IN THE UPPER TRIBUNAL **Case No: UI-2022-006123**
IMMIGRATION AND ASYLUM CHAMBER **First-tier Tribunal No: HU/20133/2019**

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 28 May 2023

Before:

UPPER TRIBUNAL JUDGE GILL

Between

Jannath Ahmed Appellant
(ANONYMITY ORDER NOT MADE)

And

The Secretary of State for the Home Department Respondent

Representation:
For the Appellant: Mr P Nath, of Counsel, instructed by Immigration Aid.
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

Heard at Field House on 11 May 2023

Decision

1. The appellant, a national of Bangladesh born on 11 October 1980, appeals against the decision of Judge of the First-tier Tribunal Monson (hereafter the "judge") who, in a decision promulgated on 7 October 2022 following a hearing on 14 September 2022, dismissed his appeal against a decision of the respondent of 22 November 2019 to refuse his application of 26 June 2019 for indefinite leave to remain on the basis of long residence and for leave to remain on human rights grounds.

2. The issues in this case are:

   (i) whether the judge erred in reaching his finding (para 47) that the respondent had discharged the burden of proving that, in his previous application of October 2012 for leave to remain, the appellant had used a TOEIC English language test certificate that had been obtained fraudulently.

   (ii) whether the judge had erred by failing to consider whether the appellant satisfied the requirements of para 276ADE(1)(vi) of the Immigration Rules, that is, whether there were very significant obstacles to his reintegration in Bangladesh; and

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(iii) whether the judge otherwise erred in finding that the decision was proportionate to the appellant's rights under Article 8 of the ECHR by failing to consider, inter alia, the appellant's "*strong family ties*" with relatives in the United Kingdom and the best interests of the children of his siblings in the United Kingdom.

The judge's decision

3. In his appeal before the judge, the appellant's human rights claim under Article 8 was based on:

(i) his claim that he had accumulated 10 years' lawful residence and therefore satisfied the requirements of para 276B of the Immigration Rules;

(ii) that he did not obtain a TOEIC English language test certificate by deception, although he had been found previously to have done so by Judge of the First-tier Tribunal Mayall in his decision promulgated on 11 January 2018;

(iii) that there were very significant obstacles to his reintegration in Bangladesh and he therefore satisfied para 276ADE(1)(vi) (paras 34-27 of his "Statement of case" dated 7 September 2020); and

(iv) that the decision to refuse leave to remain was disproportionate.

4. The judge found that the appellant was an "*open-ended overstayer*", as this term was used in Hoque [2020] EWCA Civ 1357, and that the respondent was therefore correct in asserting in the decision letter that the appellant had not accrued at least 10 years' continuous lawful residence (paras 27 and 28 of the judge's decision). This finding is not challenged in the grounds.

5. On the deception issue, the judge summarised (at para 5) the decision that was the subject of the appeal before Judge Mayall and (at paras 6-8) the appellant's evidence before Judge Mayall. The judge then summarised the findings of Judge Mayall at paras 9-13 of his decision which read:

> "9. In his findings of fact, which began at paragraph [33], the Judge held that London College of Media and Technology (the college at which the appellant had taken his test) fell fairly and squarely within the "established fraud factory" category. The Project Facade enquiry into the college showed that between May 2012 and March 2013 the percentage of invalid tests found by ETS at the College was 43%; and on the day in which question, the percentage of invalid tests was 57%. In contrast, a level of 0.28% was recorded at secure public test centres operated by ETS itself.
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> 10. Save for his oral evidence, there was no evidence from the appellant to support his claim that he had not cheated. Significantly, he had made no attempt even to obtain a copy of his voice recording so as to prove that he had in fact taken the test. Nor had he taken any steps, other than telephoning the College, to obtain any information from the College.
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> 11. It was accepted that he had received satisfactory marks in English Language tests in the past. It was suggested that this meant that there was no reason whatsoever for him to cheat. This consideration was diluted, however, by his own evidence that he was under pressure to obtain a satisfactory test result very quickly. His preparation time was severely limited.
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> 12. In his witness statement, he had given no details as to his taking of the test. In cross-examination, he had given some evidence as to why he chose the college, and how he got there, but the Judge found that even this evidence was "somewhat vague." There was nothing that could not have been obtained from other sources after the allegation had been made against him.

