificate obtained in 2011.

17. I turn to other matters relevant to Article 8. I accept that the Appellant is married to a Bangladeshi citizen who has no leave to remain in the United Kingdom. I accept that the couple have a child, born in April 2018, whose best interests are a primary consideration. I am willing to accept that the child has now just started school (presumably in reception class). There was no evidence of any relevant health issues pertaining to the family unit and I find that there are no such issues. There is no evidence whatsoever of very significant obstacles relating to the Appellant's ability to reintegrate into Bangladeshi society. The same applies to his wife. I find that no such obstacles exist.

18. In respect of the child, she is not a qualifying child for the purposes of section 117B(6) NIAA 2002. There is no reliable evidence to indicate that it would adversely affect her best interests if the child were to accompany her parents to live in Bangladesh. She is of a young age and with the support of her loving parents would be readily able to adapt to life in that country.

19. There is no evidence to suggest that the Appellant and/or his wife have no familial ties in Bangladesh and I find that such ties do exist. The Appellant has been in this country now since January 2010. That is not an insignificant period of time. However, this counts for relatively little in light of section 117B(4) and (5).

20. The Appellant does speak some English, although, with respect, having heard his oral evidence this is at nothing more than a barely reasonable level. I will assume that the Appellant is not reliant on public funds.

21. Having weighed up all the factors in the case, both for and against the Appellant, I conclude that a removal in consequence of the Respondent's refusal of the human rights claim would be proportionate to the legitimate aim of maintaining effective immigration control.

Anonymity

22. There is no basis for making an order in this case. The important principle of open justice is not outweighed by the presence of the Appellant child.

Notice of decision

The decision of the First-tier Tribunal involve the making of an error of law and that decision has been set aside.

I re-make the decision by dismissing the Appellant's appeal.

H.Norton-Taylor
Judge of the Upper Tribunal
Immigration and Asylum Chamber

Dated: 2 March 202

ANNEX: ERROR OF LAW DECISION

UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER) **APPEAL NUMBER: UI/2022/003550**

THE IMMIGRATION ACTS

Heard at: Field House
On: 11 November 2022

Decision and Reasons Promulgated
On:

Before

Upper Tribunal Judge Norton Taylor
Deputy Upper Tribunal Judge Mailer

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MD ASHRAFUL ALAM
NO ANONYMITY ORDER MADE

Respondent

Representation
For the Appellant: Ms S Lecointe, Senior Home Office Presenting Officer
For the Respondent: Mr M Mustafa, counsel, instructed by Liberty Legal Solicitors LLP.

DECISION AND REASONS

1. For the sake of convenience we shall refer to the parties as they were before the First-tier Tribunal, namely, the Secretary of State as "the respondent" and Mr Alam as "the appellant".

2. The respondent appeals with permission against the decision of First-tier Tribunal Judge Chinweze, promulgated on 20 June 2022, following a hearing on 22 April 2022. He allowed the appellant's appeal against the respondent's decision dated 10 June 2020, refusing his human rights claim made on 13 December 2019 for indefinite leave to remain in the United Kingdom on the basis of long residence and on private life grounds.

The Background

3. The appellant is a national of Bangladesh, born on 25 November 1980. He arrived in the UK on 10 January 2010 as a Tier 4 student, and was granted leave to enter until 31 December 2011. He obtained successive grants of leave, pursuant to applications made on 30 December 2011 and on 5 April 2012, to remain as a Tier 4 student and a

Tier 1 Post Study Migrant. His wife, Ms Mst Ismot Ara, arrived in the UK on 2 October 2013. She has at all times been treated as the appellant's dependant.

4. Prior to the expiry of leave to remain on 24 August 2014, they applied on 21 August 2014 for further leave as a Tier 4 (General) student and dependant. Their applications were refused with a right of appeal on 18 September 2015. The respondent asserted that the appellant had submitted a fraudulent Test of English for International Communication – TOEIC – certificate in support of his application made in December 2011, as he had used a proxy to take the test. They appealed against the respondent's decision.

The decision of First-tier Tribunal Judge I A Lewis

5. Their appeals were dismissed by First-tier Tribunal Judge I A Lewis in a determination promulgated on 15 February 2017. He set out the appellant's immigration history. He heard evidence from the first appellant who adopted his written evidence. The second appellant was also present. Her witness statement repeated the evidence of her husband and having regard to the absence of the presenting officer, Judge Lewis indicated that he did not consider it necessary to hear live evidence from her as well. He took into account that she attended the hearing and was ready and willing to give evidence and be cross examined.

6. The appellant asserted that he had submitted genuine and valid documents. He provided details such as the time and place of the English tests he sat in October - December 2011. He emphasised a previous IELTS test in which scored 5.5 on the speaking test, and the fact that he had successfully completed his studies was indicative of having the requisite language skills.

