Case No: JR-2015-LON-002664
[JR/6461/2015]

IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Field House,
Breams Buildings
London, EC4A 1WR

20 March 2023

Before:

UPPER TRIBUNAL JUDGE BLUNDELL

- -

Between:

THE KING
on the application of
MUHAMMAD NAZAM

Applicant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- -

The applicant appeared in person, by video link

Zane Malik KC
(instructed by the Government Legal Department) for the respondent

Hearing date: 26 January 2023

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J U D G M E N T

- -

Judge Blundell:

1. This is likely to be the longest running claim for judicial review which will ever come before me. The decision under challenge was to give directions for the applicant's removal from the United Kingdom under section 10 of the Immigration and Asylum Act 1999. It was reached on 4 March 2015.

2. By that decision, the applicant was notified that he was considered to be a person who had used deception in seeking leave to remain. The reasons given for the decision neatly encapsulate the pre-decision history of the matter and may usefully be reproduced in full:

> You are specifically considered a person who has sought leave to remain in the United Kingdom by deception. For the purposes of your previous application dated 29 December 2011, you submitted a TOEIC certificate from Educational Testing Service ("ETS") to the [sic] your sponsor in order for them to provide you with a Confirmation of Acceptance for Studies.
>
> ETS has a record of your speaking test. Using voice verification software, ETS is able to detect when a single person is undertaking multiple tests. ETS undertook a check of your test and confirmed to the SSHD that there was significant evidence to conclude that your certificate was fraudulently obtained by the use of a proxy test taker. Your scores from the test taken on 13 December 2011 at Opal 40 have now been cancelled by ETS.
>
> On the basis of the information provided to her by ETS, the SSHD is satisfied that there is substantial evidence to conclude that your certificate was fraudulently obtained.
>
> I have considered all of the information available to me and I am satisfied that Muhammad Nazam is liable to administrative removal as defined in section 10 of the Immigration and Asylum Act 1999 on the basis that ETS undertook a check of the test and confirmed to the SSHD that there was significant evidence to conclude that the certificate was fraudulently obtained by the use of a proxy test taker.
>
> I have also considered whether it is appropriate to administratively remove Muhammad Nazam and, having taken into account all of the facts available to me now, I am satisfied that the prejudice he may suffer is not such that it is unfair to serve him with Form IS151A Notice to a Person Liable to Removal.

3. Pre-action correspondence proved unfruitful and the applicant issued this claim for judicial review on 27 May 2015. He was represented by a firm of solicitors (J Stifford) and it was they, seemingly, who settled the original grounds, the contents of which it is unnecessary to set out here.

Events post-issue

4. The case was then stayed and resumed to await developments in the jurisprudence. The first pause was to await the decision of the Court of Appeal in *Mehmood & Ali v SSHD* [2015] EWCA Civ 744. The applicant amended his grounds in response to directions from the Upper Tribunal in the aftermath of that decision. The respondent acknowledged service

and explained, in compliance with directions which had been issued by Upper Tribunal Judge Edward Jacobs, that the applicant had a right of appeal from abroad against the decision under challenge. Appended to the Acknowledgement of Service were copies of the familiar witness statements from Rebecca Collings and Peter Millington.

5. On 7 April 2016, Upper Tribunal Judge Macleman refused permission on the papers and certified that the application was totally without merit. He concluded that the right of appeal post-removal was an adequate alternative remedy.

6. The applicant sought permission to appeal to the Court of Appeal. Permission was refused by Judge Macleman. The applicant filed an Appellant's Notice in the Court of Appeal. His application for permission to appeal was stayed again to await the decisions of the Court of Appeal in *R (Gazi) v SSHD* [2016] EWCA 1251 and *R (Roohi) v SSHD* [2016] EWCA Civ 1391.

7. The stay was lifted after those decisions were handed down and then, at the request of the Civil Appeals Office, the applicant provided a supplementary skeleton argument on 16 February 2017. The respondent applied for the claim to be summarily dismissed on two occasions. The application was ultimately stayed again, however, to await the decision of the Court of Appeal in *Ahsan & Ors v SSHD* [2017] EWCA Civ Civ 2009; [2018] Imm AR 531.

