Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/13863/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 December 2020	**On 3 June 2021**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

MMHS
(ANONYMITY IN FORCE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Z Malik, Counsel instructed by City Heights Solicitors
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I re-make an order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the appellant. Breach of this order can be punished as a contempt of court. I make this order because the appellant is vulnerable because of ill health and publicity could harm him.
2. This is an appeal against a decision of the First-tier Tribunal dismissing the appellant's appeal against a decision of the respondent on 30 July 2019 refusing his application for

indefinite leave to remain, for settlement and/or leave to remain on human rights grounds.

3. The appeal has previously been determined unsatisfactorily and I set aside an earlier decision of the First-tier Tribunal and directed the case be heard again in the Upper Tribunal. A copy of my Reasons for Finding an Error of Law is appended hereto.

4. Although I had the assistance of Mr Malik and Ms Cunha I want to begin by considering the respondent's decision that led to this appeal.

5. This shows that the appellant entered the United Kingdom in September 2009 with entry clearance as a student. His leave was extended until 23 June 2012. On 22 June 2012 he made an application for leave to remain as a spouse and the application was successful. He was given leave to remain until 4 March 2015. On 4 March 2015 he applied for indefinite leave to remain as the spouse of a settled person but the application was refused. He appealed but his appeal was unsuccessful and his appeal rights were exhausted on 22 May 2018. On 22 May 2018 he made an application for settlement which he varied twice, most recently to an application for indefinite leave to remain outside the Rules.

6. The Reasons for Refusal referred to a document published on 28 February 2018 and described as "Modernisation Guidance - Leave Outside The Immigration Rules - version 1" which identifies the level of the seriousness that exceptional circumstances must reach before they justify a grant of settlement outside the Rules. The respondent acknowledged that such circumstances could occur but it was expected that such cases would be extremely rare.

7. The respondent explained that this was not such a case.

8. The key points are that in the opinion of the respondent the appellant had lived in the United Kingdom for nine years and ten months. He was then 36 years and 1 month old and he would be able to reintegrate himself into Bangladesh, being the country of his nationality. He had spent his formative years there, leaving when he was 26 years old. He spoke the national language and was familiar with the customs and indeed had relatives living there.

9. The appellant said that he was married to a British citizen but he was refused leave to remain on account of that marriage because neither of them attended a marriage interview. It was the appellant's case that he had no longer any contact with his wife.

10. The respondent noted that the earlier application had been refused and an appeal dismissed for wide-ranging reasons.

11. The Secretary of State did not accept that the appellant could not obtain work in Bangladesh. The appellant said that he could not get a government job or any other job.

12. The decision noted health problems. The appellant had produced a letter showing he had both physical and mental health problems. The physical problems included bilateral carpal tunnel syndrome and surgical treatment was expected and he suffered from anxiety and depression. His GP had prescribed medication and advised closer observation and support.

13. The Secretary of State found that the appellant had not established a medical condition so exceptional that he could not obtain treatment in Bangladesh or that he would be disadvantaged in obtaining such treatment.

14. There were no strong links with the United Kingdom of a kind that would justify an exceptional decision to remain.

15. The Secretary of State was aware of the length of residence although the appellant had not produced a passport to show absences since September 2017, he had not passed the Life in the UK Test and the English Language Test. The Secretary of State also found that he was not suitable because he had been identified as a TOEIC cheat.

16. There was nothing weighty in his private or family life or exceptional circumstances generally.

17. Before me it is for the appellant to prove the facts on which he relies on the balance of probabilities and then for the respondent to show that any interference with his private and family life is justified. I must conduct a balancing exercise weighing any public interest in his removal against the consequences of interfering with his private and family life.

18. Much has been said in this case about the appellant's vulnerability and although the appellant did give evidence before me, and I consider his evidence later, I want to begin by outlining the medical evidence.

19. I concentrate mainly on the report of Ms Mai Atas-Kelly dated 14 July 2019. Ms Atas-Kelly's qualifications include her being a consultant, chartered psychologist and registered practitioner psychologist working in private practice. She has lectured at Royal Holloway University and has been a clinical lead in the National Health Service. Her report shows a proper appreciation of her role as an expert. There is no significant challenge to her evidence and, having reflected on the case as a whole, I found her report honest and competent and deserving of significant weight.

20. The appellant presented to her as a Bangladeshi Muslim who had married a UK resident who was Somalian. It was his case that this caused such a degree of family disapproval that his relatives stopped communicating with him and then his wife left him and left the United Kingdom and, he understood, remarried in Somalia. This prompted a deterioration in his mental health that has been exacerbated by uncertainty over his immigration status.