13. Given the evidence produced by the respondent, the Judge concluded that the allegation of cheating was made out."

6. The judge then set out a summary of the appellant's witness statement dated 29 January 2019 at paras 15-17 of his decision which read:

"15. The application was supported by a signed witness statement from the appellant dated 29 January 2019. In his statement, he said that he had sought production of the voice recordings relating to his test in 2012, and he could confirm that the audio files that had been supplied related to someone else, as none of them contained his own voice. However, there were numerous anomalies in the six separate audio files that had been provided. Firstly, it was apparent that the voices of at least two individuals were contained within the audio clips. Secondly, the topics on the audio files vastly differed from those that he had faced in the test which he had sat. Thirdly, the total duration of the voice recorded in the clips was less than 5 minutes, which was absurd because the speaking test invariably lasted approximately 20 minutes. Fourthly, none of the voice clips had any title, name or description that confirmed, "even at the lowest level of possibility", that they were "for sure" related to his test.

16. In addition, ETS's own Test Score Data Retention Policy stated that individually identifiable TOEIC scores were retained in a data base for two years; and after two years, all information that could identify an individual was removed. The question which arose was how ETS had been able to identify and retrieve his voice recording which, according to its own policy, was to be removed on or about 18 July 2014, two years after he sat the test on 18 July 2012.

17. Accordingly, the respondent had failed to make out the allegation of deception. The respondent had provided "no evidence", let alone evidence of sufficient strength and cogency, to make out this allegation."

7. After setting out a summary of the decision that was the subject of the appeal before him, the judge summarised the oral evidence, at paras 21-24. The judge heard oral evidence from three witnesses, being the appellant, his aunt and his sister. He stated, at paras 21 and 22 respectively, that the appellant and the aunt gave evidence through a Bengali interpreter. Paras 21-24 of the judge's decision may be summarised as follows:

(i) In cross-examination, the appellant denied that he had not provided any new documentary evidence in support of his claim that he had not cheated in his English Language test. He said that that he had provided the voice recordings.

(ii) The appellant's aunt gave evidence stating, inter alia, that the appellant had been living with her in her home since 2013; that he ensured that she was well looked after, helping to provide medication and running errands; that she had not provided any documentary evidence showing that she was often ill; and that, although she had one son and two daughters, they lived far away and had their own families and their own lives.

(iii) The appellant's sister gave evidence stating, inter alia, that her parents, who were in Bangladesh, had had seven children altogether (including her); that four of them (including her) were in the United Kingdom and three were in Bangladesh; and that she was in contact with her family in Bangladesh "*maybe two to three times a month*".

8. The judge considered the deception issue at paras 30-47, beginning by stating (at para 30) that the formidable obstacles faced by the appellant in establishing that he was a victim of an historic injustice were, firstly, the application of the Devaseelan guidelines and, secondly, the decision of the Upper Tribunal (UT) in DK and RK

(ETS: SSHD evidence, proof) India [2022] UKUT 112 (IAC). DK and RK was a decision of a UT panel chaired by Mr Justice Lane, the then President of the UT.

9. The judge said (para 31) that DK and RK is a landmark case that had engaged directly with the broad thrust of the expert evidence that was first canvassed in MA (ETS – TOEIC testing) [2016] UKUT 00450 (IAC).

10. The judge then considered very carefully and in some detail (at para 32 onwards) the reasoning and outcomes of the President's re-appraisal in DK and RK of the evidence relied upon by the respondent. He also took into account para 33 of Underhill LJ's judgment in Ahsan v SSHD [2017] EWCA Civ 2009.

11. In view of the grounds in relation to the deception issue, I have quoted (below) fairly extensively from the judge's decision. Nevertheless, I stress that it is necessary to read paras 32-47 of the judge's decision in full in order to do full justice to his detailed consideration of DK and RK.

12. Set out below is (in part) a summary of the judge's decision on the deception issue and (in part) extracts from his decision:

    (i) At para 33 of his decision, the judge noted that, on the topic of false positive rates and the reliability of ETS' system for detecting the presence of a proxy test taker, the President said in DK and RK at para 103 that:

> "… There may be a false positive rate of one per cent, or even possibly three per cent, but there is no proper basis for saying that the false positive rate was or would be any higher than that" and that "the voice recognition process is clearly and overwhelmingly reliable in pointing to an individual test entry as the product of a repeated voice" albeit that "[b]y "overwhelmingly reliable" we do not mean conclusive, but in general there is no good reason to doubt the result of the analysis."

    (ii) At para 34 of his decision, the judge noted that, on the "*chain of custody*" issue and the suggestion that the evidence linking candidates to entries might not be entirely watertight, the President said in DK and RK (at para 105) that "*the suggestion of any general mix-up at [the test centre] runs counter to the ordinary experience of the provision of a service*" and, further, that the President rejected (at para 106) the alternative hypothesis that while the test entries were in the control of ETS, they got mixed up so that entries by genuine candidates were disassociated from them, and genuine candidates were falsely attributed with tests taken by a proxy test taker.

