IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003946
FtT No: HU/02915/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 5th of December 2023

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

ASIFODDIN MOHD
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr P Saini, Counsel, instructed by Direct Access
For the Respondent: Mr T Melvin, Senior Presenting Officer

Heard at Field House on 26 October 2023

DECISION AND REASONS

Introduction

1. The appellant appeals on human rights grounds against a decision of the respondent refusing to grant him indefinite leave to remain. The decision is dated 7 May 2021.

2. By a decision of the First-tier Tribunal sent to the parties on 17 June 2022, Judge of the First-tier Tribunal Shore dismissed the appellant's appeal in

respect of paragraph 276ADE(1)(vi) of the Immigration Rules but allowed it on human rights (article 8) grounds outside of the Rules.

3. The respondent was granted permission to appeal to this Tribunal on 20 July 2022. There was no cross appeal on the part of the appellant.

4. By a decision sent to the parties on 9 February 2023 the Upper Tribunal (Upper Tribunal Judge O'Callaghan) held that the decision of Judge Shore contained a material error of law relating to conflation of two relevant, but separate, issues, namely skill and motivation. The decision was set aside, save for identified findings of fact which were preserved.

5. The resumed hearing took place at Field House on 26 October 2023. The appeal was concerned with article 8 outside of the Rules, and focused on whether, as contended by the respondent, the appellant used a proxy when undertaking an English language test at Opal College in December 2011, and therefore exercised deception which was subsequently relied upon in later applications for leave to remain.

Relevant Facts

6. The appellant is an Indian national who is presently aged 35. He was awarded a Bachelor of Commerce degree from Osmania University, India, in 2010. The course was taught by English-medium instruction.

7. He entered the United Kingdom on 8 July 2010 as a Tier 4 (General) Student, with leave to enter expiring on 23 January 2012.

8. On 9 December 2011, the appellant undertook a listening and reading exam at Opal College, London. The college was situated at Ground Floor, 101 Commercial Road, London E1. Five days later, on 14 December 2011, he attended the same college and undertook a speaking and writing test. On that day, Educational Testing Service (ETS) issued the appellant with a Test of English for International Communication (TOEIC) certificate in respect of English language proficiency.

9. On 23 January 2012, the appellant made an in-time application to the respondent seeking an extension of his leave as a Tier 4 (General) Student. By a decision dated 12 September 2012 the respondent granted the appellant leave to remain as a Tier 4 (General) Student until 30 September 2013.

10. On 1 October 2013, the appellant made an out of time application to extend his leave to remain as a Tier 4 (General) Student and by a decision dated 12 November 2013, the respondent granted him the requested leave until 30 August 2015.

11. On 24 October 2014, the appellant was served by the respondent with an IS151A. The respondent stated that the appellant had used deception to obtain leave to remain by using a proxy test taker for his test in December 2011. The appellant was informed that by using voice verification software ETS could detect when a single person was undertaking multiple tests. ETS had undertaken a check of the appellant's test on 14 December 2011 and informed the respondent that there was significant evidence to conclude that the certificate was fraudulently obtained by the use of a proxy test taker. The scores from the test taken on 14 December 2011 at Opal College were cancelled by ETS. Upon receipt of information provided by ETS, the respondent considered that the TOEIC certificate had been fraudulently obtained and that the appellant had used deception in his applications for further leave to remain dated 23 January 2012 and 1 October 2013. The respondent curtailed the appellant's leave by a decision dated 24 October 2014. There was no attendant right of appeal.

12. On 7 October 2016 the appellant submitted a human rights claim, which was refused by the respondent on 22 November 2016. The application was certified as being clearly unfounded under section 94 of the Nationality, Immigration and Asylum Act 2002. The appellant challenged this decision by means of judicial review and the respondent subsequently agreed to reconsider the matter. The respondent issued a decision on 3 January 2019, again refusing the application for leave to remain on human rights grounds but providing the appellant with an in-country right of appeal.

13. The appellant's appeal was dismissed by a decision of the First-tier Tribunal dated 28 October 2019. In his decision, Judge of the First-tier Tribunal Eldridge noted, *inter alia*:

- "The Appellant is identified as a person who took a test at Opal College on a day when no test analysed was subsequently found to be 'released' and 34 (or 21%) were 'questionable' and 127 (rather obviously 79%) were found to be 'invalid'. The Appellant's 'speaking score' was very much at the high end of achievement. The writing score was somewhat lower but still markedly towards the top end of proficiency," at [24].

