



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM CHAMBER**

**Case No: UI-2023-001174**  
**First-tier Tribunal No:**  
**HU/53570/2021**  
**IA/09047/2021**

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**  
**On the 25 June 2023**

**Before**

**UPPER TRIBUNAL JUDGE O'CALLAGHAN**

**Between**

**SAYEM AHMED**  
(NO ANONYMITY ORDER MADE)

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr S Karim, Counsel, instructed by Liberty Legal Solicitors  
For the Respondent: Mr A Basra, Senior Presenting Officer

**Heard at Field House on 12 June 2023**

**DECISION AND REASONS**

**Introduction**

1. The appellant appeals against the decision of Judge of the First-tier Tribunal Ford ('the Judge'), sent to the parties on 21 February 2023, dismissing his challenge to the respondent's refusal of his human rights application.

**Brief Facts**

2. The appellant is a national of Bangladesh and presently aged 33.
3. He has a lengthy immigration history. Relevant to this appeal:

- He arrived in the United Kingdom on 5 September 2009 and was granted leave to enter as a Tier 4 (General) Student.
  - He made an in-time application for leave to remain as a Tier 4 (General) Student. The application was refused on 4 April 2012. He exercised a right of appeal, which was subsequently dismissed.
  - He applied for indefinite leave to remain on 2 June 2020. The application was refused by a decision dated 2 July 2021 with the respondent relying, in part, upon the appellant having used fraud to secure a TOEIC certificate from the Educational Testing Service. In reaching such conclusion she noted a judicial finding in February 2017 that the appellant had used a proxy test taker.
4. The appeal came before the Judge at a remote hearing conducted by CVP on 17 February 2023. The appellant gave evidence, and the core of his case was that whilst he accepted a different voice could be heard on the recording, there had been a break in the chain of custody and the wrong recording had been provided. It was his case that he attended the TOEIC test centre and had not used a proxy test taker. His appeal was dismissed by the decision dated 21 February 2023.

### **Grounds of Appeal**

5. The appellant's grounds of appeal were drafted by Mr Karim, who represented him before the Judge. Five challenges are advanced before this Tribunal:
- Procedural unfairness.
  - Failure to consider material evidence.
  - A failure to lawfully consider the limited scope of the respondent's contention as to the appellant's use of a proxy.
  - A lack of proper care in the preparation of the Judge's decision.
  - A materially flawed article 8 ECHR assessment.
6. Upper Tribunal Judge Sheridan granted the appellant permission to appeal on all grounds by a decision dated 8 May 2023.
7. The respondent filed a rule 24 response dated 16 May 2023.

### **Discussion**

8. Mr Basra properly accepted that two material errors of law arise in the Judge's decision. Firstly, he acknowledged paragraphs 17 and 18 of Mr Karim's skeleton argument, dated 4 May 2022, filed with the First-tier Tribunal:

'17. However, the UT in a recent judgement, appears to conclude that the three-stage process isn't necessary and that the burden is on

the Respondent and that the Appellant must simply provide a response and all factors must be considered. ... *DK and RK (ETS: SSHD evidence, proof) India* [2022] UKUT 112 (IAC) (25 March 2022) ....