    (iii) At para 36, the judge noted that whilst the President in DK and RK acknowledged (at para 107) that there might be room for error, the expert evidence had not detected actual error and that the President had said that "*what is clear here is that there is every reason to suppose that the evidence is likely to be accurate*."

    (iv) At para 37 of his decision, the judge noted that the President had identified in DK and RK (at para 108) two possible sources of corroboration for the use of deception, as follows:

> "… two sources of possible corroboration that may well be present when individual cases are examined: the individual's own account of the test and the evidence (if any) of fraud in the session at which that individual's test was taken. A further possible source of corroboration may be incompetence in English. … it must not be thought that the

converse applies: as the then President pointed out in SSHD v MA [2016] UKUT 450 (IAC) at [57], there are numerous reasons why a person who could pass a test might nevertheless decide to cheat. This is a point that seems to have escaped Professor Sommer in his comments to the APPG."

(v) Concerning the relevance of an individual taking an impugned test at a fraud factory, the judge noted, at para 40, that the President said in DK and RK (at para 119):

> "In the context of the test centres as 'fraud factories', a description that is in our judgment properly applied to both NLC and UTC, it is overwhelmingly likely that those to whom the proxy results are now attributed are those who took their tests by that method. There are two parallel strands to this conclusion, and neither contradicts the other. Each could stand alone, but their combined effect is wholly compelling."

(vi) At para 42, the judge noted that the President stated in DK and RK at para 130 that:

> "… Where an appellant does not say that the voice on the recording is his or her own, there is no "voice recognition" issue: the only question can be the "chain of custody" issue."

13. The judge then applied the reasoning in DK and RK taking into account the findings of Judge Mayall, at paras 43-47 which read:

> 43. Applying the reasoning and the findings of the UT to the appellant's case, I consider that the evidence of the audio clips which ETS has produced as being linked to the appellant's speaking test reinforces, rather than undermines, the finding of fact made by Judge Mayall that the appellant used a proxy test-taker to take his speaking test. This is for two reasons. The first is the simple one that the audio clips linked to his test do not (as he admits) contain his own voice. Therefore, this tends to negate the possibility of him being a victim of a false positive result. Secondly, a crucial finding of the UT at [106] is that ETS is likely to be reliable when it comes to correctly linking test results to candidates. Therefore, while the possibility of a chain of custody error cannot be ruled out, it is unlikely.
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> 44. Prior to DK and RK, the chain of custody issue, and more particularly the First and Second Hypotheses, had considerable traction as the expert evidence which supported it stood unchallenged, and it was not until DK and RK that the expert evidence was subjected to a real-world analysis. Since the APPG report is built upon the same "academic" expert evidence, its probative value is nugatory for this reason and also because of the other shortcomings identified by the UT in their discussion of the APPG report.
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> 45. The appellant has not brought forward any independent evidence to show that the subject matter of the speaking test at the test centre on the day in question was different from the subject matter which features in the audio clips. The appellant has also not brought forward any expert evidence to support his claim that what has been provided is inherently unreliable because it features more than one voice, or because it does not cover the entire duration of the Speaking test. As to the appellant's reliance on ETS's published Data Retention Policy, it is necessary to distinguish between what is ETS's policy in normal circumstances and how ETS responded to the allegations of widespread fraud made in the Panorama programme. It is abundantly clear that ETS has not followed a policy of destroying voice recordings after two years where the presence of a proxy test-taker has been detected. It is precisely because ETS has retained voice recordings relating to invalid test results that **the Court of Appeal has agreed with the respondent that an adverse inference can be drawn against a claimant who has not attempted to prove his innocence by obtaining production of the voice recordings linked to his speaking test**. In Ahsan -v- SSHD [2017] EWCA Civ 2009, Underhill LJ said at paragraph [33]:
>
> > "Miss Giovanetti was concerned to emphasise the extent to which the forensic landscape had changed since the Secretary of State's initial, and frankly stumbling, steps in this litigation. 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 would be hard to resist."

46. As was found by Judge Mayall, the respondent's case against the appellant is corroborated by the fact the appellant took his test at a fraud factory. The other reasons which the appellant has given in this appeal as to why he should be regarded as a genuine test-taker were considered and rejected by Judge Mayall in the earlier appeal.