14. The Judge found, *inter alia*:

- Three supporting references did not aid the appellant. Only one spoke of the appellant's ability in English. Whilst the references were not ignored, "they do not speak to [the appellant's] ability in English, which is an important part of the refusal and this appeal", at [26];

- The Appellant "has not demonstrated that in the period of well over 4 years he had leave to enter and remain in this country as a

student or otherwise, he has gained any educational qualification here. Had he obtained a good level qualification or qualifications, taught in this country in English, that could have been of assistance to him in demonstrating his credibility and also in demonstrating that he was, in fact, a genuine student whilst he had leave as such", at [27];

- The appellant had not obtained qualifications whilst in the United Kingdom, and it is more likely than not that he was not a genuine student., at [27];

- In respect of the appellant not being a genuine student, at [28]:

> "I am fortified in this conclusion by the evidence he gave about the pressures he would face on [his] return. He spoke of the money he had borrowed here but also the amounts (although he did not quantify them) that his family in India had invested in him. This evidence was as part of his answer about why he would not be supported if he returned now to his home country. He has now existed here for five years without leave and the sums must be considerable but I consider, additionally, that the investment in him is just as likely to have been to enable him to work here and return money and, if possible, to achieve a right to be settled with all the family advantages that might bring over time."

- The appellant did not provide any "strong explanation" as to why he chose the TOEIC course, rather than the IELTS route, and why he chose the college concerned. The explanation that there was no other route available to him was not accepted, at [29];

- The appellant did not pursue the recording of his test because of the adverse result they may well demonstrate, at [30].

15. Upon considering the guidance provided by the Court of Appeal in *SM and Qadir v. Secretary of State for the Home Department* [2016] EWCA Civ 1167, [2017] 3 All E.R. 756, Judge Eldridge concluded:

> "32. If I apply these findings of fact and considerations to the factors quoted by Beatson LJ in *SM & Qadir* I consider as follows:
>
> a) The Appellant has much to gain from obtaining this certificate in terms of his ability to remain in the United Kingdom and earn money. I have found he was not a genuine student here and, notwithstanding the academic achievements in India, he has not shown attendance for any course of study here or that he has good prospects of success at any English language test he took. In this regard, it is now approaching eight years since he took the test

challenged by the Respondent and his current abilities in English cannot be taken to reflect his abilities then;

b) the converse is that he had much to lose in terms of status, family pressure, the ability to earn and the prospect of further leave and eventual settlement;

c) the three letters of support suggest a good character and there is nothing to show any involvement with criminality or refusal otherwise would be justified on suitability grounds. In my judgement, however, that must be set against my finding of fact that he was a non-genuine student;

d) the Appellant's evidence is that he took the test at this particular college because it was recommended to him by a friend and he knew others who were taking the test. There is no geographical incongruity in terms of the location of the test centre to his home but I consider it likely that Opal was known to be a college where proxy-testers were used and this would be known within the community within which he was living and working;

e) in cross-examination the Appellant gave quite a lot of detail about the overall process and of what he related as his experience on the day but, in my judgement, with the passage of a long period of time, all of this could be learnt and is probably now well in the public domain. I do not ignore the fact that he could give this degree of detail but he also did become relatively confused about some aspects of the testing and, in particular, he seemed to muddle what was expected of him under the various headings examined;

f) the Appellant gave his evidence-in-chief in quite good English before me. There were a number of occasions upon which he did not understand questions that, in my view, had been put appropriately and relatively simply. I make allowances, however, for the natural strain that any Appellant would find in proceedings in this matter. The real point here is that, as I have already suggested, with such a long passage of time since he took the test, ability today cannot be regarded as any real indicator of ability many years ago. What can be said in the Appellant's favour is that he has some reasonably good ability in English now and there is no incongruity in that regard to what he has asserted years ago. Nevertheless, I consider his performance at the hearing otherwise has no bearing on the task I have of assessing what happened more than seven years ago;

g) I do not consider that any academic achievements in India would lead me to conclude that his using a proxy tester was illogical. I particularly bear in mind my finding concerning

> his study or non-study in the UK and his motivation for being here but also that the motivating factors for using such tester can be many and varied and are not confined simply to lack of confidence in the ability to pass the test.
>
> 33. Viewing all this in the round, I am driven to conclude that the Respondent has discharged the evidential burden of demonstrating that deception was used by the Appellant in the obtaining of his English language test certificate in 2012 by deception in the form of using a proxy to attend the centre concerned.
>
> 34. It follows that I also conclude that the Respondent was entitled to refuse the application on the basis set out in the decision letter."