8. The applicant left the United Kingdom voluntarily on 1 August 2017.

9. The application for permission to appeal was considered by Singh LJ on 10 February 2020. He granted permission to appeal because the applicant's grounds had a real prospect of success in light of *Ahsan v SSHD*. Singh LJ did not consider that the applicant's voluntary departure necessarily rendered the claim academic, noting that he might still have a legitimate interest in challenging the finding of deception which remained on his record.

10. On 9 October 2020, the Court of Appeal remitted the matter to the Upper Tribunal by consent. It was accepted by the respondent in the Statement of Reasons that the case should be remitted to the Upper Tribunal as a 'substantive judicial review'.

Events post-remittal

11. The case was listed to be heard before me on 2 August 2021. Skeleton arguments had been filed and served. The applicant was represented by Mr Gajjar of counsel. The respondent was represented by Mr Malik (then) of counsel.

12. There was a measure of agreement between the parties as to the scope of the hearing and the means by which it was to be conducted. It was accepted that the claim was not academic because of the applicant's departure from the UK. It was accepted that the applicant would give evidence from Pakistan via video link, and the respondent took no issue

with that proposal in this particular case. It was also agreed that the issue for the Tribunal was simply whether the applicant had obtained his TOEIC certificate fraudulently by using a proxy taker.

13. Notwithstanding what was said in the skeleton arguments, there was mention before me on 2 August 2021 of the propriety of the applicant giving evidence via video link from Pakistan. Mr Malik made reference to the decision of the Upper Tribunal in *Nare (evidence by electronic means) Zimbabwe* [2011] UKUT 443 (IAC). Neither party was able – despite their endeavours – to confirm that the Government of Pakistan was content for evidence to be given to a British court or Tribunal from within its territory. I adjourned the matter to enable that consent to be obtained.

14. That consent was not forthcoming and further hearings were adjourned for the same reason. Both parties alerted me at one of those hearings to the fact that the previous President (Lane J) was to give guidance on the continuing application of the guidance in *Nare* in another appeal. That decision – *Agbabaika (evidence from abroad, Nare guidance) Nigeria* [2021] UKUT 286 (IAC) was handed down on 26 October 2021. It confirmed what had been said in *Nare*, that *'one State should not seek to exercise the powers of its courts within the territory of another, without having the permission of that other State to do so.'*

15. No progress was made by the GLD or by the applicant's lawyers in securing the agreement of the Pakistani authorities and further hearings were adjourned. On 25 April 2022, I ordered that the matter should be adjourned for six months to enable the parties to make enquiries and to relieve the applicant of the burden of paying further application fees for adjournment applications.

16. When the matter resumed before me in October 2022, progress had been made, although it was not of the type which had been hoped for. The GLD provided a letter from the Foreign, Commonwealth and Development Office to the Home Office. The letter, dated 22 June 2022, reproduced the stance of the Pakistani authorities in the following terms:

> "…with reference to the High Commission's Note Verbale dated 21st April 2022 and has the honour to state that concerned authorities of Pakistan has confirmed that such matters between the states should be regulated either by bilateral agreements or by signing the International Conventions, if available, under International Law…"

17. Mr Malik therefore explained at the hearing on 7 October 2022 that the Pakistani authorities were not content for this applicant (or any other) to give evidence from Pakistani territory. As a result, it had been agreed between the parties that the applicant would travel to Qatar, from where he would be permitted to give evidence. I was assured that the applicant was able to afford this trip, and that there would be no issue over his ability to enter Qatar for this purpose. It was thought that the parties had agreed a practical way forward, therefore.

18. The hearing was duly listed for a full day on 26 January 2023. The applicant's solicitors – who were at that stage still acting – wrote to the Upper Tribunal on 6 January to state that they were without funds or instructions. The last they had heard from the applicant was that he was struggling financially and that he would not be able to travel to Qatar. They applied to vacate the hearing.

19. I refused that request on 9 January 2023, noting that nothing in the email of 6 January provided a proper basis for adjourning the hearing. The applicant's solicitors subsequently ceased acting for him. The hearing on 26 January remained in the list.

20. The applicant joined the hearing from Pakistan, via a Microsoft Teams link which had been provided to him. He confirmed that he did not want to use an interpreter; he was content to speak in English. It was a good connection, and there were no issues with the link during the hearing. The applicant stated that he could not afford to travel to Qatar; a friend was going to assist him with the cost but had been unable to do so. He had spent many thousands of pounds on the litigation and he had nothing left. He understood the respondent to be content for him to represent himself from Pakistan. He was content to proceed on that basis.

