IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003547

First-Tier Tribunal No: HU/57346/2023
LH/00796/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 18th April 2024

Before

UPPER TRIBUNAL JUDGE JACKSON
DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MD ASHRAFUR RAHMAN CHOWDHURY
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Ms A Everett, Senior Home Office Presenting Officer
For the Respondent: Mr S Karim of Counsel, instructed by Liberty Legal Solicitors LLP

Heard at Field House on 7 March 2024

DECISION AND REASONS

1. In a decision promulgated on 11 December 2023, UTJ Jackson found an error of law in the decision of First-tier Tribunal Judge Graves promulgated on 14 July 2023, in which Mr Chowdhury's appeal against the decision to refuse his human rights claim dated 6 October 2022 was allowed. A copy of that decision is annexed to this one. For ease I continue to refer to the parties as they were before the First-tier Tribunal, with Mr Chowdhury as the Appellant and the Secretary of State as the Respondent.

2. The Appellant is a national of Bangladesh, born on 4 May 1984, who first entered the United Kingdom as a Tier 4 (General) Student on 3 October 2010. He had further leave to remain as such granted to 15 February 2014. On 18 May 2013 the Appellant's leave to remain was curtailed to expire on 17 July 2014. A later application for leave to remain as a student was granted to 30 May 2015. The

Appellant's latest application for leave to remain was made on 10 September 2021 on human rights grounds, it is the refusal of this application which is the subject of this appeal.

3. The Respondent refused the application the basis of (i) suitability grounds, that the Appellant had previously relied on a false document/false representations, namely a false English language test certificate), (ii) the requirements of the Immigration Rules in Appendix FM and paragraph 276ADE not being met; and (iii) there being no other basis upon which leave to remain should be granted outside of the Immigration Rules.

The appeal

Appellant's evidence

4. In his written statement, signed and dated 2 February 2023, the Appellant set out his immigration and studying history as well as his educational background in Bangladesh. This included English modules from primary school upwards and specific English courses and English language films and TV. The Appellant's learning environment in the UK has been in English, as has his work and social environment. The Appellant passed an IELTS test on 24 November 2007 with an overall score of 4.5.

5. The Appellant denies that he used a proxy test taker and states that he took the ETS test himself; which he did at a convenient location over two days and with TOIEC the results were quicker. The Appellant booked his test in person at Colwell College and paid £150 in cash for the test. He sat the speaking and writing test on 28 March 2012 and the listening and reading test on another day which he failed and retook on 18 May 2012. The test centre was less than half an hour's walk from the Appellant's home. He was checked in by a receptionist to whom he gave his passport.

6. The speaking test took around 20-25 minutes and was taken on a computer. It included 11 questions and instructions were given for each. The writing test took place 15 minutes after the speaking test and had 8 questions, lasting about an hour. The questions included writing a sentence based on a picture, responding to a written request and writing an opinion essay, but the Appellant could not remember the specific topics. The Appellant received the results about two weeks after the test.

7. The Appellant retook the reading and listening test. The latter consisted of 4 stages of scenic photographs which he had to view and listen to a programme on a computer showing the pictures and sounds relating to them, with short conversation. The reading test was from extracts of articles and stories which lasted about 75 minutes, in three parts. The Appellant received the results about a week after the test.

8. The Appellant also sets out the impact of the allegation of deception on him and his plans for work and study. He has been living in the United Kingdom since 2010 and has good relationships here with his family (his cousin who he lives with and his family) and friends. The Appellant has not returned to Bangladesh during his time in the UK and has lost contact with friends there and both of his parents have passed away. The Appellant has no contact with his brother and no support there on return.

9. The Appellant attended the oral hearing, adopted his written statements and gave evidence in English.

10. In cross-examination, the Appellant stated that he had chosen Colwell College as TOIEC exams were reliable at that time and he had spoken to Sevenoaks College, who had recommended a TOIEC course. Colwell College was recommended by friends from Hamilton College who had taken their test at the same place. The Appellant is no longer in touch with any of these friends and he is unaware if any of them had their test scores cancelled, although one called Farhad had won his case. The Appellant paid £150 to sit the exam. Colwell College was the nearest to the Appellant's address, on Alie Street in Aldgate East and he did not look at other colleges.

11. The Appellant accepted that the voice recording he had received was not him. He had tried to contact ETS to obtain the correct recording, but they said the one sent was all they had and nothing else was available.

12. The Appellant has not taken any other English language exam since the test in question as he has not been required to. Since the Respondent's decision, he has been living with his cousin-brother and trying to prove his innocence. He asserted that he sat the exams himself and did not cheat.

Closing submissions

13. On behalf of the Respondent, Ms Everett relied on the reasons for refusal letter dated 6 October 2022 and submitted that the Respondent's evidence was easily adequate to discharge the burden of proof in this case that the Appellant had cheated.