16. On 24 August 2020 the appellant applied to the respondent for indefinite leave to remain. The application was refused by a decision dated 7 May 2021 and the present statutory appeal follows from that decision.

17. By means of his decision, the respondent observed that ETS had confirmed the certificate issued on 14 December 2011 to be invalid. He was therefore satisfied that the certificate was fraudulently obtained and that the appellant used deception in the application of 1 October 2013. He considered the further submissions but concluded that they did not differ from those which were included as part of the appellant's previous human rights claim. The appellant's application for indefinite leave to remain was refused as he did not meet the requirements of paragraph 322(2) of the Rules.

18. In addition, the application was refused under paragraph 276B of the Rules as the appellant was considered not to meet various requirements of paragraph 276ADE of the Rules, nor did exceptional circumstances arise.

19. In respect of paragraph 276B(v) of the Rules, the respondent noted that the appellant had not enjoyed leave to remain since 24 October 2014, and had not submitted a valid application within 14 days of his appeal rights exhausted date. Consequently, paragraph 39E(1) of the Rules did not apply.

20. As noted above, the appellant did not cross-appeal Judge Shore's refusal of his appeal under paragraph 276B of the Rules, with attendant consideration of paragraph 276ADE

Error of law decision of the Upper Tribunal

21. By its decision of 9 February 2023, the Upper Tribunal held that Judge Shore had conflated two relevant, but separate, issues when allowing the appeal, namely skill in the English language and motivation to engage in fraud. Such material error flowed into the First-tier Tribunal's general

assessment of article 8 outside the Rules, and so the decision of the First-tier Tribunal was set aside.

22. At [23] the Upper Tribunal observed:

> "23. It remains the case that the appellant has established by means of the NARIC assessment that his degree in India was taught to such level that he had a level C1 command of the English language. In simple terms this is an advanced level, confirming that he could understand a wide range of demanding, longer text and recognise implicit meaning. I observe that at this level a student can function independently and with a great deal of precision on a wide variety of subjects. I further observe that the speaking test that is under consideration was conducted one year after the appellant secured his degree. In such circumstances the attention of the parties at the resumed hearing can properly be directed primarily to the issue of motivation."

23. Following discussion with the representatives at the conclusion of the error of law hearing the Upper Tribunal issued a direction that the appellant was to file and serve any additional documentary evidence he wished to rely upon, including an addendum witness statement, no later than fourteen days before the resumed hearing. The expectation was that the appellant would address in written form reasons as to why he would not have been motivated to use a proxy test-taker. The appellant did not avail himself of the opportunity to file an addendum witness statement.

24. The Upper Tribunal further confirmed that findings of fact at paragraphs 30.1 to 30.5 of the First-tier Tribunal decision were preserved. These paragraphs detail:

> "30. On the remaining appeals, I make the following findings of fact:
>
> 30.1. The appellant's immigration history is as I set it out above;
>
> 30.2. The appellant and his partner are in a genuine and subsisting relationship and have been since 2019;
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> 30.3. The appellant's partner has a residence permit; and
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> 30.4. The appellant follows the Muslim faith. His partner was born into the Hindu faith but has converted to Islam.
>
> 30.5. I find that the appellant's assertion about attitudes to inter-religious relationships in India was not made out to the required standard of proof because [of] a lack of evidence."

Evidence

25. I have carefully considered the evidence relied upon by both parties, including evidence not expressly referred to below.

26. The respondent relies upon, *inter alia*, the relevant lookup tool, a report from Professor Peter French dated 20 April 2016, a witness statement from Peter Millington, Assistant Director, Home Office, dated 23 June 2014, and a witness statement from Rebecca Collings, Civil Servant, Home Office, dated 23 June 2014.

27. The appellant relies, *inter alia*, upon two witness statements dated 6 March 2021 and 2 February 2022. By means of these statements the appellant confirms that he undertook his primary, secondary and university studies in the English language. He detailed his reasons for booking and subsequently attending Opal College. He observes that contrary to the conclusion of Judge Eldridge, he secured a Diploma in Business Management from Equinox College in 2011 and subsequently passed a Life in the UK Test.