47. Accordingly, having considered the evidence in the round, I find that the respondent has discharged the burden of proving the case against the appellant which is put forward in the RFRL. It follows that the appellant cannot succeed in his appeal under the Rules on the alternative basis that there are very significant obstacles to his integration into life and society in Bangladesh. In any event, such a case is not made out on the evidence."

(my emphasis)

14. The judge dealt with the appellant's Article 8 claim outside the Immigration Rules at paras 48-50 which read:

> "48. Turning to an Article 8 claim outside the Rules, I accept that Questions 1 and 2 of the Razgaar [sic] test should be answered in the appellant's favour with regard to establishment of private life in the UK. He may also have established family life with his aunt and the other family members with whom he resides in his aunt's household, but I am not persuaded that the criteria of Kugathas are met. Even if they are met, little weight can be attached to family life which has developed whilst a person's status in the country is unlawful.
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> 49. Questions (3) and (4) of the Razgar test must be answered in favour of the respondent.
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> 50. On the crucial issue of proportionality, I must take into account the relevant public interest considerations arising under section 117B of the 2002 Act. None of these considerations militate against the proportionality of the appellant's removal, as he has not brought forward any evidence to show that he should be accorded Article 8 relief outside the rules. Conversely, the public interest in the appellant's removal is fortified by his previous use of deception. The decision appealed against strikes a fair balance between, on the one hand, the appellant's rights and interests, and on the other hand, the wider interests of society. It is proportionate to the legitimate public end sought to be achieved, which is the maintenance of firm and effective immigration controls."

The grounds

15. The grounds (which were not settled by Mr Nath) are unduly lengthy. There are over nine pages and seven grounds.

16. Grounds 1 to 4 concern the deception issue. Ground 5 concerns para 276ADE(1)(vi) of the Immigration Rules. Grounds 6 and 7 concern the appellant's Article 8 claim outside the Immigration Rules. The grounds may be summarised as follows:

The deception issue:

(i) Ground 1: The judge incorrectly stated at para 21 of his decision that the appellant gave his evidence through a Bengali interpreter. In fact, the appellant gave his evidence in English. This error is material because one of the issues in the case was whether the appellant had cheated in an English language test. The judge's mistake infected his mind and negatively impacted on his decision. Reliance is placed upon MA (ETS – TOEIC testing) [2016] UKUT 00450 (IAC) in

which case the judge's assessment of that applicant's comprehension of English at the hearing was found to be of paramount importance.

(ii) Ground 2 (a): At para 45 of his decision, the judge said that *"[t]he appellant had not brought forward any independent evidence to show that the subject matter of the speaking test centre of the speaking of the day*" and at para 10, the judge noted the same. This was incorrect because the appellant submitted the voice recording being six clips referred to at pages 30-33 of the appellant's bundle (hereafter referred as to "AB").

Ground 2(b): In addition, the judge erred by failing to direct the respondent to reconsider the appellant's case.

(iii) Ground 3: The judge failed to consider the appellant's evidence concerning the alleged deception allegation, at AB/pp16-34.

(iv) Ground 4(a): Procedural unfairness, in that, the judge gave no reasons for his finding that the respondent had discharged the burden of proving the deception allegation against the appellant. The appellant was tendered to give evidence but no questions were asked of him.

Ground 4(b): The judge failed to give adequate reasons for his finding at para 47 that he did not accept the appellant's evidence in the round.

Para 276ADE(1)(vi):

(v) Ground (5): The judge failed to properly consider the appellant's case under para 276ADE(1)(vi) of the Immigration Rules. The judge failed to consider the change in circumstances, i.e. that the respondent made a mistake in refusing the appellant's application on the basis of the TOIEC issue without any evidence directly relating to the appellant, in light of the appellant's family and private life in the UK.

Article 8:

(vi) Ground (6): the judge failed to consider "*the aunts & brother and sisters [sic] children's best interest [sic] having formed strong family ties*". The judge erred in finding at para 48 that the appellant's relationship with his aunt and other family members with whom he resides in his aunt's household did not meet the criteria in Kugathas. He failed to consider the evidence of the close relationship set out in the witness statement as well as the oral evidence.

(vii) Ground (7): The judge failed to properly engage with the exceptional circumstances and gave no reasons for his proportionality finding at para 50. The judge incorrectly stated that "*the appellant has not brought forward any evidence to show he should be accorded article 8 relief…*" This was incorrect because the appellant brought forward detailed evidence which the grounds then proceed to set out and which is summarised at my para 53 below.

ASSESSMENT

Ground 1

17. At the commencement of the hearing, Mr Tufan submitted the minutes of the Presenting Officer who represented the respondent before the judge. This establishes that a Bengali Interpreter assisted at the appellant's hearing before the judge. However, as there were three witnesses, it does not establish that the appellant used an interpreter.