7. Judge Lewis directed himself in terms of the burden and standard of proof and was aware of the decision of the Court of Appeal in Shehzad [2016] EWCA Civ 615, with which the appellant's counsel indicated familiarity – [10].

8. He found it was indeed probably open to the respondent's decision maker to apply Paragraph 322(1A) "to the appellant's case" which would have resulted in a mandatory refusal. It had not been an error instead to apply Paragraph 322 (2) - [13].

9. He stated at [14] that the real issue in the appeal is whether or not the appellant obtained his ETS certificate through the use of a proxy sitter. He noted that in consequence of the February 2014 Panorama broadcast, the validity all ETS results across the UK testing centres were investigated, and the files accessed in the course of that investigation. That then provided the respondent with source material which could be accessed again in the context of individual applications. The fact that the decision was made more than three years and nine months after the tests had been taken did not result in anything untoward in the supporting evidence. [16].

10. He had regard to counsel's submission regarding the appellant's academic achievements both before and after the disputed test, noting that he had been awarded an MBA in April 2012 which suggested a good command of English. He

had scored well in an IELTS test in November 2007, some three years prior to his arrival in the UK and it was reasonable to assume that at the date of the disputed tests, some two years after his arrival, that his language would have improved significantly. He obtained a BTEC level 7 diploma in July 2011. The submission in essence was that the appellant did not present as a person who needed to cheat in an English examination and accordingly the evidence was indicative that he would not seek to fake a test [17].

11. Although recognising the force and the logic of that submission, Judge Lewis was not satisfied on the particular facts that what is essentially circumstantial evidence is sufficient in circumstances where the respondent had discharged the evidential burden such that its shifts to the appellant.

12. He did not regard the appellant's ability to advance a narrative account of date, time, venue and format of the examinations, advanced his case. These are essentially matters of record. The first appellant did not undertake any "book examination". His attendance at the exams would not preclude the use of a proxy sitter. Nor did he consider the potential to be able to pass an examination without cheating to be an inevitable or even significant indicator of not cheating - [19].

13. He accordingly found that the respondent had discharged the evidential burden and that the appellant failed to provide any adequate explanation or basis to reject the evidence relied on by the respondent. The decisions were in accordance with the Immigration Rules in respect of both appellants. The appellants had not advanced anything of substance in respect of Article 8 and their removal would not breach their human rights [22].

The decision of Upper Tribunal Judge Chalkley

14. Their subsequent appeals to the Upper Tribunal were refused by Upper Tribunal Judge Chalkley in a decision promulgated on 21 December 2017. Permission to appeal to the Court of Appeal was refused with the result that their appeal rights became exhausted on 27 November 2018.

The respondent's decision dated 10 June 2020

15. On 28 November 2018 the appellant submitted an application for leave outside the Rules which he varied. On 10 June 2019 he submitted an application for leave to remain on the basis of family/private life, which he varied. On 13 December 2019 he submitted an application for indefinite leave to remain on the basis of long residence. The application was refused by the respondent in a decision dated 10 June 2020, which is the subject of this appeal.

16. The respondent contended that the appellant did not meet the requirements of paragraph 276B(i)(a)(ii) and (iii) of the Immigration Rules, as he had not accrued 10 years' continuous lawful residence and it was undesirable in the public interest to grant him indefinite leave to remain, due to his personal history, character and conduct.

17. The respondent referred in that respect to the appellant's application submitted on 21 August 2014 for leave to remain as Tier 4 student, which the respondent refused

on 18 September 2015 with a right of appeal. Prior to submitting the application, he had applied on 30 December 2011 for leave to remain as a Tier 4 (General) student. In support of this application he submitted a TOEIC certificate from Educational Testing Service (ETS) to the Home Office and his sponsor in order for them to provide him with a Confirmation of Acceptance for Studies.

18. ETS has a record of his speaking test. It is asserted that using voice verification software, ETS is able to detect when a single person is undertaking multiple tests. ETS undertook a check of the appellant's test and confirmed to the respondent that there was significant evidence to conclude that his certificate was fraudulently obtained by use of a proxy test taker. ETS declared his test to be "invalid" due to the aforementioned presence of a proxy test taker who sat the test in his place, and his scores were therefore cancelled by ETS.

19. The respondent was satisfied on the basis of information forwarded to her by ETS, that his certificate was fraudulently obtained. Accordingly, as false documents were submitted in relation to his previous application, his application made on 21 August 2014 was refused under Paragraph 322(2) of the Immigration Rules. The respondent was not prepared to exercise discretion in his favour.

20. In refusing his current application dated 13 December 2019, the respondent stated that, as he had been previously refused leave to remain in the UK under general grounds 322(2), which decision was upheld at the First-tier Tribunal and the Upper Tribunal, "it is appropriate also to refuse this application under Paragraph 322(2)". The appellant accordingly could not meet the requirements of paragraph 276B(ii) due to his character and conduct and (iii) as his application falls for refusal under general grounds.