28. The appellant relies upon a UK NARIC Certificate issued by the UK Visas and Nationality Service, a department of the respondent, which was issued on 17 February 2021. This document was not before Judge Eldridge. In respect of the appellant's award of a Bachelor of Commerce degree from Osmania University in 2010, the UK NARIC Certificate confirms that its domestic equivalent is a United Kingdom Bachelor degree. The English language level is identified as CE European Framework for Languages (CEFR) Level C1. This is the second highest level of English, graded as expert, where a student can understand a wide range of demanding, longer text and recognise implicit meaning. This is a level where students can be expected to function independently and with precision.

29. The appellant attended the resumed hearing. Mr Saini explained that the appellant had recently undergone back surgery and was experiencing considerable difficulty in sitting. I permitted the appellant to stand throughout the proceedings and confirmed that if he wanted a break at any time, he could take it. I was satisfied that both Mr Saini and the appellant were content to adopt such approach. Mr Melvin raised no objection.

30. The appellant gave oral evidence. He explained that he had not previously taken steps to secure the UK NARIC Certificate and place it before Judge Eldridge in 2019 because he only became aware that this Certificate existed after the hearing when he applied to undertake the Life in the UK test. As for the diploma, secured after his first year of study in the United Kingdom, he explained his failure to provide it to his former representative when handing over documents and was angry with himself

for his failure to do so. He was chased for it by his former representatives after the hearing before Judge Eldridge.

31. He was reminded by Mr Saini that the respondent's case is that he had used a proxy test-taker to cheat in his test because he was not confident that he would succeed. He replied that there had been no need to take a proxy test-taker as he had previously studied in the English medium at university for three years. As to why he took the test at Opal College, he confirmed that he needed to apply to the respondent to secure an extension of his stay in this country and was struggling to secure a test date for IELTS within the required time permitted before his leave expired. He was informed by a friend that he could secure a TOEIC from Opal College. At the time he had not been in the country for long and was unaware as to any existing concerns about the college. He was not worried about taking the test because it was "just a test".

32. He explained to Mr Melvin that it had not been his intention to stay in the United Kingdom when he entered the country. He had approached his own college to explain that he was unable to secure an IELTS test appointment in time to make his extension of leave application and he was informed by his college that he could use a TOEIC test certificate instead. He accepted that he had arranged to sit the TOEIC exam some nine weeks before his then existing leave expired, but this was consequent to no IELTS examinations being available in the period running up to the expiry of his existing leave.

33. When asked by Mr Melvin as to whether he held personal concern in respect of the financial debt he owed his family and friends, which he was required to repay, the appellant responded that he had no concerns as they were happy to support him.

34. He explained to Mr Melvin that was unable to approach Opal College when his leave was curtailed in 2014 because the college had closed down by that point in time.

35. When asked by Mr Melvin as to why he did not seek the voice file, the appellant confirmed that his solicitor had contacted ETS, but they had not secured any records from it. When asked if he had any documentary evidence to prove that the ETS, or GLD, had been approached, he simply confirmed that he did not have any other documents beyond those before the Tribunal.

36. In re-examination Mr Saini took the appellant to para. 24 of his witness statement, detailing that he had obtained recordings, but his oral evidence contradicted this position. There was a degree of confusion on the part of the appellant. He said that he had provided all the documents he had and that he did not know what his previous solicitors possessed. He then

informed the Upper Tribunal that his former solicitor, Mr Tanwir, of SBM Solicitors, had secured the relevant voice recordings. He was asked whether he was provided with his file when he stopped instructing SBM Solicitors. He confirmed that he was given the file, but then explained that this was by means of an email. He was again asked whether he had the relevant voice recordings and if so, how had they reached him. The appellant replied that he had not actually received the voice recordings. Nor, he confirmed, did his former solicitors have the voice recordings. He clarified and confirmed that he had never received the voice recordings. When asked how the positive reference to obtaining the voice recordings became part of his witness statements, which he had both signed as truthful and accepted as truthful at the outset of his evidence, he explained the difficulties he had experienced with his previous representatives, such as an earlier witness statement having been written on his behalf by "Farha", who he explained was a receptionist at SBM Solicitors. He was reliant upon what he was, and was not, informed by SBM Solicitors.