18. I granted Mr Nath's application for the appellant to be called to give oral evidence on the question whether he had used an interpreter in giving his oral evidence at the hearing before the judge. Mr Tufan did not object.

19. The appellant said, in oral evidence, that he did not use an interpreter at the hearing before the judge. He gave his evidence completely in the English language. His sister and his aunt used the interpreter.

20. There were no questions in cross-examination.

21. As there was no evidence to counter the appellant's evidence on this issue, I am prepared to accept that the appellant did not use an interpreter at the hearing before the judge. I therefore accept that the judge made a mistake when he stated at para 21 of his decision that the appellant gave oral evidence through an interpreter.

22. Mr Nath relied heavily upon the fact that the judge made an incorrect statement very early on in his decision, at para 21. He submitted that this must have infected the judge's mind.

23. However, the fact is that, at para 21, the judge was merely setting out how evidence was taken at the hearing. Mr Nath could not point to anything in the judge's reasoning from para 27 onwards of his decision that comes anywhere near to showing that the judge considered that the fact that the appellant gave evidence through an interpreter undermined the credibility of his evidence that he had not cheated in relation to the English language test.

24. I reject the submission that this mistake at para 21 of the judge's decision *'infected'* his mind and negatively impacted his decision on the appellant's appeal. Not only is the submission based on nothing but pure speculation it ignores the very detailed consideration of the judge of the President's reasoning in DK and RK, reasoning which was very compelling given the appellant's admission that the audio clips did not contain his voice and that there was no independent evidence before the judge to address the chain of custody issue or the finding of Judge Mayall that the appellant had taken his test at a fraud factory.

25. It is also suggested in the grounds and by Mr Nath before me, in reliance upon MA, that the fact that the appellant could give evidence in English is important because the Tribunal in MA considered that a judge's assessment of an applicant's comprehension of English at a hearing is "*of paramount importance*". However, this simply ignores the fact that there are numerous reasons why a person who could pass a test might nevertheless decide to cheat – see para 108 of DK and RK and my para 12(iv) above.

26. In the instant case, Judge Mayall considered that the appellant's evidence, that there was no reason whatsoever for him to cheat because he had received satisfactory marks in English language tests in the past, was diluted by his own evidence that he was under pressure to obtain a satisfactory test result very quickly and that his

preparation time was limited (para 11 of the judge's decision, quoted at my para 5 above.

27. There is therefore no substance in ground 1 which I reject.

Grounds 2 to 4

28. Ground 2(a) quotes incorrectly from para 45 of the judge's decision. The judge did not say:

> "[t]he appellant had not brought forward any independent evidence to show that the subject matter of the speaking test centre of the speaking of the day".

Not only is this quote inaccurate, it does not even make sense. What the judge had said was as follows (first sentence of para 45):

> "The appellant has not brought forward any independent evidence to show that the subject matter of the speaking test at the test centre on the day in question was different from the subject matter which features in the audio clips."

29. It is contended (para 21 of the grounds and Mr Nath in submissions before me) that the six audio clips that the appellant had produced (AB/pp30-33) constitutes "*independent evidence*" and therefore the judge erred in stating that the appellant had not brought forward any independent evidence and he erred in failing to consider the evidence of the six audio clips.

30. However, in the first place, the submission that the judge had failed to consider the audio clips ignores para 43 of the judge's decision, where he engaged with the evidence of the audio clips.

31. Mr Nath submitted that the words in para 45 of the judge's decision that I have emboldened at my para 13 above show that the judge failed to consider the audio clips produced by the appellant. In his submission, the judge was dealing with the instant case at this point. I have no hesitation in rejecting this submission. It is clear that the judge was not referring to the appellant's case at this juncture. He was referring to the caselaw.

32. Secondly, in order to appreciate what the judge meant by "*independent evidence*" in the sentence in question, it is necessary to compare his summary of the appellant's witness statement at paras 15 and 16 of his decision (quoted at my para 6 above) and his assessment of that evidence at paras 43-45 (quoted at my para 13 above). It is abundantly clear that, at paras 43-45, the judge was working through the appellant's evidence in his witness statement, beginning (at para 43) with the appellant's evidence that the audio clips did not contain his voice. The judge observed that, given the reasoning in DK and RK, while the possibility of a chain of custody issue could not be ruled out, it was unlikely. In the second sentence of para 45, he dealt with the appellant's evidence that the audio clips were not reliable because they featured more than one voice and did not cover the whole duration of the test. In the third, fourth and fifth sentences of para 45 of his decision, he dealt with the appellant's evidence in relation to ETS's Test Score Data Retention Policy.