21. His application for indefinite leave to remain on the grounds of long residence was accordingly refused under Paragraph 276D with reference to Paragraph 276B(i)(a) (ii) and (iii) with reference to paragraph 322(2).

22. With regard to his private life application under paragraph 276ADE(1), his application fell to be refused on grounds of suitability in section S-LTR of Appendix FM. His presence in the UK is not conducive to the public good, as his conduct, character associations or other reasons, make it undesirable to allow him to remain in the UK - S-LTR.1.6. He had previously made false representations or failed to disclose material facts for the purpose of obtaining a document from the respondent indicating that he has a right to reside in the UK - S-LTR.4.3.

23. He did not meet the requirements under Paragraph 276ADE(1)(vi) of the rules, as it is not accepted that there will be very significant obstacles to his integration into his home country if required to leave the UK. His removal was considered to be proportionate to the aim of maintaining effective immigration control.

24. Nor were there any exceptional circumstances warranting a grant of leave to remain in the United Kingdom outside of the requirements of the Rules. Consideration was given to section 55 of the Borders, Citizenship and Immigration Act 2009 with regard to the welfare of his child who was born in the UK on 4 April

2018. He and his child could return to Bangladesh as a family unit and continue to enjoy family life there together with his spouse.

Decision of the First-tier Tribunal promulgated on 20 June 2022.

25. It was against that background that First-tier Tribunal Judge Chinweze considered the appeal against the respondent's decision dated 10 June 2020. On this occasion the appellant's wife was not a co-appellant.

26. At the hearing on 23 April 2022, the appellant's counsel, Mr Mustafa, conceded that the appellant was unable to satisfy the requirement of 10 years' continuous lawful residence in the United Kingdom. He also conceded that on the basis of the evidence supplied by the respondent, she had discharged the evidential burden that the appellant had made false representations when he submitted the TOEIC test certificate.

27. The remaining issues were:

    i. Whether the Tribunal should depart from the findings of First-tier Tribunal Judge Lewis and find that the appellant had raised an innocent explanation;

    ii. Whether the respondent had discharged the legal burden that the appellant had used a proxy to take the TOEIC tests.

    iii. Whether the appellant faced very significant obstacles to his integration into Bangladesh;

    iv. Whether the refusal decision amounted to a disproportionate interference with the appellant's rights [16]

28. The appellant gave evidence in English at the hearing. He adopted his statement dated 23 December 2021 as his evidence.

29. The Judge summarised his evidence at paragraphs 18 to 23 of the decision: He had completed a BTec level 7 extended diploma and a Masters of Business Administration from John Moores University in Liverpool, in 2012.

30. He "fervently denied" using a proxy to take his TOEIC. He took the reading part on 14 October 2011 and the writing and speaking part on 15 October 2011 at Synergy Business College. He also sat an International English language test on 5 December 2007. It is likely that his English will have improved even further by 2011 which made it even more unlikely he would have used a proxy to take his test. His daughter was born in the UK on 4 April 2018 and is 3½ years old. He is now 40 years old and has lost his social and cultural ties in Bangladesh. He may not be able to get a job there if he were forced to return. Private companies will be reluctant to hire him.

31. Having set out the requirements under paragraph 276B of the Rules at [29], he concluded that the appellant did not meet them as he had not resided continuously and lawfully in the UK for at least 10 years [31].

32. He considered at [32] whether he met the private life provisions. He referred to paragraph 276ADE(1)(i)(vi) of the Rules. This includes the requirement that as at that the date of application :-

    (i) the appellant does not fall for refusal under any of the grounds in section S – LTR.1.1 to S-LTR 2.2 and S-LTR.3.1 to S-LTR.4.5 in Appendix FM; and

    (vi) subject to sub-paragraph (2), is 18 years old or above, has lived continuously in the UK for less than 20 years, but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK.

33. He referred to S-LTR.1.6 of Appendix FM which provides that the presence of the applicant in the UK is not conducive to the public good because their conduct (including convictions which do not fall within Paragraphs S-LTR.1.1.3 to 1.5), character, associations, or other reasons, make it undesirable to allow them to remain in the UK.

34. He referred at [33] to S-LTR.4.3 of Appendix FM which states that:

    The applicant has previously made false representations or failed to disclose material facts for the purpose of obtaining a document from the Secretary of State that indicates that he or she has a right to reside in the UK.

35. He referred to the decision of the Upper Tribunal in SM and Qadir v SSHD (ETS – Evidence - Burden of proof) [2016] UKUT 00229 at [57], which set out the way the burden of proof operated in this situation. There is an evidential burden on the respondent to adduce sufficient evidence to raise an issue as to the existence or non-existence of the facts in issue; the evidential burden is then transferred to the appellant to raise an innocent explanation, namely an account which satisfies a minimum level of plausibility and if he is able to do so, the respondent has to establish on the balance of probabilities that the appellant's prima facie innocent explanation is to be rejected [36].