37. Mr Saini informed me that SBM Solicitors ceased trading in or around 2021.

38. I am grateful to the representatives for their short and concise oral submissions.

39. Mr Melvin relied upon a skeleton argument filed with the Upper Tribunal the day before the hearing. At its core, the respondent submitted that the allegation of the employment of a proxy test-taker has been made out. Various concerns of Judge Eldridge, such as money worries, were unchallenged and it remained entirely unclear as to whether the appellant's previous solicitors had obtained the voice recording. If they had not, the appellant had clearly made no effort to secure this important evidence. Mr Melvin submitted that in the absence of any proper evidence to obtain the voice recordings, such failure should stand against the appellant. Ultimately, he is one of many thousands who have employed a proxy test-taker and to act fraudulently in seeking to secure further leave to remain. In such circumstances the respondent's decision as to suitability under para. 322(2) of the Rules was made out.

40. Mr Saini firstly turned to certain findings made by Judge Eldridge. In respect of the money worries, identified at [28] of Judge Eldridge's decision, he accepted that it was uncontroversial that there may be problems for someone returning early from studies in the United Kingdom where a significant financial outlay had been made. However, the appellant's evidence was clear, his family were happy to support him and so he was not under pressure. I was asked to consider the appellant's lengthy historic study in the English medium and to be mindful that the assessment in this matter was fact sensitive. The appellant had explained

that he was unable to secure a test for IELTS for some time, and his leave would have expired prior to his taking that test, he was entitled to abide by his friend's support and attendant observation that they were happy to take the test at Opal College. In the circumstances it is more likely than not that he sat the test and so there would be no public interest in removal.

ETS/TOEIC

41. This appeal is concerned with an allegation by the respondent that the appellant cheated when sitting and securing a TOEIC certificate offered by ETS.

42. In broad terms, the history of the TOEIC litigation commences in 2010 when the respondent decided that the then existing arrangements for testing facility in the English language as part of the process for determining whether leave to enter or remain in the United Kingdom for certain purposes should be replaced by one in which a small number of testing services would be licensed, and only tests taken with those providers would meet the requirements of the Rules. Six providers were approved to work under licence, of which again ETS was one. The licences began on 6 April 2011. The licensee had the responsibility for ensuring the integrity of the test procedure. The level of competence required varied according to the immigration category under which an application was made.

43. In 2014 the respondent was made aware of an investigation by the BBC for its Panorama programme in which undercover reporters gained access to several test centres across the United Kingdom where ETS English language tests were being undertaken by people subject to immigration control who required proof of their English language skills to make an application for leave to remain. The BBC investigation revealed, using covert recording, significant fraud in the test processes. Some TOEIC tests set by ETS were not sat by the actual candidate but by 'proxy' test takers. The abuse included the use of 'proxies' to undertake speaking and listening tests on behalf of the candidates and the provision of correct answers for those sitting written tests.

44. On 6 January 2014, five weeks before the Panorama programme was broadcast, the BBC wrote to the Home Office summarising the results of an investigation into the integrity of testing at two ETS centres:

    (i) Registered candidates standing aside from the secure computer terminals, allowing other people with superior English language skills to take the oral and written parts of the exam on their behalf. The proxy sitters were organised

by the very staff who were supposed to ensure the proper conduct of the exam.

(ii) Verification trips, intended to act as proof that the registered candidate sat the exams themselves, being falsified by staff of those centres in order to facilitate this fraud.

(iii) Exam 'invigilators' at one centre dictating the correct answers to the registered candidates in the multiple-choice part of the exam.

(iv) At the other centre multiple choice exam answer papers were filled out and submitted without the registered entrant even being present.

45. Following the BBC investigation, ETS undertook analysis of speaking tests to identify where tests were taken by a substitute (or proxy) test taker. The analysed results have been split into 2 areas:

Invalid: where the analysis indicated that cheating in the test took place

Questionable: where analysis has not proven cheating but where concerns are deemed sufficient to withdraw the test result

46. Where a test certificate has been classed as invalid, ETS has confirmed through voice-matching analysis that cheating is likely to have taken place.

47. ETS has confirmed the appellant's test to be 'invalid'.

48. As recently confirmed by the Court of Appeal in *Ram v. Secretary of State for the Home Department* [2023] EWCA Civ 1323, at [5], the correct approach for a tribunal which has to determine whether an applicant for leave to remain used a proxy in the spoken English part of the ETS test is that set out in *DK and RK v. Secretary of State for the Home Department* [2022] UKUT 00112 (IAC). At [126]-[129] the Presidential panel said, under the hearing "General Conclusions":

'126. The two strands, therefore, amount respectively to the virtual exclusion of suspicion of relevant error by ETS, and the virtual exclusion of motive or opportunity for anybody to arrange for proxy entries to be submitted except the test centres and the candidates working in collusion.