33. I am therefore satisfied that, in the first sentence of para 45, the judge was dealing with the appellant's evidence that "*the topics on the audio files vastly differed from those that he faced in the test he had sat*". On any reasonable view, this is the only construction that makes sense when the words in the first sentence of para 45 (in particular, the words *"… subject matter of the speaking test …")* are considered against the evidence in the appellant's witness statement where he said that the topics in the test he faced were different from the topics in the audio files.

34. Furthermore, it also makes sense that this is the evidence that the judge was dealing with in the first sentence of para 45 because, when one considers the structure and content of paras 43-45 of the judge's decision in the context of paras 15-16 of the appellant's witness statement, it is clear (as I have said) that the judge was working through each aspect of the appellant's evidence in his witness statement dated 30 September 2020

35. Further and in any event, the submission that the audio clips constitute independent evidence is misconceived and is based upon a total failure to appreciate the judge's reasoned consideration of the decision in DK and RK, which he set out in considerable detail in his decision, including:

    (i) that where (as in the instant case) the appellant does not say that the voice on the recording is his own, there is no "*voice recognition*" issue and the only question can be the chain of custody issue (para 12(vi) above);

    (ii) that there may be a false positive rate of one per cent or even possibly three per cent but in general there is no good reason to doubt the result of the analysis (para 12(i) above);

    (iii) that the President had rejected the suggestion advanced, in relation to the chain of custody, of the possibility of results of different candidates being mixed up at the test centre or subsequently (para 12(ii) above); and

    (iv) the reasoning of the President concerning the relevance of an individual taking an impugned test at a fraud factory (as was found to be the case by Judge Mayall in the instant case) to the effect that it is "*overwhelmingly likely that those to whom the proxy results are now attributed are those who took their tests by that method*" (para 12(v) above).

36. When seen against the judge's consideration of the reasoning in DK and RK and taking into account that the appellant was found by Judge Mayall to have taken his test at a fraud factory and that the appellant admitted that the audio clips did not contain his voice, it is clear that the audio clips did not constitute "*independent evidence*" *in support of his case,* on any reasonable view.

37. Mr Nath questioned whether it was reasonable to expect the appellant to produce expert evidence. It was for the appellant and his representatives to decide what evidence was to be submitted to the judge. However, they can expect that a judge dealing with his appeal will have to consider and apply DK and RK. Applying DK and RK and given that the appellant had admitted that the audio clips did not contain his voice, it seems to me that evidence that addressed the chain of custody issue and/or that the test centre where he took the test was not in fact a fraud factory contrary to Judge Mayall's finding could have assisted to cast doubt on the respondent's evidence.

38. This is not to say that the appellant bore the burden of proof to show that he had not cheated. It merely recognises that, given the evidence and reasoning in DK and RK, he had to produce evidence that cast sufficient doubt on the respondent's evidence as to lead to a finding that the respondent had failed to discharge the burden of proof upon her.

39. However, there was no evidence before the judge other than the appellant's own evidence, in his witness statement and in oral evidence, that he took the test and in which he described what happened on the day. Not only is it the case that his subjective evidence did not touch upon the chain of custody issue, it was evidence that had been considered by Judge Mayall, as the judge noted in the second sentence of para 43 of his decision. The judge was therefore correct to apply Devaseelan and simply state (at para 46) that the other reasons given by the appellant as to why he should be regarded as a genuine test taker were considered and rejected by Judge Mayall.

40. I therefore reject ground 2(a).

41. Mr Nath submitted that the judge erred by failing to consider the evidence that the appellant gave in his witness statement dated 30 September 2020 about the test he took.

42. However, this was not pleaded in the grounds. Mr Nath therefore does not have permission to rely upon this ground. I reject the submission on this basis.

43. Even if this ground had been pleaded, there is no substance in the submission. Paras 7-10 of the appellant's witness statement were summarised by the judge at paras 15-17 of his decision and dealt with at paras 43-45 of his decision. Para 5 of the witness statement dated 30 September 2020, the paragraph following para 5 which is incorrectly numbered 11 and para 6 of the witness statement did not raise anything materially different from the evidence that was considered by Judge Mayall. Pursuant to the guidance in Devaseelan, the judge did not need to say more than he said in the second sentence of para 46, that *"[t]he other reasons which the appellant has given in this appeal as to why he should be regarded as a genuine test-taker were considered and rejected by Judge Mayall in the earlier appeal".*

44. Ground 2(b) is devoid of substance. It was not open to the judge to direct the respondent to reconsider the appellant's case. He had appealed the respondent's decision. The judge was therefore obliged to decide whether to allow or dismiss the appeal. Judges of the First-tier Tribunal no longer have power to remit an appeal to the Secretary of State.