21. Ms Atas-Kelly noted that the appellant appears to have made "multiple suicide attempts over the past few years, that left me very concerned with his wellbeing". This is one of several similarly chilling observations in the report and I have reflected on them.

22. Ms Atas-Kelly was satisfied that the appellant presented with a Major Depressive Disorder. She believed that his condition required highly specialist Cognitive Behavioural Therapy with a minimum duration of about a year.

23. She believed that any additional stress or "negative change" is:

> "very likely to worsen [the appellant's] mental health and suicidal ideation. It is my professional view that if [the appellant] attempts suicide following a negative change in his

> circumstances he might reach a significant level of desperation and is likely to aim to succeed in his attempt."

24. Ms Atas-Kelly then set out the background to the case. She noted that the appellant presented as "honest and forthcoming" but appeared to be "low in mood and energy". She outlined his claim that following his marriage, and because of it, to a non-Bangladeshi woman his father and siblings had stopped contacting him. He had always found his parents supportive and they had paid for him to move to the United Kingdom and study there. He had to find out from friends about his parents' health and circumstances. The appellant believed he was married lawfully in the United Kingdom to his wife and he wanted to divorce her but could not make contact to initiate proceedings.

25. He was taking medication for hallucinations and for depression and anxiety and was awaiting surgery for carpal tunnel syndrome.

26. He outlined his thoughts of self-harm and suicide attempts and general mood.

27. Ms Atas-Kelly concluded that the appellant met the diagnostic criteria for a "major depressive disorder with psychotic features of a sever course".

28. She said:

> "It is my professional opinion that [the appellant]'s emotional and psychological states are at a risky disequilibrium, and that any additional stress/negative change is very likely to worsen [the appellant]'s mental health and suicidal ideation. It is my professional view that if [the Appellant] attempts suicide following a negative change in his circumstances he might reach a significant level of desperation and his is likely to aim to succeed in this attempt."

29. The other evidence about the appellant's health includes a letter from a consultant psychiatrist, a Dr A Adenola, and a general medical practitioner. These tend to show that the Ms Atas-Kelly are well founded.

30. The appellant gave evidence before me. He adopted his statement dated 10 December 2019 starting at page 34 in the bundle.

31. He began by outlining his immigration history including his marriage to a British citizen. He began by addressing the contention that he is a TOEIC cheat.

32. He denied using a proxy taker for his test, commenting "because I did not need one".

33. He said at paragraph 12 that he completed a pre-university programme in Bangladesh at London Newcastle College which he regarded as comparable to a foundation year in the United Kingdom and it was taught in English specifically with the intention that students could prepare for university level lectures in English when they studied abroad. He also passed a relevant exam in English.

34. He studied a Hotel Management course in Bangladesh in English and passed at a high standard.

35. He said he spoke English fluently before coming to the United Kingdom. After coming to the United Kingdom and studying he successfully completed a Professional Diploma in Tourism and Hospitality Management. Again the course was in English. He had also enrolled to study at diploma level at a course in London and produced his form CAS.

36. He said that he married in May 2012. His wife did not speak Bengali and he did not speak her native tongue. Their only common language was English.

37. He had also worked as a shift manager at McDonald's and was only able to do that job because he could speak English. He said that he was more than capable of passing the test that he was said to have avoided by cheating. He then complained about incompetence by the Secretary of State. He referred to page 6 of the refusal letter where the Secretary of State stated:

> "In relation to paragraph 276B(ii)(c). In your application dated 30 January 2012 you submitted a TOEIC certificate from Education Testing Service ('ETS') … Your scores from the test taken on 18 April 2012 at Elizabeth College have now been cancelled by ETS …"

The appellant pointed out the incongruity of referring to a document relating to a test taken on 18 April 2012 in support of an application dated close to three months earlier on 30 January 2012.

38. He explained how he was confident in his ability to pass the necessary test and chose a TOEIC test because it was recognised.

39. He said he tried to book the test before getting married as he understood a TOEIC test could be booked in a short timeframe and the results would come quickly.

40. He said he checked online on the available tests and found suitable dates at Elizabeth College at a time convenient to him. He said he had time to do the test even after getting married but he wanted it "out of the way" because there was much else to do. He knew that attending the Elizabeth College test centre would not involve a big detour on his way to college.

41. He said he made the booking to do the test about two weeks ahead. It was scheduled for 18 April 2012, he paid the test fee in cash and paid £20 to get additional material to prepare.

42. He was very confident about passing the test. Given what he had achieved he expected it to be easy.

43. He explained that at the relevant time he was living in Southall near the Ealing Broadway underground station. He took the bus to Ealing Broadway, then the District Line to Victoria and then the Victoria Line to Vauxhall and it took a ten minutes' bus journey to the test centre. He did not remember everything that had happened. He was recalling something that had happened seven years before he made the statement.