36. He noted at [37] the respondent's evidence adduced from the Home Office which he stated had been produced in a substantial number of TOEIC appeals [38]. He referred in detail to the ETS internal inquiry. ETS acknowledged that the technology was not perfect. He noted that the Upper Tribunal in SM criticised the evidence of Ms Collins and Mr Millington for containing "multiple frailties" which left open the possibility that false positive results might have arisen [46].

37. He noted at [49] that despite the weakness identified, the UT in SM and Qadir was satisfied by a narrow margin that the SSHD had discharged the initial evidential burden.

38. In considering whether the appellant had raised an innocent explanation, he set out the 'factors' identified in SM & Qadir at [54]. He referred to the "look up tool" which the respondent had used which sets out the data used by ETS of all spoken English TOEIC tests sat on the same day and the same test centre of the appellant [50]. There was a discrepancy between the dates of tests in the lookup tool and the dates that the appellant said he took his test, which he did not find to be a material

discrepancy [50-51]. No issue had been taken before Judge Lewis over the dates. He concluded that due to the passage of time the appellant had made a mistake in his statement when he referred to taking the first speaking and writing test on 15 October 2011 that he in fact took it on 15 November 2011 - [52].

39. At [53] he stated that

> "I am satisfied upon considering the evidence relied on by the respondent that she has discharged the evidential burden that the appellant dishonestly submitted a fraudulently obtained test certificate with his application for leave to remain in December 2011."

40. With regard to "the appellant's evidential burden" [54], he stated that in assessing whether the appellant has raised an innocent explanation, the UT in SM & Qadir set out a number of factors to be considered.

41. He noted that the appellant appealed the refusal decision of "15 September 2018 (sic)" to the Tribunal [55]. He summarised the evidence and the findings of Judge Lewis at [56-59].

42. He 'bore in mind' the principles derived from the Upper Tribunal in Devaseelan (Second Appeals - ECHR - Extra–Territorial Effect) Sri Lanka [2002] UKIAT 00702 at [39(1)-(3)], and the decision in LB (Algeria) [2004] EWCA Civ 804, where the Court of Appeal commented on the guidance in Devaseelan [60-62]. In LB, the Court of Appeal stated at [30] that the most important feature of the guidance is that the fundamental obligation of every special adjudicator to independently decide each application on its own individual merits, was preserved. The guidance was expressly subject to this overriding principle.

43. He considered in the light of the guidance in SM whether there are 'sufficient grounds for finding that the appellant has raised an innocent explanation' [63]. He noted what the appellant had to gain or lose from using a proxy test taker. He had no previous convictions for dishonesty. He noted that the appellant had passed an English language speaking test on 5 December 2007, four years before the "suspect" tests were taken in November and December 2011. He noted that the appellant completed academic qualifications in the UK. He gave his oral evidence in English at a competent level.

44. He had regard at [60] to the decision of the Upper Tribunal in MA (ETS – TOEIC Testing) Nigeria [2016] UKUT 450 at [57], that there could be a number of reasons why a candidate well versed in the English language might cheat. He did not find that these factors applied to the appellant.

45. He stated at [71] that the most significant feature of FtJ Lewis's decision is that he was not addressed, nor does he refer in his determination to the decision of SM & Qadir, published some 5 months before the hearing date before him. Had the shortcomings in the respondent's evidence been placed alongside the evidence adduced by the appellant, a balance may have been tipped in favour of a finding that the appellant had provided an "innocent explanation"

46. In the light of the factors he highlighted he was satisfied that the appellant was reasonably proficient in the English language when he sat the tests that have been invalidated. When this is coupled with the concerns over the evidence the respondent relied on, he was satisfied that he can depart from the findings of Judge Lewis. He found that the appellant has provided an innocent explanation for the allegation of fraud [72].

47. He went on to consider whether the respondent established on the balance of probabilities that the appellant's innocent explanation is to be rejected. That required a balancing of all the findings and evaluative assessments set out.

48. He stated at [75] that it is clear from SM & Qadir that the methodology employed by ETS for identifying invalid and questionable tests was not foolproof. The July 2019 All Party Parliamentary Group (APPG) report on TOEIC found that three experts believed the data supplied by ETS to the Home Office to be "questionable" (not least because of problems about "continuity", i.e., ensuring that test results were attributed to the correct individuals). The APPG concluded that accordingly such decisions should not be based "on this evidence alone".