45. Ground 3 refers to the appellant's evidence at AB/pp16-34. The evidence at AB/16-34 includes the evidence as to the audio clips which I have dealt with. The remaining evidence is the evidence of the appellant's qualifications. That evidence was considered and dealt with by Judge Mayall, as the judge correctly stated in the second sentence of para 46. Mr Nath's submission before me that the judge was nevertheless obliged to re-assess the evidence that the appellant gave before Judge Mayall simply ignores the guidance in Devaseelan to which the judge referred at para 30 of his decision.

46. Ground 4(a) is devoid of substance. It is based upon a failure to appreciate the nature of the evidence that it was necessary for the appellant to produce on the

deception issue, in light of the reasoning in DK and RK, in order to cast sufficient doubt on the reliability of the respondent's evidence against him and the assessment of the evidence in DK and RK.

47. Mr Nath submitted that the appellant was tendered for cross-examination at the resumed hearing before the judge. He submitted that, if the appellant had been cross-examined, his evidence about having attended his test could have been tested. This submission simply ignores the nature of the respondent's case against the appellant on the deception issue in light of the reasoning in DK and RK. Given the appellant's admission that the audio clips did not contain his voice and the finding by Judge Mayall that he had taken his test at a fraud factory, there was a need for evidence that cast doubt on the integrity of the chain of custody in his particular case and/or that cast doubt on Judge Mayall's finding that he took his test at a fraud factory. It is impossible to see how any oral evidence that he could have given if he had been tested under cross-examination about his evidence of having attended the test centre could go towards either of these issues. Cross-examination of the appellant would therefore have been pointless and a waste of time. The mere fact that the respondent's representative did not cross-examine the appellant does not mean that the respondent abandoned her reliance upon the evidence and reasoning in DK and RK.

48. Instead of producing evidence that cast doubt on the reliability of the evidence against him in light of the reasoning in DK and RK, the appellant produced six audio clips, admitting that they did not contain his voice. If he and his representatives had appreciated the reasoning in DK and RK, they would have understood, on any reasonable view, that not only is it the case that the audio clips reinforced the respondent's case against him, it destroyed his own evidence that he was innocent and had genuinely taken the test.

49. I therefore reject ground 4(a).

50. Ground 4(b) is wholly untenable. The judge gave detailed reasons for not accepting the appellant's evidence on the deception issue in the round – see paras 30-46. I reject ground 4(b).

Ground 5

51. Mr Nath submitted that the judge had failed to consider para 276ADE(1)(vi) at all because para 276ADE(1)(vi) is not mentioned at all in his decision. This is simply wrong. The judge found at para 47 that the appellant could not succeed on the alternative basis that there were very significant obstacles to his reintegration into life and society in Bangladesh, given that the respondent had discharged the burden of proving the deception case against the appellant. This was entirely correct. Given the judge's finding on the deception issue, the appellant did not meet the suitability requirement in para 276ADE(1)(i) and therefore he could not succeed on the basis that there were very significant obstacles to his reintegration. I agree that he did not specifically mention para 276ADE(1)(vi) in terms. However, he did not need to. I am satisfied that he dealt with para 276ADE(1)(vi) at para 47 of his decision, succinctly and adequately.

52. I therefore reject ground 5.

Grounds 6 and 7

53. I have explained grounds 6 and 7 above. In relation to ground 7, para 41 of the grounds relies upon the following: The appellant has been in the United Kingdom for more than 10 years, having arrived in 2009. It would be difficult for him to integrate into Bangladeshi society after having spent such a long period of time away from that country. He has no ties to Bangladesh. There is no one to support him in Bangladesh. Despite what is termed as 'modern means of communication', long-distance relationships and friendships rarely continue after the first few months. The judge failed to consider Agyarko [2017] UKSC 0017 at 43-45. The appellant not being able to find employment in Bangladesh amounts to insurmountable obstacles. The judge failed to sufficiently recognise that the appellant has not had any connection to Bangladesh for over 10 years. The judge failed to consider the appellant's case in a 'practical' or 'realistic' sense', and in light of the appellant's circumstances. The judge failed to consider the appellant's sister, brother, aunt, uncle and their respective children.