44. He remembered the starting time was 10 o'clock in the morning. He remembered there were many computers in the room and twenty or 25 people there to sit their test. He was told which computer he had to sit at to do the work and he opened the computer screen and followed the instructions. He said he had to speak about pictures shown on the computer screen, about the environment of the pictures and he was asked to express an opinion. The test was automated with limited timeframes. The speaking test took fifteen to twenty minutes and then he began "the writing part".

45. The writing part of the test started after a ten or fifteen minute break. He had to compile sentences in accordance with pictures and reply to emails as if he were a customer service employee and write to a customer service department. He had to write an opinion essay

which took about an hour. He prepared by downloading examples of tests of this kind and was confident.

46. He was happy with the results but not surprised that he had scored well when he collected his certificate two weeks or less later. He expressly confirmed he had attended the test centre. He denied in emphatic terms that he had taken the test by proxy.

47. He said that he had contacted ETS about the allegation of deception and received a reply by email which he enclosed in his bundle. The detailed reasons given by the respondent, namely that ETS had a computerised voice recognition software system and a system of additional review by human ear was not confirmed by ETS, who gave only a very general reply.

48. The appellant explained that he had since developed an affectionate relationship with an English-speaking partner.

49. The appellant said that he was a competent user of the English language and could communicate fluently and was not able to accept that he had been identified as a fraud and treated accordingly. He said in very emphatic terms that he had paid the required fee and had taken the test in good faith and had not cheated.

50. He then said how his circumstances had changed since the refusal. Then, according to the respondent, he had accumulated nine years ten months' residence but he had not passed his "Life in the UK" and "English Language Test" as required by Immigration Rules and he had now lived in the United Kingdom for over ten years and had passed the "Life in the UK Test" and had passed the "English Language Test" and he produced copies of documents in support of his claim. He also submitted his passport to show that he had not travelled out of the United Kingdom since 2017, in fact he had not left the UK since his arrival in 2009.

51. He then went on to explain why in his opinion there were exceptional circumstances in this case.

52. The appellant said that he came to the United Kingdom leaving everything he had in Bangladesh and had established a life in the United Kingdom where he had made friends and studied and learnt to work and indeed met his wife and fitted in with UK culture. He found his wife had helped him integrate into the United Kingdom and regularise his immigration status although the marriage had not gone as he wanted. He said it had caused him to lose his ties with his family in Bangladesh and indeed with his friends there. He said his relationship with his wife started to deteriorate only after the refusal of his previous indefinite leave to remain application and his life would have been different if that problem had not arisen. He now had to divorce her.

53. He said he had lost all ties with Bangladesh including his family and all he had left was his friends and achievements in the United Kingdom and he would be destroyed as a person if he had to go back to Bangladesh on his own and start again. He said it was wrong of the Home Office to refuse his previous application as a spouse of a British citizen. He said how his mental health had deteriorated, he thought as a result of the experiences he had had. He described the Bangladeshi community now as alien to him.

54. He then outlined his medical conditions and he gave details of stormy episodes in their marriage.

55. He had made suicide attempts and had been admitted to the Memorial Hospital in East Ham for therapy.

56. He said that the conclusion that the false allegation of him being a TOEIC cheat had ruined his life and impacted adversely on his health.

57. The appellant was cross-examined.

58. He was asked questions no doubt intended to indicate that he had had an opportunity to improve his English language skills since he did the test in April 2012.

59. He said that he thought his score was 200 out of 200. He believed he had top marks. He accepted he had probably improved his language skills in the meantime but not that they had improved greatly because he was a competent speaker then.

60. He was asked about his reaction when he was told that his test results were invalid. He said he asked about this in a letter and was told there had been management irregularities. Mr Malik interrupted politely to draw attention to correspondence beginning at page 73 in the bundle which begins with a letter from ETS telling the appellant that his test result had been cancelled. I cannot see a date on that letter. He had produced a reply in 19 November 2019 which the appellant identified himself and subsequent correspondence in which he confirmed that he had taken the test in April 2012 and denied any wrongdoing. The appellant was possibly a little confused about when he had all of the documentation from the Home Office.

61. He was asked why he had chosen to do the test at Elizabeth College and he said that he was getting ready for the marriage and wanted to spend time with his wife and he had wanted the test "out of the way". He said when he made his application on 30 June 2011 he did not rely on a test.

62. He said when he booked his test he bought a book to help him with his preparation and download examples online to prepare for the exam. He prepared for the oral examination by looking at examples of tests. He did not have a tutor. He was asked if he remembered any questions and said it was too long ago and he could not remember.