127. 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.
>
> 128. In using the phrase "amply sufficient" we differ from the conclusion of this Tribunal on different evidence, explored in a less detailed way, in *SM and Qadir v SSHD*. We do not consider that the evidential burden on the respondent in these cases was discharged by only a narrow margin. It is clear beyond a peradventure that the appellants had a case to answer.
>
> 129. In these circumstances the real position is that mere assertions of ignorance or honesty by those whose results are identified as obtained by a proxy are very unlikely to prevent the Secretary of State from showing that, on the balance of probabilities, the story shown by the documents is the true one. It will be and remain not merely the probable fact, but the highly probable fact. Any determination of an appeal of this sort must take that into account in assessing whether the respondent has proved the dishonesty on the balance of probabilities.'

49. I further observe the guidance provided in *DK and RK* as to the process to be undertaken in ETS/TOEIC matters:

> "60. We therefore ask first whether the Secretary of State's evidence would enable a properly-instructed trier of fact to determine that the burden of proof had been discharged on the balance of probabilities. If the evidence at this point would not support a finding that the matter was proved on the balance of probabilities, the appellants would be entitled to succeed in their appeals. If, however, it would support such a finding, the evidence as a whole falls for consideration in order to decide whether the appeals succeed or fail."

50. In determining this first step, an individual allegation should be assessed in the context of all the background evidence and is fact specific.

Discussion

51. I observe the guidance in *Devaseelan (Second Appeals - ECHR - Extra-Territorial Effect) Sri Lanka** [2002] UKIAT 00702, [2003] Imm AR 1, and note in the case of second appeals that the decision of Judge Eldridge forms the starting point for this second judicial decision and facts occurring since the first decision are to be taken into account, along with events that took place prior to Judge Eldridge's decision and were not considered by him.

52. In approving the guidance in *Devaseelan* the Court of Appeal confirmed in *Djebbar v. Secretary of State for the Home Department* [2004] EWCA

Civ 804, [2004] Imm AR 497 that the most important feature of the guidance is the fundamental obligation of every judge independently to decide each new application on its own individual merits. A judge is not estopped from reaching a contrary decision; the first decision is a 'starting point'.

53. I have read the evidence relied upon by the parties with care.

54. At the outset, I accept the appellant's evidence that he was not aware of the existence of certificates issued by (the former) UK NARIC (now UK ENIC) at the time of his hearing before Judge Eldridge. I consider this to be a very good reason for the appellant not having previously relied upon it: *Sultana v Secretary of State for the Home Department* [2021] EWCA Civ 1876.

55. I note that Mr Melvin did not challenge the appellant's evidence as to his lack of knowledge nor, understandably, did he challenge the content of the document, it being issued by the United Kingdom's national agency responsible for providing information and expert advice on international qualifications and skills.

56. In the circumstances, I consider that consequent to the content of the UK NARIC Certificate, the findings of fact made by Judge Eldridge can properly be revisited. I am satisfied that the appellant has established that as at the time he secured entry to this country as a student, his standard of English language was such that he understood a wide range of demanding, longer text and recognised implicit meaning. His command of the English language was at a level where he could be expected to function independently and with precision. I am satisfied that if Judge Eldridge had been provided with the UK NARIC Certificate, he would have reached the same conclusion.

57. There was no challenge by Mr Melvin to the appellant having secured a Diploma in Business Management from Equinox College in 2011, some several years prior to the appeal hearing before Judge Eldridge. The appellant accepts that he possessed this document at the time of the hearing in 2019 and he was in error for not placing it before Judge Eldridge. This document cannot properly be considered in a vacuum. It supports the undisputed fact that the appellant entered the country in 2010 with a command of the English language. He was able to undertake and pass a diploma course conducted in English the following year. I note that fairness requires every tribunal to conscientiously decide cases presented to them. In deciding whether earlier findings of fact from other tribunals should be carried forward into subsequent appeals, second tribunals should not be restricted to looking only at material post-dating the earlier decision. Earlier findings of fact are a starting point but are not determinative: *Secretary of State for the Home Department v. BK*

(Afghanistan) [2019] EWCA Civ 1358, [2019] 4 W.L.R. 111, at [44]. I am therefore satisfied that this document can properly be considered in my assessment.