14. Ms Everett had undertaken further research into Colwell College and the Respondent's case was that there was no evidence of a Colwell College in London that was licensed to operate TOIEC testing at the relevant time. In the absence of a licence, the look up tool must have referred to Colwell College in Leicester as the only licensed provider. However, anecdotally there was some reference to a Colwell College in London from time to time. It has not been possible for Ms Everett to obtain the licensing conditions of Colwell College in Leicester to see if this included any other premises, such as in London; but equally there is no evidence at all of two separate entities both called Colwell College. However, even if the Appellant sat or paid a proxy to sit a test in London, it was submitted that this did not mean that the Respondent's evidence did not bite in this case.

15. Particular reliance was placed on paragraph 129 of DK and RK, that when the voice recording is not of the Appellant, it is highly probable that he cheated. Whilst it is possible that there was a chain of custody error in the recording, the evidence all points to that not happening as there would need to be considerable effort for a genuine test to be substituted for a fraudulent one. It is not sufficient for the Appellant to merely assert this as a possibility when that would be against the weight of the evidence.

16. On behalf of the Appellant, Mr Karim relied on his skeleton argument and submitted that the Appellant should be found to be credible.

17. In relation to Colwell College, the situation was unsatisfactory given that there was nothing more than speculation as to whether there were two separate colleges or one single college with a satellite location in London. There have

however been references to a Colwell College in London, for example in Ahsan, such that it must have been accepted that there was such a location. It was noted that there was no documentary evidence available from the Respondent as to licensing conditions or otherwise as to Colwell College and if the Home Office were not able to obtain this, how is an individual Appellant able to do so in support of his claim. Mr Karim submitted that in DK and RK there was overwhelming evidence in support of deception being used. However, in the present appeal, there is a basic difficulty even as to where the test was taken. Overall in this case, the evidential burden has not been met, particularly as the only evidence submitted by the Respondent is in relation to Colwell College in Leicester. In any event, if this stage is met, the Appellant has given an explanation to the minimum level of plausibility and the legal burden has not been met on the evidence.

18. As to that evidence, Mr Karim noted that there was no evidence of any criminal prosecutions having been pursued, successfully or otherwise, following the Project Façade report into Colwell College and it is implausible that the level of fraud was so high at that location that not a single test result was released as valid. It was submitted that a single genuine test could have blown the whistle on the whole fraud. Reference was made to a BBC news article by the same journalists who had originally been involved in the Panorama programme on ETS testing, which stated that if true, the whole thing would be the largest ever fraud. That, it was submitted, was itself implausible and highlights the problems with the ETS evidence.

19. In this particular appeal, it was submitted that the generic evidence relied upon by the Respondent was not sufficient to discharge even the first part of the test, the evidential burden. When asked about the validity of the look up tool as specific evidence about this Appellant, Mr Karim submitted that this was ‘not gospel’ on the facts of this case and was disputed, it being undermined by the lack of information as to where the test was taken and there could be mistakes on the look up tool.

20. Mr Karim further relied on the All-Party Parliamentary Group report on TOIEC dated 18 July 2019 which, although found not to be admissible in in DK and RK (parliamentary privilege, evidence) [2021] UKUT 61, was admissible in Alam v Secretary of State for the Home Department [2021] EWCA Civ 1538. It was submitted that both decisions were endorsed by the Court of Appeal in Akter v Secretary of State for the Home Department [2022] EWCA Civ 741.

21. The Appellant first took his listening and reading test in March, failed both and then retook on 18 May. Mr Karim suggested that if he had used a proxy, he would not have failed the first time. The Respondent has not addressed the retake and the look up tool only refers to the speaking and writing test on 28 March 2012. There is no documentary evidence available as to the first failed test in March.

22. Mr Karim submitted that there were a number of factors against the Appellant cheating in his test, including that he was under no time pressure to pass as his test was taken 9 weeks before his application for leave to remain in May 2012; he had learnt English from a young age; had worked in the United Kingdom; had passed the IELTS in 2007 and completed an English course prior to taking the exam. Overall, the Appellant had no motive to cheat. Further, the Appellant had given consistent and credible evidence and his recollection of taking the test had

largely been unchallenged. The Appellant's contact with ETS was also hardly indicative of a person who had cheated.

23. In relation to Article 8, Mr Karim relied on his skeleton argument and submitted that if it were found that the Appellant had not used deception, then in accordance with the Respondent's policy, he would be entitled to six months' discretionary leave such that the appeal should be allowed on human rights grounds for that reason alone.

24. On behalf of the Appellant, the skeleton argument relies on his length of residence in the United Kingdom since 2009 and close bond with friends and relatives here, in contrast to no remaining family relationships in Bangladesh. There is reference to the Appellant suffering from anxiety and depression (although no medical evidence of the same is relied upon) and that overall the Appellant would face very significant obstacles to his reintegration in Bangladesh and his removal would be disproportionate.