21. Mr Malik invited me to consider and determine the claim on its merits. He noted that it had been confirmed in *Raza v SSHD* [2023] EWCA Civ 29 that the Pakistani authorities would not give consent for an individual to give evidence via video-link from Pakistan. He submitted that the applicant had not 'placed himself in a position to give oral evidence' and that I should proceed without hearing any such evidence.

22. The applicant did not seek disagree with that analysis, and I proceeded to hear submissions on the written evidence.

Submissions

23. Mr Malik submitted that the question was whether the applicant had used deception to secure the TOEIC certificate which he had subsequently provided to his sponsor in order to secure a Certificate of Approval for Sponsorship. In order to resolve that question, the Upper Tribunal had to consider (i) whether the respondent had adduced sufficient evidence of fraud to call for an explanation; (ii) if so, whether the applicant had adduced an explanation which was capable of belief; and (iii) if so, whether the respondent could establish that his explanation should be rejected.

24. As to the first of those questions, it was clear from the authorities that the Secretary of State's generic evidence, together with the Look Up Tool evidence which showed that the applicant's test scores were invalid, sufficed to answer this question in the respondent's favour.

25. As to the second question, it was accepted by the respondent that the applicant had adduced a reasonable explanation. The case fell to be decided, in Mr Malik's submission, on the third question.

26. As to the third and final question, Mr Malik submitted that the applicant's explanation fell to be rejected. He accepted that there were some points to be made in the applicant's favour, and he did so. The evidence given by Ms Collings and Mr Millington had been the subject of criticism in *SM & Qadir* [2016] UKUT 229 (IAC). The respondent's appeal against that decision had been dismissed and the Court of Appeal had endorsed the holding in the UT's decision that seven matters fell to be considered in any such case: [18] refers.

27. It was also to be noted that the Court of Appeal had observed at [33] of *Ahsan v SSHD* that it would be hard to resist the conclusion that an individual had cheated where their test was taken at a 'fraud factory' or where their voice file did not record the applicant's voice, or they had taken no steps to obtain it.

28. Mr Malik asked me to note three particular paragraphs in *DK & RK (II)*: [67], [68] and [75]. Having set out those points on the authorities, Mr Malik turned to the facts. He made four short points on the applicant's witness statement:

    (i) The evidence of the applicant's examinations in Pakistan showed low proficiency in English;

    (ii) The applicant had taken an IELTS test before his TOEIC test. His scores in that test were insufficient to secure leave to remain. There was no explanation for the marked improvement in the TOEIC test;

    (iii) The applicant had taken his test at Opal College and there was little detail in his witness statement about, for example, booking or taking the test; and

    (iv) The applicant had taken very few steps to clear his name after the decision under challenge. He had not contacted the college and there had been a significant delay in contacting ETS.

29. Mr Malik submitted that the applicant had not put himself in a position to give oral evidence. He could have applied to enter the UK in order to do so but he had not. The decision to remove him under section 10 was a lawful one and the application should be refused.

30. I suggested to the applicant that he may benefit from a break in order to collect his thoughts. He accepted that invitation and the hearing resumed after half an hour.

31. The applicant submitted that all of his school certificates showed passes in English. His degrees had been taught in English. He had entered the UK as a student and had wanted to secure further leave to remain on that basis. The requirement was for a certificate at CEFR level B2. He had obtained an IELTS score of 5 in Speaking but the overall score was too low. He had wanted to rebook the IELTS but had been unable to do so. He had checked online and found the TOEIC test instead. He had sat

the tests on three different dates. He had been unwell on 24 November so he got a low score on that date. He had retaken the speaking and writing tests in December and had prepared for them. He submitted that 'when anybody prepares the exam, he can get the results.'

32. The applicant stated that he had sent the TOEIC certificates to the respondent at different times because of the need to re-test.

33. The applicant explained that he did not contact Opal College or ETS because the respondent had not served a refusal letter upon him. They had instead tried to arrest him, he said, but they had failed twice as he was not at home. The letter had only been served on him in May 2015, after the intervention of his solicitors. He had not thought to contact ETS or the college at the time, and nobody had suggested that he should do so. Some of his friends had received invitations to resit the tests but he had not. He considered that to be totally unfair and unjust.