49. He noted at [76] that the Upper Tribunal confirmed the admissibility of what was said by the witnesses to the APPG in DK & RK (ETS: SSHD: Evidence; proof) [2021] UKUT 00061 at [23] (IAC) - DK & RK (1) - namely, that, once verified, the record of what was actually said to and by Professors Sommer and French and Dr Harrison on 11 June 2019 should be admitted. Those three individuals have given expert evidence in other ETS cases. What they had to say on that date may, therefore, be of relevance. Admitting the transcript on this basis would not infringe Parliamentary privilege or the principle that courts and tribunals make up their own minds about the matters to be decided by them on the basis of the evidence before them.

50. He noted at [77] that the Upper Tribunal confirmed the admissibility of what was said by the witnesses to the APPG in the later decision of the Presidential panel in DK & RK (ETS: SSHD evidence, proof) India [2022] UKUT 00112 at [87] - DK & RK (2) - although care had to be taken in considering it alongside evidence formally given in judicial proceedings [88 – 91].

51. He referred to the evidence of Professor Sommer's view at [78-79], that it was unsafe to rely on computer data from ETS as a sole means of reaching a decision. There was no chain of custody over any evidence supplied. There had been an assumption by ETS that corruption would not arise. He referred to the evidence of Professor French at [79]. Even if, as was suggested in his 2016 report, the error rate was only 1%, there would always be that one in 100 people who were wrongly accused of deception.

52. Having taken into account the factors in support of the appellant's innocent explanation and "the undoubted flaws in the system used by ETS in identifying invalid tests", he found that there is a possibility that the appellant has been incorrectly identified as having cheated. He could not exclude the possibility that the questionable test results relied on by the respondent contained a number of

false positives and that it is conceivable that the appellant fell into this category - [80].

53. He concluded at [81], that the respondent has failed to establish on the balance of probabilities that the appellant's prima facie innocent explanation is to be rejected. He found that paragraph S-LTR 4.30 of Appendix FM does not apply to the appellant. He accordingly meets the suitability requirements under Paragraph 276 ADE (1)(i) of the Rules.

54. He then considered whether the appellant faces very significant obstacles to his integration into Bangladesh, and concluded that he would not face such obstacles. There is no counter appeal raised against that decision.

55. In assessing the proportionality of the respondent's Article 8 claim outside the Rules, having found that the appellant did not use deception when seeking an extension in December 2011, he concluded that he should therefore be put back into the position he would have been in had the allegation of deception not been made [101]. The appellant should accordingly be given another opportunity to apply for leave to remain [105]. This would reduce the public interest in his removal for purpose of s.117(4) and (5) of the 2002 Act.

56. He held that the refusal constituted a disproportionate interference with the appellant's right to respect for his private life under Article 8 and he allowed the appeal on human rights grounds.

The grounds of appeal for a grant of permission

57. The grounds seeking permission contend that it is unclear how the Tribunal "overturned a previous decision". Further, the respondent relies on the findings of the Upper Tribunal in DK and RK (2), which are clear. The SSHD's evidence is reliable. The level of academic achievement does not preclude individuals practising deception for a number of reasons. There is no reliable evidence to show that there was a possibility of an individual's test recordings being attributed to another person.

58. In granting permission First-tier Tribunal Judge SPJ Buchanan found it to be arguable that the Judge failed to give adequate reasons to explain why the earlier decision and the subsequent failed appeal process were not given due weight as it appears from paragraph 63, that the Judge had simply decided to consider the matter afresh without having identified subsequent facts that would warrant departure from the outcome of the earlier process.

59. Following the grant of permission, Mr Mustafa provided a detailed Rule 24 response dated 8 November 2022.

60. He submitted with regard to the respondent's first ground, that the Judge at [56-59] carefully considered the decision of Judge Lewis. Secondly, at [60-62] he considered the Devaseelan guidelines and treated the decision of Judge Lewis as the starting point. He considered the comments in LD Algeria v SSHD [2004] EWCA Civ 804 at [30].

61. Thirdly, the Judge in accordance with the guidelines treated the decision of Judge Lewis as the starting point.

62. Fourthly, bearing that in mind, he decided to consider the appeal on its own individual merits and found that Judge Lewis had not considered SM & Qadir, promulgated five months prior to the hearing before him. He therefore did not consider that the respondent's evidence had shortcomings. Had this been considered he may well have found in the appellant's favour and this possibility could not be excluded.

63. For these reasons, it is clear how and why the Judge departed from Judge Lewis's decision. He did so for careful reasons. It was plainly open to him, particularly when Judge Lewis made no findings undermining the appellant's credibility. There is no obligation on the Judge to provide the best possible reasons. The appellate court should be slow to interfere with the decision of the First-tier Tribunal particularly where it had the benefit of hearing oral evidence.

64. With regard to the respondent's second ground, he submitted that the contention that the First-tier Judge's finding on the ETS point "is against the case law" is without merit and merely an attempt to re-argue the appeal. The Judge undertook a comprehensive and forensic analysis of all the evidence relied upon by the respondent.