58. Having considered the UK NARIC Certificate and the evidence as to the diploma awarded in 2011, I am satisfied that though it is a starting point in my assessment, Judge Eldridge's reasoning is fatally undermined. He considered the appellant not to be a genuine student. The award of the diploma establishes the error of the conclusion. Additionally, this erroneous conclusion underpins the fleeting observation, and fleeting it is, to the appellant's medium of study in India, at [32(a)] of Judge Eldridge's decision - "I have found he was not a genuine student here and, notwithstanding the academic achievements in India, he has not shown attendance for any course of study here or that he had good prospects of success at any English language he took." The assessment as to potential success in an English language test, and consideration as to whether he employed a proxy test taker, must be properly undertaken with an informed assessment of his existing command of the English language.

59. I commence my consideration on the foundation that the appellant was a genuine student in this country. The securing of his diploma evidences such state of affairs.

60. I turn to the question of whether the appellant, when planning in 2011 to apply for further leave to remain, used a proxy on 14 December 2011. As confirmed by the Presidential panel in *MA (ETS – TOEIC testing)* [2016] UKUT 00450 (IAC) this is intrinsically a fact sensitive exercise.

61. I find that the appellant was taught in the English language for several years in the medium of English language. This was not disputed by the respondent before me. Nor is it disputed that the appellant's degree course in India concluded in 2010. Later that year he secured entry clearance and following his arrival commenced and ultimately secured a diploma at Equinox College. Therefore, by the time he attended Opal College in December 2011, he had spent several years being taught primarily in English.

62. I find that his studies at Equinox College between 2010 and 2011 permitted the appellant to retain the command of English identified by the UK NARIC Certificate: CEFR Level C1, graded as expert. I am satisfied that in December 2011 the appellant could understand a wide range of demanding, longer text in the English language and recognise implicit meaning. He could function independently and with precision in English.

63. It is not the respondent's case in this matter, unlike in respect of New London College, Hounslow which was considered in *Ram*, that Opal College was a fraud factory. Unlike New London College, no evidence was relied

upon establishing that persons involved in the running of the college were convicted of fraud in respect of the conduct of tests.

64. I note the respondent's case that on the day in question, namely 14 December 2011, no tests undertaken at Opal College were 'released', i.e. considered safe from fraudulent activity. Thirty-four were found to be questionable, and one hundred and twenty-seven were found to be invalid.

65. I observe that the appellant's 'speaking score' was very much at the high end of achievement. This would be expected for someone who had completed a degree in the medium of the English language and whose command was identified at the expert CEFR Level C1.

66. I further observe that the appellant's writing score relating to the test he undertook on the same day placed him at the top end of proficiency. Again, this would be expected for someone with the appellant's identified command of the English language.

67. The scores are consistent with the appellant's command of English identified by the UK NARIC Certificate. The respondent relies upon the confirmation by ETS that someone else's voice is on the test recording. I am therefore required to consider the appellant's credibility in respect of an innocent explanation.

68. The appellant has consistently provided detailed evidence over time as to why he chose Opal College to undertake the course, being concerned to take a test in time before applying for further leave to remain and having been recommended to the college by a friend. He was clear that in 2011 there were no publicised concerns existing as to the *bona fides* of the college. He has been consistent as to how he attended the college, and the circumstances in which he took the separate tests. I accept his evidence that he had been unable to secure a timely IELTS test. His consistency in evidence on these issues does not require me to find that he is credible: *Ram*. However, it is a factor that can properly be placed in my assessment of whether he used a proxy in 2011.

69. I accept the appellant's evidence that he was not feeling under such pressure to remain in this country because of the money his family had provided to him in respect of his education that he felt a need to cheat in the TOEIC test. He had secured his diploma, and I accept was confident that he would pass the test, being mindful of the standard of his English, and the lower CEFR level he was required to meet.

70. I have considered the failure of the appellant to secure the recordings of his test from ETS, which is relied upon by the respondent. I observe the confused nature of his evidence at the hearing, though I note my confirmation to the representatives at the time that the appellant was not

aided by lengthy questions, some of which embraced more than one question. I also accept, on balance, that the appellant was truthful when confirming the attitude adopted by his previous solicitors, and the lack of professional care in their handling of his case. I find that the appellant placed his affairs in the hands of solicitors who considered the ETS investigations to be a 'big scam' and did not undertake sufficient or adequate steps to protect his position. In reaching such conclusion, I observe that SBM Solicitors ceased trading in 2021 and cannot now be approached to provide their observations as to events. I am therefore required to consider the appellant's evidence alone and I find that he is credible as to relevant events.