34. The applicant explained that he had chosen Opal College after he had tried unsuccessfully to book other places. He had gone to the counter and booked the test there and then. He thought he had got a taxi there. He said that he could recall the tests; the listening test required him to answer multiple choice questions about a conversation between two people.

35. The applicant said that the decision had destroyed his life. Other people of his age were settling down but he was still trying to prove his innocence. He was able to speak good English and he understood it very well. A letter from his college confirmed that he was able to do so. He had left the UK because of the pressure from the Home Office but he had been determined to carry on his challenge. He had spent thousands of pounds trying to clear his name, which had been tarnished in the UK and in Pakistan as a result of this allegation. He had a strong belief in the justice system of the United Kingdom.

36. Mr Malik asked for permission to respond, which I gave. He submitted that much of what the applicant had said was evidence, whereas the case was to be decided on the basis of the written evidence. The applicant had nothing to say in response to this submission.

37. I reserved my judgment at the conclusion of the submissions.

Legal Framework

38. Before the coming into force of the Immigration Act 2014, section 10 of the Immigration and Asylum Act 1999 provided materially as follows:

> (1) A person who is not a British citizen may be removed from the United Kingdom, in accordance with directions given by an immigration officer, if—
>
> (a) …

> (b) he uses deception in seeking (whether successfully or not) leave to remain;
>
> (ba) …
>
> (c) …
>
> (2)-(7) …
>
> (8) When a person is notified that a decision has been made to remove him in accordance with this section, the notification invalidates any leave to enter or remain in the United Kingdom previously given to him.

39. As Underhill LJ explained at 12 of *Ahsan & Ors v SSHD*, the recipient of a decision under section 10 was only able (at the relevant time) to pursue an appeal against that decision from within the United Kingdom if they had made a human rights claim. The applicant had made no such claim, hence why his remedy against the decision of March 2015 lay in judicial review.

The Authorities

40. There have been countless decisions of the Upper Tribunal, the Administrative Court and the Court of Appeal on the large cohort of cases which emerged after the 2014 Panorama documentary about proxies taking TOEIC tests at ETS affiliated colleges in the UK. Some of those decisions were cited by Mr Malik, as I have recorded above. I do not intend to conduct a comprehensive review of them, as it is unnecessary to do so for the purposes of this judgment.

41. As the jurisprudence has developed, so has the evidence typically relied upon by each side in cases of this nature. The generic evidence originally relied upon by the Secretary of State (the witness statements from Messrs Collings and Millington) has been countered by what might best be described as generic expert evidence from Dr Harrison and Professor Sommer. The Secretary of State herself commissioned generic expert evidence, from a Professor French and Mr Heighway.

42. After a period of relative quiet in this area, an All-Party Parliamentary Group under the Chairmanship of Stephen Timms MP produced a report on TOEIC in July 2019. Further litigation followed, and the Upper Tribunal issued two reported decisions about what was said in that report and elsewhere: *DK & RK (India)* [2021] UKUT 61 (IAC) and *DK & RK (India)* [2022] UKUT 112 (IAC).

43. The judicial headnote to the latter decision crisply summarises the conclusions reached by the President and Vice President after a five-day hearing:

> (1) The evidence currently being tendered on behalf of the Secretary of State in ETS cases is amply sufficient to discharge

> the burden of proof and so requires a response from any applicant whose test entry is attributed to a proxy.
>
> (2) The burden of proving the fraud or dishonesty is on the Secretary of State and the standard of proof is the balance of probabilities.
>
> (3) The burdens of proof do not switch between parties but are those assigned by law.

44. In *SSHD v Akter* [2022] EWCA Civ 741; [2022] 1 WLR 3868, Macur LJ (with whom Peter Jackson and Andrews LJ agreed) described *DK & RK (II)* as 'authoritative' in its consideration of the respondent's evidence in cases such as this: [32].

Analysis

45. It is for the respondent to establish on the balance of probabilities that the applicant obtained leave to remain by deception. It is common ground that the applicant entered the UK as a student in 2009 and that he made a successful application for further leave to remain in that capacity in December 2011. In support of that application, it is accepted on all sides that he provided his sponsor with TOEIC certificates which purportedly showed that his English language ability was at the required level of B2 on the CEFR.