63. He said that he was about an hour by bus and direct tube line from his home to the test centre. The visit when he took the test was not his first time. He had been there to book the test and he went to collect his certificate but he had not been back since he had his certificate.

64. He said he only did the speaking and writing, not the reading tests.

65. He was then asked why he could not get a job in Bangladesh. He said that he had not tried to get a job in Bangladesh. He was no longer on speaking terms with his siblings and his father and mother had died.

66. He was asked why he could not find work in Bangladesh. He was an English speaker who had developed skills in the United Kingdom. He insisted that he could not. It was suggested that he did not want to get a job in Bangladesh but he said there was no-one there to support him or help him. He said he did have friends who helped him in the United Kingdom. He did not accept that if he returned to Bangladesh he would be able to make friends or find a job although he had been able to do those things in the United Kingdom. He also said he had an operation coming up and he had not made any plans for

that. He last worked in the United Kingdom at the end of 2017 or the start of 2018, he could not remember. Friends were supporting him in the meantime.

67. He was not re-examined.

68. Ms Cunha said that her submissions were based on the cross-examination. She said it was unbelievable that the appellant would score maximum marks in his tests even though there was scanty evidence of how he had prepared. It was not believable that he could produce a perfect paper. The inference was he had used a proxy. The appellant had not done a reading test.

69. She submitted that it was not believable that he would be able to recall accurately the bus route to and from the centre including the route number and could remember nothing about the test. The route number does not feature in my note of evidence but I do recall the appellant giving the route number when he talked about taking a bus.

70. Ms Cunha said that the Secretary of State was entitled to regard it as an invalid test. The results did not put him in the questionable category but the invalid category.

71. Further, it was unbelievable that he could not re-establish himself in Bangladesh.

72. There was no evidence he was suffering from depression or evidence that he could not get proper treatment in Bangladesh. She submitted the simple fact was he did not want to go to Bangladesh. He was benefitting from medical treatment for which he did not appear to be paying and did not want to leave. He had no significant private life and the decision was sound.

73. Mr Malik then addressed me.

74. Mr Malik began his submissions by saying that the key issue was whether or not the claimant had cheated in his TOEIC test.

75. He reminded me, correctly, that there was a three stage approach. The Secretary of State must show that there was sufficient evidence to establish a prima facie case of fraud. He accepted that that clearly is the case here. In that event the appellant must put forward an innocent explanation which the Secretary of State must then rebut.

76. He submitted that the appellant's evidence that he had taken the test was capable of belief and the appellant had therefore raised with the minimum level of plausibility an innocent explanation and it was for the Secretary of State to disprove it.

77. It is his first contention that the appellant did not need to cheat.

78. He said the perfect test result was not indicative of cheating but of competence and supported the appellant's underlying contention that he had no interest in cheating.

79. Mr Malik said that there was no direct evidence of the appellant cheating.

80. Certainly the appellant had denied in very emphatic terms any need for the proxy. He claimed that he had studied in English and that had not been challenged. He had claimed that English was the only common language between him and his wife and that was not challenged. He had got a job in McDonald's which he had held for the best part of three years. He had become a "team leader" when he worked for Tesco.

81. His response to the test being disqualified was innocent protestation, an enquiry about what was happening, which Mr Malik submitted was the response of an honest person. Further, he had answered questions competently and clearly, indicating that his present understanding of English is very good.

82. The assertion that it would be hard to obtain a perfect mark is wholly unsupported by any reference to the standard that he required to meet. I was in no position to know if there was anything suspicious about the appellant being given full marks in the test. In any event it is not clear to me if the perfect mark was for work attributed to the appellant but done by a proxy. The appellant took no issue with the "Look-up Tool". It was clearly the case that the test results submitted for assessment were not the appellant's work. The appellant did not explain this and did not have to explain it. The appellant said he had taken the test and what happened after that we do not know.

83. Mr Malik then contended that if the "suitability" bar is removed then the appellant is now someone how has lived continuously in the United Kingdom for over eleven years, which is ordinarily sufficient to permit leave to remain. His application for leave that led to the present appeal was made on the day that his existing leave ran out. If he was late at any point, he was no later than the fourteen days' grace period of starting a period of overstaying.

84. He also maintained that the claimant really did not have any meaningful links to Bangladesh. He was estranged from the family that he had there and had not been there for eleven years.

85. Mr Malik submitted that the appellant had no family life of any kind in Bangladesh.

86. Additionally, he did have mental health problems. He is a man who had attempted to take his own life. It was hard to see how with those disadvantages he could establish himself in Bangladesh. He submitted he was not going to be someone who depended on the state where she was able to work.