71. I am mindful that there may be many reasons as to why somebody with a reasonable command of the English language might use a proxy taker, for example fear of the adverse impact of failure, or a concern as to failure consequent to nerves. However, having considered the evidence presented by both parties, I conclude that the appellant was not motivated to use a proxy in 2011. I am particularly mindful that the usual approach adopted by those colleges engaged in fraud was to permit registered candidates to stand aside from the secure computer terminals and allow someone with superior English language skills to take the oral and written parts of the examination on their behalf. The proxies were organised by the colleges, not the registered candidates. The respondent does not challenge the fact that for several years the appellant had been sitting, and passing, examinations that required him to have a strong command of English. I am satisfied that the appellant enjoyed such command that he would not countenance standing to one side to permit someone he did not know, and whose command of English was unknown to him, to sit the test. As the appellant explained at the hearing, he considered it to be just another test. Standing back and considering the circumstances in late 2011, this sentiment rings true. He had been required to sit his degree exams in the medium of the English language. He had sat exams for his diploma a short while previously, again in English. I am satisfied that he was not fearful of failing the test. He had no subjective ground to be fearful. The standard to be met was lower that the competency he enjoyed.

72. I find, on balance, that the evidence provided by ETS in respect of the appellant is materially undermined by credible evidence, both documentary as well as the appellant's own evidence, as to establish that the appellant did not exercise deception when sitting the relevant tests in 2011.

73. In the circumstances, though the respondent has established a *prima facie* case as to the appellant's dishonesty, the appellant has provided a credible innocent explanation. I have found that he attended the test centre and had no reason to require a proxy test-taker considering his

command of the English language, and his regular success in examinations conducted in the medium of English. He therefore had skill in English, and no motivation to exercise deception. The burden of proof therefore switches back to the respondent. When the evidence is considered holistically, both the weighty general evidence in *DK and RK* and the appellant's own credible evidence, I conclude that the respondent has not established to the requisite standard that this appellant sat the speaking and writing test at Opal College on 14 December 2011 with the aid of a proxy test-taker. The respondent is therefore unable to establish deception on the appellant's part.

74. Consequently, the appellant's challenge to the respondent's reliance upon the suitability requirement established by paragraph 322(2) of the Immigration Rules is successful.

75. As to article 8 outside of the Rules, I observe the public interest in the maintenance of effective immigration controls. I additionally note the respondent's '*Educational Testing Service (ETS): casework instructions*' Version 4.0 (18 November 2020).

76. The appellant entered the country lawfully in July 2010 and has established a private life: *Ahsan v Secretary of State for the Home Department* [2017] EWCA Civ 2009 at [86].

77. I consider section 117B of the Nationality Immigration and Asylum Act 2002. The appellant's private life was established when his immigration status was temporary and precarious, and so I attach little weight to it. However, for the reasons detailed above, his immigration history is such that but for the allegation of deception his leave to remain would not have been curtailed on 24 October 2014. The decision to curtail was founded solely on the basis that he used TOEIC deception. I have found that allegation not to be proven to the requisite standard. The appellant has at all material times exhibited a strong command of the English language and there is no reason to believe that he will be a financial burden on the state, when he has the desire and means to be financially independent.

78. Respect for the appellant's private life and the absence of immediate countervailing public interest considerations are such that any removal at this juncture would be a disproportionate breach of the appellant's private life.

79. I therefore conclude that the appellant's removal would amount to a disproportionate interference with the right to private life for the purpose of article 8(2) ECHR. Consequently, the respondent's refusal is unlawful under section 6 of the Human Rights Act 1998.

80. The leave that follows from my decision is entirely a matter for the respondent – see [119-121] of Ahsan. I observe the recent Supreme Court judgment in *R (Afzal) v. Secretary of State for the Home Department* [2023] UKSC 46.

Notice of Decision

81. By a decision sent to the parties on 9 February 2023 the Upper Tribunal set aside the decision of the First-tier Tribunal dated 17 June 2022.

82. The decision is remade, and the appeal is allowed.

D O'Callaghan
Judge of the Upper Tribunal
Immigration and Asylum Chamber
4 December 2023