65. He found at [53], in accordance with case law, that the respondent had discharged the evidential burden. He then considered whether the appellant had raised in an innocent explanation. In so doing, he weighed the relevant factors set out in SM & Qadir. Having weighed the factors, he found that the appellant had raised an innocent explanation.

66. In considering whether the explanation fell to be rejected he noted from SM & Qadir that the methodology employed by ETS for identifying invalid and questionable tests was not foolproof and that the evidence supplied by ETS is contained false positives. He considered the evidence in relation to the false positive rate. The Judge's findings do not run counter to DK & RK (2), as it was held at [103] that there may be a false positive rate of one percent or even possibly three percent, and, at [117] that the evidence supplied by ETS was not necessarily wholly free from error.

67. Further, pursuant to DK and RK (1) the APPG report was not evidence before it, due to parliamentary privilege and pursuant to DK and RK (2) care had be taken in considering what was said by witnesses to the APPG.

68. Having considered the above as well as the factors in support of the appellant's innocent explanation, the Judge concluded that the respondent failed to discharge the legal burden as there was a possibility he fell into the category of false positive. This was conceivable and cannot be excluded. That approach is consistent with DK and RK (2) where it held at [131] that "they rely on their own assertions about the tests. If credible, and sufficiently comprehensive, such assertions might perhaps, in an individual case, suffice to prevent the Secretary of State establishing dishonesty on the balance of probabilities".

69. It follows that the Judge's findings on the ETS point was open to him and within the parameters of a legitimate finding. The respondent's submission in essence treats the general evidence considered in DK and RK (2) to be determinative. Yet at [107] of that case, it was held that they would not say that the evidence has to be regarded as determinative. There may be room for error. Further, each case falls to be determined on its own individual facts and evidence and that the individual case can never be proved by evidence of generality.

The hearing

70. On behalf of the respondent, Ms Lecointe adopted the two grounds of appeal, namely that the Judge failed to properly apply DK and RK (2) and failed to properly consider and address the principles derived from Devaseelan, as they applied in this case.

71. She submitted that is not known whether Judge Lewis was apprised of the decision in SM and Qadir. Even if it had not been not drawn to his attention, his reasoning was based on that decision, and he took into account the competing factors. The decision had been in the public domain at the time and would be part of his reasoning even if not specifically mentioned by him.

72. There should be good and proper reasons provided before departing from Judge Lewis's decision. The reasons given by the Judge to depart from that decision were not adequate. Moreover, there were no findings undermining the appellant's credibility.

73. With regard to the second ground, she submitted that the Judge did not deal with and properly consider the decision in DK and RK (2). The basis of Judge Lewis's appeal is plain. The appellant has been guilty of deception. The Tribunal is concerned only with whether the individual appellant was dishonest (DK and RK) (2) [111].

74. Mr Mustafa in reply relied on his Rule 24 response as set out and submitted that the Judge has undertaken a proper analysis. His conclusions are sustainable.

Discussion and conclusions

75. We remind ourselves of the need to show appropriate restraint before interfering with the decision of the First-tier Tribunal as emphasised by the Court of Appeal in recent years: R (Iran) v Secretary of State for the Home Department [2005] EWCA Civ 982 at [90]; UT (Sri Lanka) v SSHD [2019] EWCA Civ 1095 at [19]; AA (Nigeria) v SSHD [2020] EWCA Civ 1296 at [41] and Lowe v SSHD [2021] EWCA Civ 62 at [29-31].

76. In our judgment the First-tier Tribunal judge has made errors of law.

77. We have had regard to the guidance given in Devaseelan v SSHD [2002] UKIAT 702, summarised in SSHD v BK (Afghanistan)[2019] EWCA Civ 1358 at [31] and [32].

78. The proper approach of the second Tribunal should reflect the fact that the first adjudicator's determination stands as an assessment of the claim that the appellant

was then making at the time of the determination. It is not binding on the second adjudicator but on the other hand the second adjudicator is not hearing an appeal against it. It is not the second adjudicator's role to consider arguments intended to undermine the first adjudicator's determination, but the second adjudicator must be careful to recognise that the issue before him is not the issue that was before the first adjudicator.

79. In particular, if before the second adjudicator the appellant relies on facts that are not materially different from those put to the first adjudicator, the second adjudicator should regard the issues as settled by the first adjudicator's determination to make his findings align with that determination rather than allowing the matter to be re-litigated.

80. Judge Lewis properly identified at [14] of his determination that the issue in the case was whether or not the appellant obtained his ETS certificate through the use of a proxy taker. He was not satisfied on the particular facts in the case, that what was essentially circumstantial evidence was sufficient in circumstances where the respondent discharged the evidential burden such that it shifts to the appellant [18] - [19]. In considering all the evidence he found that the respondent has discharged the evidential burden and that the appellant had failed to provide any adequate explanation or basis to reject the evidence relied on by the respondent [20]. The respondent's decisions were in accordance with the Immigration Rules.