87. He then turned to whether there were issues of dishonesty. He drew my attention to the decision in **Majumder and Qadir v SSHD [2016] EWCA Civ 1167**. He referred me particularly to paragraph 18 where it was noted that approval that:

> "In considering an allegation of dishonesty the relevant factors include the following: what the person accused had to gain from being dishonest; what he had to lose; what is known about his character; the cultural environment in which he operated; how the individual accused of dishonesty performed under cross-examination, and whether the Tribunal's assessment of that person's English language proficiency is commensurate with his or her TOEIC scores; and whether his or her academic achievements are such that it was unnecessary or illogical for them to have cheated."

88. He submitted that this analysis only benefits the appellant.

89. Finally, he referred me to the case of **Ahsan and Others v SSHD [2017] EWCA Civ 2009** and particularly paragraph 33, Underhill LJ where we are told:

> "The observations of the UT in *SM and Qadir* should not be regarded as the last word. Where the impugned test was taken at an established fraud factory such as Elizabeth College, and also where the voice file does not record the applicant's voice (or no attempt has been made to obtain it), the case that he or she cheated will be hard to resist. We were not ourselves

> taken to any of the underlying evidence, but I am willing to accept that that appears to be a reasonable summary of the effect of the recent decisions to which we were referred. However, I am not prepared to accept – and I do not in fact understand Ms Giovannetti to have been contending – that even in such specially strong cases the observations in the earlier case law to the effect that a decision whether the applicant or appellant has cheated is fact-specific are no longer applicable and that there is no prospect of their oral evidence affecting the outcome."

90. It is very difficult to make clear findings in this case.

91. I have considered the appellant's evidence. His story has the advantage of consistency. Ms Cunha did not expose any obvious or undeniable errors. I have reflected on her submission that it seems incongruous that he was able to remember in detail the route by public transport but nothing at all about the questions asked. Certainly, he did give very clear evidence about the bus he had travelled on but I am not sure where this gets me. The route to the test centre by public transport will be obvious and can be checked by the appellant whether he made that journey or not and if the appellant had made the journey as he has claimed he may very well deliberately or possibly without really thinking about it have checked it out in his mind because it is the sort of thing that he could be asked.

92. I really cannot draw strong or any adverse inferences from the fact that he knew the way to the centre. Neither could I get excited about his not knowing in much detail about what happened there. He is recalling something that is some years before that he had no reason to recall in great detail until some significant time after the event.

93. His case is made very persuasively in his witness statement but that in part is a credit to the way it was assembled by his solicitors. There is nothing wrong about that. When drawing statements solicitors have a duty to present their client's case in a proper way but as persuasively as they can in accordance with their instructions.

94. I approached the case from this perspective and I asked myself if the appellant is telling the truth then what can he be expected to say or do. What he could do is say how he prepared for the test, which he did, what happened when he got there, which he did, how he got there, which he did, and how he reacted when he was told that something had gone adrift and he reacted by protesting innocence and asking for further details. There is nothing there that I find hard to believe or that points to his being dishonest.

95. The appellant has offered no explanation for the voice recording that he is supposed to have prepared in answer to the test being provided by another person but if he is telling the truth he may very well not be able to provide that information.

96. In the extract from **Ahsan** above Underhill LJ refers to Elizabeth College being notorious as a place where people conducted tests dishonestly but also accepts that each case should be considered on its own facts. I find it unlikely that the appellant needed a proxy to take the test. His English is competent now; he has been taught in English and has obtained employment in jobs which could be expected to require him to use the English language competently. He is somebody who could be expected to have passed the test. It does not follow that he took the test. A very rich person can be guilty of stealing cheap goods from shops but the evidence certainly points to the conclusion that the appellant would have passed the test if he had taken it.

97. The Appellant's test is said to have been taken on 18 April 2012. The papers before me include a statement from T/Detective Inspector Andrew Carter dated 15 May 2015. He said that between 18 October 2011 and 26 September 2012 Elizabeth College undertook 3919 TOEIC speaking and writing tests identified as "invalid" or "questionable" and the ETS identified 69% of these as invalid. It is not clear to me if the total of 3919 was the total number of tests conducted or the total number of tests said to be either "invalid" or "questionable", I think he means that 3919 is the total number of tests so that none of the results were reliable.