46. It is also common ground that the applicant's test scores were subsequently invalidated by Educational Testing Services ("ETS"), the company responsible for the TOEIC tests. The Advanced Look Up Tool shows that 73% of tests taken at Opal College on 13 December 2011 were invalidated by ETS and that the remaining 27% were deemed 'questionable', that is to say that there was sufficient evidence of fraud detected at the college that none of the test results were deemed to be reliable.

47. In *DK & RK (II)*, the Upper Tribunal considered two particular arguments about the reliability of ETS decisions to invalidate test results such as the applicant's. The first was that the process of voice recognition, as described in the statements made by Messrs Collings and Millington, was unreliable. At [103], the Upper Tribunal rejected that argument in these terms:

> We conclude that the voice recognition process is clearly and overwhelmingly reliable in pointing to an individual test entry as the product of a repeated voice. By "overwhelmingly reliable" we do not mean conclusive, but in general there is no good reason to doubt the result of the analysis.

48. The second argument was that the respondent had failed to establish that ETS had a reliable 'chain of custody' so as to ensure that the results tested by the process of voice recognition were attributed to the correct candidate. That argument was rejected in similarly resounding terms at [107]:

> Again, we would not say that the evidence has to be regarded as determinative. There may be room for error (although none of the experts involved has detected any error, as distinct from showing that there is room for error). What is clear here is that there is every reason to suppose that the evidence is likely to be accurate.

49. Those two conclusions were drawn together at [114]:

> That takes us to a crucial observation about the appellants' arguments in these proceedings. The appellants' arguments have been largely directed to demonstrating the possibility of error in the evidence - or error in determining the conclusion to which the evidence points. In particular, attention is drawn to the possibility of a false positive in voice recognition, or a failure in maintaining proper labelling of test data. As we have indicated, the former is assessed to be likely but low; the latter, the "chain of custody" argument, remains only a theoretical possibility not supported by any detailed evidence, and rendered less likely by some of the general evidence. But it is important to appreciate that although these possibilities prevent the data conclusively proving fraud in a scientific sense, they do not substantially remove the impact of the evidence as capable of establishing facts in issue so that a human trier of fact is satisfied of the matter on the balance of probabilities.

50. The final paragraph to which I should refer is [127], which provides the foundation for (1) of the judicial headnote to the case:

> Where the evidence derived from ETS points to a particular test result having been obtained by the input of a person who had undertaken other tests, and if that evidence is uncontradicted by credible evidence, unexplained, and not the subject of any material undermining its effect in the individual case, it is in our judgment amply sufficient to prove that fact on the balance of probabilities.

51. Whilst the burden is on the respondent, therefore, the evidence upon which she relies is ‘amply sufficient’ to discharge that burden, in the absence of contradiction by credible evidence. As will be apparent from my summary of the competing submissions, the applicant submits that there must have been some sort of mistake by ETS; that he genuinely took the test; and that he had no reason to cheat because he was proficient in English before he came to the United Kingdom.

52. I propose to engage with those points in largely the order adopted by Mr Malik in his helpful and able submissions. In doing so, I have borne in mind the seven factors which were said at [18] of *Majumder v SSHD*

[2016] EWCA Civ 1167 to be relevant to such an analysis. In particular, I have borne in mind throughout that there is nothing other than the allegation of fraud in 2011 which calls into question the applicant's character.

Proficiency in English in Pakistan

53. The applicant submits orally and at [7] of his witness statement of 12 July 2021 that he is fluent in English and that he did not require anybody's help to pass an English-speaking test.

54. The first point to note in that regard is that even those who demonstrate proficiency in the English language might have cheated in their test: *MA (Nigeria)* [2016] UKUT 450 (IAC), at [57]; *DK & RK (II)*, at [108]. The most that can perhaps be said is that a person who has a demonstrable proficiency in English is generally less likely to cheat; it is a relevant consideration rather than a determinative one.

55. As Mr Malik noted in his oral submissions, however, the evidence before me does not establish that the applicant was proficient in English at the time that he took the test.

56. There is evidence before me of the applicant's examination results in Pakistan and in the UK. The school certificate which was issued by the Board of Intermediate & Secondary Education in Sargodha on 4 August 1994 shows that the applicant secured 81/150 in English. A subsequent certificate from the same board, dated 28 February 1998, shows that English was the applicant's weakest subject, with a score of 89/200, or 45%.