81. The evidence before Judge Chinweze as set out from [17-23] was essentially the same as that had been asserted by the appellant before Judge Lewis at [9] of his decision. No attempt had been made to obtain the contested tape from ETS following that determination.

82. Judge Chinweze referred to SM & Qadir stated at [53], and stated that upon considering the evidence relied on by the respondent, he was satisfied that she has discharged the evidential burden that the appellant dishonestly submitted a fraudulently obtained test certificate with his application for leave to remain in December 2011. He referred to the appellant's evidential burden and noted at [54] that in assessing whether the appellant has raised an innocent explanation, the UT in SM & Qadir at [69] has set out a number of factors to be considered, which he set out.

83. He referred to the decision of Judge Lewis dated 15 September 2018 and summarised the findings and conclusions from [56-59] of his determination.

84. He referred to the guidance in Devaseelan at [60-62].

85. He stated at [71] that the most significant feature of Judge Lewis's decision is that he has not addressed nor does he refer in his determination to the decision in SM & Qadir published five months prior to the hearing before him. Had the shortcomings in the respondent's evidence been placed alongside the evidence adduced by the appellant, the balance might have been tipped in favour of finding that the appellant had provided an innocent explanation.

86. At [72] he stated that in the light of the factors he had highlighted he was

> "satisfied that the appellant was reasonably proficient in the English language when he sat the tests that have been invalidated, when this is coupled with the concerns over the evidence the respondent relied. I am satisfied that I can depart from the findings of FtTJ Lewis. I find that the appellant has provided an innocent explanation to the allegation of fraud".

87. He stated at [80] that

> "I have taken into account the factors in support of the appellant's innocent explanation and the undoubted flaws in the system used by ETS in identifying invalid tests. I find that there is a possibility that the appellant has been incorrectly identified as having cheated, and I cannot exclude the possibility that the questionable test results relied on by the respondent contained a number of false positives and that it is conceivable that the appellant fell into this category".

88. Under the heading 'General Conclusions', the panel in DK & RK (2) held that:

> "[127] Where evidence derived from ETS points to a particular result having been obtained by the input of a person who had undertaken other tests, and if that evidence is uncontradicted by credible evidence, unexplained, and not the subject of any material undermining its effect in the individual case, it is in our judgment amply sufficient to prove that fact on the balance of probabilities -
>
> [128] In using the phrase "amply sufficient" we differ from the conclusion of this Tribunal on different evidence, explored in a less detailed way, in SM and Qadir v SSHD. We do not consider that the evidential burden on the respondent in these cases was discharged by only a narrow margin. It is clear beyond a peradventure that the appellants had a case to answer.
>
> [129] In these circumstances the real position is that mere assertions of ignorance or honesty by those whose results are identified as obtained by a proxy are very unlikely to prevent the Secretary of State from showing that, on the balance of probabilities, the story shown by the documents is the true one. It will be and remain not merely the probable fact, but the highly probable fact. Any determination of an appeal of this sort must take that into account in assessing whether the respondent has proved the dishonesty on the balance of probabilities."

89. In DK and RK (2) the UT did consider the APPG material at [87 - 92]. It noted that a major difficulty with the APPG transcript is that it shows that those involved were not entirely well-informed on the materials directly available. Nobody seemed to know about the contractual or licensing arrangements between ETS and the Home Office and the transcript records some statements wholly unsupported by evidence. There was also a misapprehension that the question is about whether people could pass the test now rather than whether they cheated in the test they took [90].

90. The UT concluded at [92] that even without all those considerations they could not find anything in the way of facts in the transcripts substantially to undermine the existing evidence adduced by the Secretary of State.

91. The Tribunal referred to the Secretary of State's case that the evidence showed that there was widespread fraud and cheating in ETS centres [61]. That evidence was "overwhelming" [67]. It is clear beyond a doubt that these were institutions for the manufacture of fraudulent qualifications. The conclusion does not show that any

individual certificate was obtained fraudulently. It has an important part in evaluation of the evidence as a whole, in that it provides the context.

92. At [68] the UT noted that without that context an allegation that certificates were fraudulently obtained with the assistance of the managers of colleges franchised by a respected international group, inspected and authorised by the SSHD, would be met with scepticism. Such a person would need "a lot of persuading" that the allegation of fraud was made out. When however such a fact finding is shown how contrary to any preconceptions, the truth is that fraud was frequently and widespread, individual allegation becomes more plausible.

93. It noted that an individual allegation always has to be assessed in the context of the whole of the background evidence. The more plausible the alleged fact is, the more the allegation is likely to be accepted on the basis of such individual evidence as is available. Individual evidence will have different effects according to the background against which it is assessed [69].