98. There is no evidence before me indicating how the proxy results were submitted to ETS. In MA (ETS - TOEIC testing) [2016] UKUT 450(IAC) the Upper Tribunal (The Hon. Mr Justice McCloskey, President, and Upper Tribunal Judge Rintoul) at paragraph 15 set out matters about which the joint experts had expressed concern. In particular the Tribunal refers at paragraph 15(x) to a "distinct lack of clarity relating to the process as described by ETS in (ix) above. The description of uploading of the data following completion of the test is not consistent" and at (xi) "to the integrity of the test taking procedures and systems established by ETS in its manuals depends heavily on the reliability and probity of test centre staff. Further, the ETS security precautions concentration [is] on the elicit conduct of candidates and not test centre employees" whereas it is the reliability of the submission system and the integrity of the staff that are in question.

99. A difficulty in the path of believing the appellant is that, even on his version of events, someone provided false data in response to a test that the appellant was required to sit. It is improbable that anyone would do that deliberately unless they did it for gain.

100. I have reread the decision of this Tribunal in **SSHD v MA (ETS - TOEIC testing) [2016] UKUT 450 (IAC)**. Paragraph 15 is illuminating. Having expressed gratitude to the three experts for their efforts in producing a joint report (there were some differences but nothing of significance to this appeal), the Tribunal expressed disquiet at the evidence linking a particular set of records to a particular candidate. In short terms, it seems that procedures were laxed and non-existent. Rather (15(xi)), the integrity of the system depended heavily on the "reliability and probity of test centre staff" and we know from other sources that that was not a startling feature of Elizabeth College.

101. Two related explanations suggest themselves. The organisation of the centre could be so shambolic and so corrupt that it was easier to falsify each candidate's entries regardless of the wishes of a particular candidate than it was to submit results properly. I have been told nothing in this case that excludes such an explanation.

102. It could be that the wrong records were linked because somebody was acting with deliberate dishonesty either because it is is what the appellant wanted or because they just made a mistake and "helped" the wrong person. In the absence of any direct evidence on the point it is very hard to discount the appellant's story. Applying these tests as I find that I should, and certainly, as Mr Malik argues that I should, I find that the Secretary of State has not discharged the burden of showing the appellant was dishonest. It follows from this that I find he should not be burdened with findings that he has cheated or made false representations.

103. I have come to the conclusion that I have to accept the appellant's story. There is a prima facie case against him but that is as far as it goes.

104. I am not persuaded that this appellant was probably dishonest.

105. Much was made in the error of law hearing about the appellant's vulnerability. I have to say although I have read the medical evidence this was not something that featured in his conduct before me where he appeared to answer questions confidently and sensibly.

106. I remind myself of the need to consider the evidence as a whole. I am not at all persuaded that the appellant could not manage in the event of his return to his country of nationality. If he is mentally ill then he may well find it harder to get treatment there than in the United Kingdom but treatment is available in Bangladesh. However, I accept his claim that he is no longer able to look to his family for support. He clearly has married and the marriage has proved disastrously unhappy. He has married someone from Somalia and the marriage has now ended in all but name and the appellant may well be finding it difficult to have sufficient contact with her to end the marriage formally. Of course what remains of his family in Bangladesh might be supportive in the event of his returning but I accept that he does not expect any support and has given reasons to make that credible. His family had fallen out with him.

107. I accept the appellant has now passed his Life in the UK Test and English Language Test and he has had ten years' lawful residence and he has produced a passport to show that he has remained in the United Kingdom as Mr Malik suggested.

108. I disagree with the finding that the appellant is a "TOEIC cheat" and therefore "unsuitable".

109. The reasons for refusing his application have largely fallen away. It has not been established that he has misbehaved in the way suggested and he now appears to satisfy the requirements of the rules based on 10 years continuous lawful residence.

110. That is probably sufficient to allow the appeal. There is no public interest in refusing an application from someone who is entitled to remain and the appellant now meets the requirements of the rules.

111. I do not accept that the appellant could not be returned to Bangladesh. It has not been shown that he could not get the treatment that he needs and I do not understand the case to have been argued on that basis. It is not an "Article 3" case. For the same reasons I find that it would not be refused on health grounds or on Article 8 grounds. The appellant is perfectly capable of holding a job and making friends, as was established in cross-examination. I do not accept that he needs family or other support to achieve that end. It will be harder for him because of his health problems, maybe very significantly harder, but that is as far as it goes.

112. Given my findings on his character, this has become unimportant. I have, however, asked myself if the fact I reach a different conclusion from that urged by the appellant on his ability to establish himself in Bangladesh ought to undermine his evidence about taking the test. I think to some extent it necessarily does but not very much. We differ because of emphasis and degree. The appellant is mentally unwell and does not want to return to Bangladesh and has persuaded himself that he cannot. It would be different if he had been shown for example to be malingering, making up symptoms that he does not have, or if he could be shown to be lying about links with his family but none of that has happened. I do not regard my conclusion that he has exaggerated the personal difficulties

he would have on return as a proper reason to say that he is not telling the truth about whether or not he took the test.