18. This judgment, however, does not take into account what is said by the Court of Appeal at [7] of *Alam v Secretary of State for the Home Department* [2021] EWCA Civ 1538 (22 October 2021), where the Court appears to approve the three-stage process.'
9. Mr Basra noted that the Judge made reference to having considered the guidance provided in the cases of *Alam* and *DK and RK* at [16] of her decision but accepted that the Judge then entirely failed to address the legal argument advanced on behalf of the appellant at the hearing, as identified at paragraphs 17 and 18 of the skeleton argument detailed above. This legal argument went to the core of the appellant's contention as to how there being, on his case, a break in the chain of custody should properly be considered. Mr Basra accepted that the failure to expressly consider the core legal argument advanced on the appellant's behalf established a material error of law.
10. The second material error arises in respect of the Judge's consideration of evidence provided by a witness for the appellant, a Mr. Rashid. At [27] of the decision - and I observe the repeated confusion in the decision of the name Rashid with Rahman, another of the appellant's witnesses - the Judge detailed:
  - '27. While I've taken Mr. Rahman's evidence into account, I do not consider it to be independent evidence as it was made clear that he and the appellant are close friends. In addition, I had no documentary evidence as to Mr. Rahman's own standard of English language reading, writing and speaking skills in 2012. I was told that he talked [sic] the appellant English before he came to the UK. But without knowing more about Mr. Rahman's own level of English language skills at that time, I attach little weight to this factor.'
11. The appellant observes that whilst Mr Rashid was cross-examined, it was not to any length, and it was not advanced at the hearing that that his evidence should be disbelieved because he is a friend of the appellant. This is not a matter where inconsistencies arise in the evidence, as considered by the Court of Appeal in *R (Maheshwaran) v. Secretary of State for the Home Department* [2002] EWCA Civ 173, [2004] Imm AR 176. The appellant observes that no closing submissions were made challenging Mr Rashid's credibility - though I consider that this alone is not determinative of the matter of credibility - nor did the Judge raise any concerns as to the evidence during the hearing. It appears that nobody asked Mr. Rashid as to whether he was giving evidence solely to help a friend, and therefore was not being truthful. I observe the common law rule of evidence identified by the House of Lords in *Browne v. Dunn* (1893) 6 R 67 that if a witness's evidence is to be disbelieved, they must be given

a fair opportunity to deal with the allegation. Mr. Basra accepted that the Judge should have asked Mr. Rashid to address this concern.

12. I note that the Judge gave a further reason for placing limited weight on Mr. Rashid's evidence: a failure to provide documentary evidence establishing his command of the English language in 2012. I consider that the failure to provide such evidence, which could have included evidence of his teaching at an English language institute in Bangladesh prior to 2012, was a matter that the Judge could properly rely upon. However, I am ultimately satisfied that her conclusion as to the weight to be placed upon Mr. Rashid's evidence was significantly, and adversely, influenced by her view as to the friendship, and consequently the error of law is such that the conclusion cannot be saved by the second reason provided. The error of law is material.
13. Having accepted that a material error of law has been established, there is no requirement for me to consider the remaining grounds of appeal.

### **Resumed Hearing**

14. I am mindful that the presumption is for a resumed hearing to be undertaken by the Upper Tribunal.
15. Both representatives requested that the matter be remitted back to the First-tier Tribunal. I acknowledge that there will be significant evidence to be considered at the resumed hearing, coupled with at least one additional witness attending. I am also mindful of the fact that the core of the appellant's case was simply not considered by the Judge, and so I am satisfied that it would be unfair for the appellant not to enjoy the first bite of the cherry in respect of advancing his case, particularly in circumstances where any appeal from this Tribunal will be subject to the second appeal test. In those circumstances I conclude that the only fair course is for the matter to be remitted back to the First-tier Tribunal for a fresh hearing.
16. Though not a direction from this Tribunal, as the matter is being remitted, the appellant should properly consider filing an updated skeleton argument addressing his argument as to the three-stage process of consideration, drawing judicial attention to *Secretary of State for the Home Department v. Akter* [2022] EWCA Civ 741, [2022] 1 WLR 3868, where both *Alam* and *DK and RK* are considered.

### **Notice of Decision**

17. The decision of the First-tier Tribunal sent to the parties on 21 February 2023 is subject to material error of law and is set aside.
18. No findings of fact are preserved.

19. The resumed hearing will take place in the First-tier Tribunal at Taylor House, to be heard by any Judge other than Judge of the First-tier Tribunal Ford.

*D O'Callaghan*  
**Judge of the Upper Tribunal**  
Immigration and Asylum Chamber  
**21 June 2023**