94. That is not to say that the need for individual evidence is reduced. The individual case can never be proved by evidence of generality unless the general is universal. But the general evidence changes the starting point. A possible response to the assertion of fact moves from disbelief that such a thing could ever - or could regularly - happen, to a specific enquiry about whether one of the events that certainly did happen was associated with the individual under investigation. This feature of the interaction of general and individual evidence is a matter of common experience and is not unrelated to the discussion of cogency [70].

95. At [75] the UT concluded that any assessment of whether the burden of proof is discharged in any individual case falls to be determined against a background of the fact that there were many thousands of results obtained fraudulently. The assertion that an individual appellant cheated is not an unqualified assertion to be viewed against the background of general unlikelihood, but is a particular assertion that the appellant was one of the large number who certainly did cheat.

96. In Secretary of State for the Home Department v Halikma Akter and others [2022] EWCA Civ 741, handed down on 27 May 2022, the Court of Appeal referred to the decision of the presidential panel of the Upper Tribunal in DK & RK (2). It noted at [26] that the Upper Tribunal had, at [89] of its decision, regarded the APPG transcripts of the experts' evidence unfavourably. The APPG transcript showed that those involved were not entirely well informed on materials already available; see [90]. The conversation often seemed "to lose its structure and mission" ; see [91]. The APPG was not "operating judicially".

97. The Court of Appeal stated at [29] that the judgement in DK & RK (2) includes a comprehensive account of the evidence which the UT heard and its analysis of the same and upon which it based its decision. There would need to be good reason, which would inevitably mean substantial fresh evidence, for another UT to revisit and overturn the determination.

98. The Court of Appeal considered that DK & RK (2) is authoritative in this regard [31]. The evidence relied upon by the respondent in the appellant's case was

sufficient to discharge the evidential burden, and there is a case for the appellant in the case before them to answer.

99. We find that Judge Chinweze failed to grapple with the assessment and findings of the presidential panel in DK & RK (2) with regard to the evidence tendered on behalf of the Secretary of State in ETS cases, which was found to be amply sufficient to discharge the burden of proof and required a response from the appellant whose test entry is attributed to a proxy, as was the evidence in this appellant's case. The burden of proving fraud or dishonesty is on the respondent and the standard of proof is the balance of probabilities. The burdens are assigned by law.

100. In failing to give effect to, or at least to adequately address, the decision of the Presidential panel in DK & RK (2), which Judge Chinweze only briefly referred to in his decision at [77], we find that he erred in concluding, without any proper basis being articulated, that there were undoubted flaws in the system used by ETS in identifying invalid tests. Nor was there any properly articulated basis for his finding that there was a "possibility that the appellant had been incorrectly identified as having cheated". That amounts to unreasoned and unwarranted speculation, at odds with the decision in DK & RK (2).

101. Nor was there any proper basis for his conclusion at [80], that it was possible that the questionable test results relied upon, contained a number of false positives and that it is conceivable that the appellant fell into this category. That is also the product of impermissible speculation.

102. In summary, we find that there were no shortcomings in the analysis and reasoning of the decision of Judge Lewis (noting that it was of course upheld by the Upper Tribunal), that Judge Lewis' failure to have specifically addressed SM and Qadir was not of itself a legally sufficient basis on which to entirely revisit Judge Lewis' findings, and that the judge's reasons and conclusions at [64] – [72] are unsustainable in so far as the Devaseelan issue is concerned.

103. Further, the judge's failure to adequately engage with DK & RK (2) renders the judge's decision unsustainable in so far as the conclusions at [80] – [81] are concerned.

104. In the circumstances we conclude that the decision of the First-tier Tribunal should be set aside.

Disposal

105. Ms Lecointe submitted that it is appropriate to retain the case in the Upper Tribunal. Mr Mustafa however contended that having regard to the extent of judicial fact finding which required for the decision to be re-made, it is appropriate to remit this appeal to the First-tier tribunal.

106. We have found that there was adequate evidence to discharge the respondent's evidential burden of proof. This requires a response from the appellant whose test entry was attributed to a proxy.

107. Given the limited issue, we conclude that it is appropriate to list this case for a resumed hearing before the Upper Tribunal in due course.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

We exercise our discretion under s.12 (2)(a) of the Tribunals, Courts and Enforcement Act 2007 and set aside the decision of the First-tier Tribunal.

The appeal is retained in the Upper Tribunal and will be listed for a resumed hearing in due course.

No anonymity direction made.

Directions to the parties

1. The appellant shall file and serve any further evidence relied on, no later than 21 days after this decision is sent out.

2. Any further evidence relied on by the respondent shall be files and served no later than 35 days after this decision is sent out.

3. The parties may apply to vary these directions.

Signed C Mailer Date: 1 December 2022

Deputy Upper Tribunal Judge Mailer