113. I realise that from the Secretary of State's point of view this is a disappointing decision. The Secretary of State is faced with somebody who appears to have cheated in a test and who is not therefore qualified under the Rules. He took the test at a notorious centre for dishonesty and no good explanation has been given for how the test results could be false. As I hope is apparent, the difficulty I experienced is that although I acknowledge all this I also have to accept (and not just because this is established by authority relied on by Mr Malik but because it is self-evident) that a person can be innocent of any problems and this appellant's conduct, I find, is entirely consistent with a person who genuinely took the test. I have been given no proper reason to disbelieve his claims that he did, only to doubt them, which is not the same.

114. I conducted the balancing exercise with regard to Part 5A of the Nationality, Immigration and Asylum Act 2002 but as I have indicated, there is not much to do when the person appears to satisfy the requirements of the Rules and he has rid himself of the disadvantages of not being able to speak the language or integrate himself.

115. This I fear is another less than entirely satisfactory decision to add to the many concerning decisions made in the wake of the ETS/TOEIC scandal but I have resolved it in a way that I find right on the evidence before me and I allow the appeal.

Notice of Decision

116. The appeal is allowed.

Jonathan Perkins

Signed
Jonathan Perkins
Judge of the Upper Tribunal

Dated 28 May 2021

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU 13863 2019

THE IMMIGRATION ACTS

Heard at Field House
On 27 July 2020

Decision & Reasons Promulgated

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Before

UPPER TRIBUNAL JUDGE PERKINS

Between

M M H S
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Z Malik, Counsel instructed by City Heights Solicitors
For the Respondent: Ms S Chunha, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I make an order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the appellant. Breach of this order can be punished as a contempt of court. I make this order because there is evidence that the appellant is mentally ill and "vulnerable". The division of the Tribunal that finally disposes of this appeal will consider if it is necessary to continue the order.

2. This is an appeal by a citizen of Bangladesh against a decision of the First-tier Tribunal dismissing his appeal against a decision of the Secretary of State refusing him leave to remain on 30 July 2019.

3. I begin by considering the decision of the First-tier Tribunal. This notes that the appellant entered the United Kingdom in September 2009 as a student and he was given leave on different occasions until 4 March 2015. He then applied for further leave. That application was unsuccessful but he appealed to the Court of Appeal so his appeal rights were not exhausted until 22 May 2018. On that day he applied for settlement. He varied his application to apply for leave to remain on the basis of ten years' lawful residence and varied it again to apply for leave to remain outside the Rules on 15 October 2018. It was that third, varied, application that led to the decision complained of.

4. It was necessarily implicit in the application for leave outside the rules that the appellant did not claim to meet any of the Rules that would have led to his being allowed leave to remain. The Secretary of State decided that the appellant was just over 36 years old at the date of the decision. He had been in the United Kingdom for just less than ten years (nine years and ten months) and he could re-establish himself in Bangladesh.

5. The appellant had applied for leave on the basis of a marriage but that application foundered when the appellant and his wife failed to attend a marriage interview and they are now separated but not divorced. The appellant said his wife was not co-operating.

6. The appellant said that he could not reintegrate in Bangladesh. At 36 years old he was too old for a government job. He was highly educated and removal would harm his career. He had not been in trouble with the police and was no threat to anyone and not a burden to the taxpayers.

7. He had claimed that he had mental and physical health problems. These included carpal tunnel syndrome, anxiety and depression. He did not support the application for exceptional leave with appropriate medical evidence and could not find medical evidence in the extended time offered to him by the Secretary of State who refused the application. The Secretary of State did not accept that the appellant could not integrate into life in Bangladesh and found that the appellant could maintain his friendships in the United Kingdom albeit at a distance. He had not passed his "Life in the UK" test or his English Language Test and the Rules required him to have passed both.

8. A particular difficulty in his case is that he had been identified as someone who had obtained a TOEIC certificate fraudulently and used deception in an earlier application (in his case 22 June 2012). The judge noted that the application was considered outside the Rules but there was little on which to build a case. The appellant did not have a partner or children. Additionally, the Secretary of State decided he was not suitable because he had obtained a test certificate fraudulently.

9. The Reasons for Refusal Letter stated that the appellant's presence in the United Kingdom was "not conducive to the public good". Further it was thought that the appellant had retained enough knowledge of life, language and culture in Bangladesh and had family members there who could be expected to assist him so there were no "very significant obstacles" to his reintegration into Bangladesh.