57. The applicant then went to the University of the Punjab and was duly issued with a certificate in January 2001. He scored poorly in Economics (74/200) but his score in English was even worse (73/200, or 36.5%).

58. The applicant then went to ITM College, where he studied for a Master's Degree in Computer Science. His results, displayed at p153 of the bundle, do not show that he was specifically assessed in English. The applicant stated that his first and second degrees were taught in English but the only evidence in that respect is a letter from the Director of ITM College, Mr Javaid. The standard of English in that letter is so poor that it calls into question the standard of English used by the staff. The penultimate paragraph of the letter will illustrate that point:

> His grassroots knowledge of further revitalized strategic learning in multicultural environment and work experiences in Networking and programming. It would be an asset for you, and I surely believe that he will bring prerequisite skills and qualifications to the progress of the programme, and to the development projects and organisations in the future.

59. It is apparent from the certificates in the bundle that the applicant graduated from both degree courses, but these documents do not establish, without more, that he was proficient in English when he came

to the UK. Mr Malik submitted that the applicant had not taken an independently validated English test before he came to the UK and that appears to be the case. On balance, the evidence from the applicant's schools and universities in Pakistan does not support his contention that he was able to communicate effectively in English before he came to the United Kingdom.

Proficiency in English in the UK

60. The applicant entered the UK on 9 December 2009. His entry clearance conferred leave to enter until 31 December 2011. As the latter date approached, the applicant decided that he would seek further leave to remain as a student, under Tier 4 of the Points Based System.

61. As the applicant notes at [6] of his witness statement, he was required to demonstrate that his English was at or above the B2 standard in the Common European Framework of Reference for Languages ("CEFR"). He arranged to take an International English Language Testing System ("IELTS") test in September 2011. He scored 5.0 in the Speaking category but his score overall was 4.5. The certificate at p165 of the bundle is photocopied poorly but the applicant stated (without demur from Mr Malik) that he had scored 4.5 in Listening, Writing, and Reading.

62. It is common ground between the parties that the applicant's IELTS score was insufficient to support an application for further leave to remain as a Tier 4 Student. The online table to which I was referred during the hearing showed, in fact, that a score of 4.5 is at the bottom end of the B1 level, meaning that the applicant was at that stage just into the category of 'Independent User'. An overall score of 5 would also have been insufficient, since that is at the upper end of the B1 bracket. What the applicant was required to achieve was a score of 5.5 or above in order to establish that his competence was at CEFR level B2.

63. As Mr Malik submitted, the applicant's failure of the IELTS test in mid-September (the certificate is dated 13 September 2011) would likely have generated some concern that he would miss the impending deadline to apply for further leave to remain. It provided him with an incentive to cheat, as was submitted by Mr Malik.

64. The applicant's scores in the TOEIC tests were leagues better than any of the results I have previously set out. The certificates at p166-167 show that he achieved full marks in Writing and Listening. He achieved 425/495 (86%) in Reading and 160/200 (80%) in Speaking. The applicant's overall score of 920 represented a level of proficiency at the very top of the B2 bracket, which requires a score of between 785-940. Within a couple of months, therefore, the applicant had supposedly been able to increase his proficiency very significantly.

65. I accept Mr Malik's submission that there is a lack of adequate explanation in the applicant's witness statement as to how he achieved this marked improvement. In his submissions, the applicant said that he had simply put his mind to it and had prepared for the tests. Had his score improved marginally over this short period, that might have

amounted to an adequate explanation. Given the marked improvement demonstrated by the applicant, however, something more by way of explanation was required.

66. In reaching these conclusions I have not lost sight of the documents at p146-149 of the bundle. There are two documents. The first shows that the applicant was awarded a Master's degree from Anglia Ruskin University in Marketing and Innovation in February 2012. The second shows that he was awarded a Postgraduate Diploma in Business and Marketing Strategy by the Association of Business Practitioners in November 2011. Neither document establishes whether the courses were assessed by examination or by coursework, however, and they say nothing about his ability to respond spontaneously to questions designed to test his English language ability in a variety of different ways.

67. I also note that the certificate from Anglia Ruskin University shows that the applicant started the course in September 2011 and that his results in the two modules were both low, at grade D. The applicant's academic achievements in the UK do not establish his proficiency in the English language, therefore, and it is the sudden unexplained hike between the IELTS score and the TOEIC scores which is of greater evidential value.