54. I agree that the judge's consideration of Article 8 was brief. However, I am satisfied that, given the evidence before him and his findings of fact in relation to the deception issue and para 276ADE(1)(vi), his consideration of Article 8 was nevertheless adequate, for the following reasons:

55. I have considered the appellant's witness statements dated 29 January 2019 and 30 September 2020, as well as the letters of support from various relatives, including Tahira Khanum, the appellant's aunt, and Fatema Begum, the appellant's sister, both of whom gave oral evidence before the judge. Although the authors of the remaining letters of support did not give oral evidence, I have considered their letters of support. I have also noted the judge's summary of the oral evidence before him, at paras 21-24 of his decision.

56. I have not been able to locate any evidence at all in the material before the judge which demonstrates that the criteria in Kugathas for a finding of family life was capable of being satisfied. The evidence at the highest level was that of Tahira Begum who gave oral evidence. In her witness statement, she said that she is often ill and that she relies upon the appellant who she said ensures that she is well-looked after, helping to provide her with medication or carrying out errands on her behalf. However, in oral evidence under cross-examination, she agreed that she had not provided any documentary evidence that she was often ill. Even if she was often ill and her adult children could not help her because "*they lived far away… they had their own family and they were living their own lives*" (para 23 of the judge's decision), there was no evidence why her husband (Abdul Razak) who also provided a letter of support and who gave the same address as Tahira Begum could not help her with her medication and running errands, nor was there any evidence why she could not obtain assistance from social services if she needed such assistance.

57. The evidence given in all of the letters of support and in oral evidence, of the appellant being loved and being close to his sister and other relatives, is simply insufficient to satisfy the Kugathas criteria on any reasonable view.

58. Given the evidence that was before him, the judge dealt with the evidence as to the existence or otherwise of family life adequately, simply by stating that he was not persuaded that the criteria in Kugathas was met, although it may have helpful if he had engaged with at least some of the evidence.

59. Insofar as grounds 6 and 7 contend that the judge erred in failing to consider the best interests of any minor children, the fact is that, if the judge had dealt with the matter, he would simply have had to say that there was no evidence before him, oral or written, that explained the impact upon the children of the appellant being removed and that it appeared that the children were in any event living with their biological parents and had other relatives. The failure of the judge to say so is not an error of law, in the particular circumstances of this case.

60. The appellant's evidence was that he has no one to turn to in Bangladesh or to support him. However, his sister said in oral evidence that she has three siblings in Bangladesh and that she was in contact with her family in Bangladesh "*maybe two or three times a month*". There was no explanation before the judge why she could not help the appellant re-establish contact with the same siblings in Bangladesh even if he himself has not had any contact with them over the years.

61. Mr Nath accepted that there was no evidence before the judge that the appellant would not be able to obtain employment in Bangladesh. In the absence of such evidence and given the presence of his siblings in Bangladesh, the submission in the grounds that it would be difficult for him to reintegrate in Bangladesh was wholly unsupported before the judge as is the submission in the grounds that the appellant had no ties in Bangladesh.

62. The judge was plainly aware of the appellant's length of residence in the United Kingdom. Not only did he deal with the appellant's long residence claim (at paras 27-28 of his decision), he specifically stated, at para 48, that questions 1 and 2 of the Razgar test should be answered in the appellant's favour with regard to the establishment of private life in the United Kingdom.

63. On any reasonable view, on the evidence that was before the judge, it is very difficult indeed, if not impossible, to see how the appellant could have succeeded in his Article 8 human rights claim, given that the weight that is ordinarily given to the public interest in the case of someone who does not satisfy any criteria for leave to remain under the Immigration Rules is fortified in his particular case because there was at least one (important) reason why he did not meet the requirements under the Immigration Rules, that is, that he had practised deception and therefore he did not satisfy the relevant suitability requirement .This is so even if one leaves aside the fact that he has remained in the United Kingdom without leave since his section 3C leave ended on 1 October 2015 and therefore that, on the evidence that was before the judge and given his finding on the para 276B issue, any private life established up until 1 October 2015 was established whilst his immigration status was precarious and thereafter whilst his immigration status was unlawful.

64. For all of the reasons given above, I am satisfied that the judge did not err in law.

65. The appellant's appeal to the Upper Tribunal is therefore dismissed.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of any error of law sufficient to require it to be set aside. Accordingly, the decision of the First-tier Tribunal to dismiss the appellant's appeal against the respondent decision stands.

The appellant's appeal to the Upper Tribunal is dismissed.

Signed
Upper Tribunal Judge Gill Date: 18 May 2023

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**
3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.
4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**
5. **A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.**
6. **The date when the decision is "sent' is that appearing on the covering letter or covering email**