10. The judge considered the evidence and submissions. The judge reminded himself that leading decisions had established that the generic evidence relied on by the Secretary of State in TOEIC cases was reliable but that a finding that someone had cheated had to be made on the specific evidence in the particular case and that the appellant had raised a

prima facie innocent explanation. At paragraph 124 the judge explained his finding that the appellant was not credible. In particular the appellant gave answers that the judge found lacking in detail and cogency. He was willing to blame others and was sketchy about important dates in his relationship with his wife saying, for example, on different occasions that he had parted from his wife in 2015, and 2016 and 2017 although he was describing only one separation.

11. At paragraph 125 the judge found the appellant's evidence of his medical conditions was exaggerated. Although he had been diagnosed as having anxiety and depression there was nothing to support his claim of self-harm except medical notes recording that the appellant had made the claim to have done things to himself.

12. The judge did not believe that the appellant was estranged from his family in Bangladesh; he had rejected the appellant's explanation that he had attended the test centre honestly and had not been involved in any cheating but found that he had relied knowingly on a dishonestly updated certificate and that made him "unsuitable". The judge noted "very limited evidence" that the appellant was mentally unwell and the evidence came nowhere near to establishing the degree of severity necessary for the appeal to be allowed on protection grounds. The judge went on to find that he could establish himself in Bangladesh and obtain treatment for a depressive illness.

13. These findings were challenged in carefully drawn grounds prepared by Mr Malik who, in his oral submissions, did little to expand or explain them. This is not a criticism. The grounds were detailed and intended to be sufficient and Mr Malik saw little point in reading out what I could read for myself. He did make oral submissions but they were short.

14. Mr Malik's first ground is that the decision and findings on credibility were "vitiated by procedural impropriety, namely, there was a failure to recognise that the appellant was a vulnerable witness."

15. Mr Malik's grounds acknowledge that the First-tier Tribunal recognised there was medical evidence of the appellant having carpal tunnel syndrome, anxiety and depression. However, the judge also recorded how the appellant had "depression, low mood and suicidal thoughts" and he had made "various suicide attempts" and that he was admitted to the Memorial Hospital in East Ham for "therapy and suicide attempts". Mr Malik argued that this was clearly sufficient to show that the appellant was a vulnerable witness and should have been treated differently.

16. The second part of the submission is less clearly made out than the first, but I am concerned at the readiness with which the First-tier Tribunal Judge has "written off" the evidence of mental difficulties. They do not necessarily help the appellant by providing him with a strong case but he is entitled to be dealt with on his own terms and I am immediately concerned that this has not been done here.

17. Ground 2 complains that the judge "erred in law in making adverse credibility findings without considering whether the deficiencies in the evidence were due to his mental health issues and vulnerability". This is an entirely fair criticism. There were deficiencies in the evidence but there was also evidence that the appellant may not have been at fault. This does not mean that his evidence has to be accepted or that "bad evidence" becomes

"good evidence" by reason of ill health but more care was needed. It is particularly important that "dishonesty" is not unthinkingly correlated with "unreliability". It is also at least possible that the anxiety and depression was the explanation for the lacking in detail and cogency and the findings are flawed because this possibility was not considered.

18. The third ground is that the treatment of the expert evidence of the consultant-chartered psychologist was flawed. Again I agree with Mr Malik. The Judge should not have given little weight to that evidence because the psychologist "was only repeating what [the appellant] had told her" (paragraph 125). The judge was concerned that the psychologist had not seen the general medical practitioner's notes. It may be that the judge was making a fair point but expressing it badly but I must make my decision on what the judge said and psychologists do not accept uncritically things that their patients say.

19. Ground 4 complains that the First-tier Tribunal erred in finding that the appellant was dishonest and was failing to conduct a balancing exercise. Mr Malik is certainly right in his contention that there was no balancing exercise carried out. The judge simply equated cheating with being unsuitable and offered no explanation or consideration of other factors. I do not in making this observation wishing to encourage the appellant to think that there are other factors that would lead to a different conclusion but I accept that there is a material error here. The point needs to be revisited.

20. I appreciate that I have said little so far about the submissions of the Secretary of State. This does not mean that I have ignored them. The difficulty Ms Chunha faced is that Mr Malik's grounds were well crafted and supported by authority and identified tangible faults. This appeal has to be heard again but I direct it be heard again in the Upper Tribunal.

Notice of Decision

21. The First-tier Tribunal erred. I set aside this decision and direct that the case be re-determined in the Upper Tribunal, before me if reasonably practicable. No findings are preserved.

22. I consider this appeal to be suitable for determining remotely. Any party who objects to a remote hearing should make know its objections forthwith.

Jonathan Perkins

Signed
Jonathan Perkins
Judge of the Upper Tribunal

Dated 22 September 2020