Absence of detail regarding the tests at Opal College

68. I also accept Mr Malik's submission that the applicant provided little evidence about Opal College in his witness statement. He gave no indication of how he had found out about the college or any details of the mechanics of sitting the test. It was only after Mr Malik had noted this lack of detail in his submissions that the applicant sought to put flesh on the bones of his statement.

69. Leaving to one side the fact that the applicant was not permitted to give evidence from Pakistan, I consider that his attempt to provide the otherwise absent detail at the last minute was indicative of late embellishment. He was competently represented until a few days before the hearing, by solicitors who had secured remittal from the Court of Appeal, and it would have been obvious to all concerned that detail was required in these respects. If the applicant had taken a taxi to the college and paid in cash, that would have been included in his witness statement. If he was able to recall the mechanics of the Listening test, as he claimed before me, that would also have been included in the witness statement. This case has been running for many years, and it was very noticeable that the applicant sought to provide these basic details at the very last moment.

70. I also note in this connection the extent of the fraud undertaken at Opal College on 13 December 2011, when the applicant is said to have taken his Speaking and Writing Tests. As I have already recorded, 73% of tests taken at the college on that day were invalidated by ETS due to the presence of a proxy taker. The label which appears in the authorities - 'fraud factory' - has not, to my knowledge, previously been applied to this particular college but it might well be apt. Although it is inconceivable that the applicant could have attended the college on that

day without noticing that level of fraud, he makes no reference to any such activity in his witness statement or in his submissions before me.

Applicant's inaction between 2015 and 2021

71. I also accept Mr Malik's submission about the applicant's inactivity upon receiving the respondent's decision. I accept that he was not informed promptly of that decision but he states at [5] of his statement that he became aware of it in March 2015. (He said May 2015 in his oral submissions, but nothing turns on this.)

72. The applicant made no attempt to contact Opal College at that time, or at all, and it was only in July 2021, when the first hearing before me was approaching, that the applicant and his solicitors made any attempt to secure the voice recordings from ETS. I know from my experience of other cases that the voice recordings have been available from ETS's solicitors for many years. It is notable that they were not requested more promptly. It is even more notable that the applicant has said nothing about what they might or might not contain, despite those recordings having been made available to him in August 2021.

Cost and length of proceedings

73. The applicant made reference to the amount of money he had spent in contesting this case. As I have noted on more than one occasion already, it has been an extremely protracted battle, and one which must have cost the applicant a significant sum. I do not consider this expenditure or the length of the battle to militate in favour of a conclusion that the applicant did not cheat, however. He might be an innocent man who is desperate to clear his name. He might be a guilty man who is desperate to repair the damage to his reputation which has arisen as a result of his own actions. In my judgment, the evidence in this case points squarely in favour of the latter conclusion.

Resits

74. I will also deal briefly with the point made by the applicant about the fact that some people he knows were offered resits, rather than immediate removal action being taken against them under section 10. There is evidence in the bundle that at least one individual (a Mr Rahman) was offered the opportunity to submit a re-test or to withdraw his immigration application after ETS had cancelled his TOEIC score.

75. I make two observations about that evidence. Firstly, I know nothing more about Mr Rahman's circumstances, and cannot know from the single letter at pp35-36 in the bundle whether his circumstances are remotely similar to the applicant's. Secondly, my recollection is that the respondent's policy at the time was that such invitations were extended only to those candidates whose results had been declared 'questionable' by ETS. That would make sense, since there was no positive proof of fraud in such a case, whereas a candidate whose result had been declared invalid by ETS was one who was found to have used a proxy. I suspect that Mr Rahman's test had been found to be 'questionable'

therefore, which is why there was a difference in treatment between him and the applicant.

Conclusion

76. Having considered all of the evidence, and having taken what was said in *DK & RK (II)* into account, I reach the clear conclusion that the applicant used deception when he sought leave to remain in 2011. The deception in question was that he relied upon his scores in the TOEIC tests in order to secure a CAS, whereas he knew that he had used a proxy to secure those results. I am satisfied that the respondent has discharged the burden of proving that deception to the civil standard.

77. The single issue in the case having been resolved in favour of the respondent, I will refuse the application for judicial review. I am minded to make an order for costs in favour of the respondent. The applicant will have an opportunity to make representations on that issue when this judgment is circulated in draft.