Findings and reasons

25. The first issue in this appeal is whether the Appellant used deception by using a proxy test taker for an English language test on 28 March 2012. The Court of Appeal in Ullah v Secretary of State for the Home Department [2024] EWCA Civ 201 recently affirmed the three stage test in deception cases as follows:

> 25. The legal burden of proving that the Appellant acted dishonestly lies upon the Secretary of State. There is a three-stage process: (i) the Secretary of State first must adduce *prima facie* evidence of deception ("*the first stage*"); (ii) the Appellant then has a burden of raising an innocent explanation which satisfies the minimum level of plausibility ("*the second stage*"); and (iii), if that burden is discharged, the Secretary of State must establish on a balance of probabilities that this explanation is to be rejected ("*the third stage*"). This staged approach was approved by the UT in *SM and Qadir v Secretary of State for the Home Department (ETS - Evidence - Burden of Proof)* [2016] UKUT 229 (IAC), by the High Court in *R (Abbas) v Secretary of State for the Home Department* [2017] EWHC 78 (Admin), and, by the Court of Appeal in *Secretary of State for the Home Department v Shehzad and Chowdhury* [2016] EWCA Civ 615 and *Majumder and Qadir v Secretary of State for the Home Department* [2016] EWCA Civ 1167.

26. In respect of the first stage of the test, in DK & RK (ETS: SSHD evidence; proof) India [2022] UKUT 00112 IAC, the Upper Tribunal found that:

> 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 appellant whose test entry is attributed to a proxy.

27. Although Mr Karim submitted that the first stage of the test was not satisfied in the current appeal, in part because of matters which he said undermined the generic evidence relied upon by the Respondent and in part because of the specific issues in this appeal in respect of Colwell College; we find, consistently with DK and RK, that the Respondent has discharged the initial evidential burden of proof. This is based both on the generic evidence, but also on the look-up tool which identifies the Appellant's specific test as invalid and the accepted fact that the voice recording of the speaking part of the Appellant's test was not his voice.

28. As to the generic evidence, we have taken into account the conclusions in DK & RK in paragraph 4 that:

> 4. In this decision we examine the evidence on which the Secretary of State relies to establish the frauds in individual cases. We conclude that despite the general challenges made, both in judicial proceedings and elsewhere, there is no good reason to conclude that the evidence does not accurately identify those who cheated. It is amply sufficient to prove the matter on the balance of probabilities, which is the correct legal standard. Although each case falls to be determined on its own individual facts and evidence, the context for any such determination is that there were thousands of fraudsters and that the appellant has been identified as one of them by a process not shown to have been generally inaccurate.

29. The criticisms of the generic evidence on behalf of the Appellant are in substance the same as those made to the Upper Tribunal in DK & RK and there remains before us, nothing more than unsubstantiated concerns about a process which has still not been shown to be generally inaccurate.

30. In relation to the All-Party Parliamentary Group on TOIEC, the parts relied on by the Appellant in his skeleton argument are from the section on findings and therefore fall outwith the material that can be admissible in appeal proceedings for the reasons given in DK and RK (parliamentary privilege, evidence) and approved in Akter. The decision in Alam was, in the latter case, considered not to be incompatible with DK and RK as it was confined to consideration of the evidence given to the APPG (albeit not initially in evidence before the Upper Tribunal, but considered by the Court of Appeal). We do not therefore consider the parts relied upon specifically by the Appellant in the present appeal to be admissible. The whole report, including the record of evidence was available to us, but in the absence of any specific sections of the evidence being relied upon, we do not find, consistently with the appeals in which detailed consideration has been given of the same with full argument by the parties in those cases, that there is any part of that evidence which significantly undermines the generic evidence relied upon such that the initial evidential burden is not met.

31. The only further specific evidence relied upon by the Appellant before us (compared to what has been considered in the reported cases above) was a BBC news article ‘The English test that ruined thousands of lives’, undated other than a record that it was published 5 days before it was printed, so we assume from sometime in the first half of 2013 when the Appellant’s appeal bundle would have been prepared before his hearing in the First-tier Tribunal. The article records that a BBC investigation raises fresh doubts about the evidence used to curtail leave to remain for students who allegedly cheated in an English language test. The article further contains quotes from MPs and students as to their opinions about the evidence and level of fraud in English language testing, which includes reference to a figure of 97% of tests being suspicious being ‘implausibly high’ and representing the largest exam cheating scandal in British history.

32. We do not find that this article takes the Appellant’s case any further. It primarily refers to evidence which had already been given and considered by the Upper Tribunal in DK & RK without any further specific detail or new matters which could lead us to reconsider the conclusions reached in that appeal on the generic evidence. We attach very little weight to the quotes from named individuals which contain no detail or reasons and offer only the opinion of those quoted without more. We also note that whilst 97% of tests were considered suspicious in the relevant period, only 58% of those were actually considered to be invalid – whilst still a high number, it is not as ‘implausibly high’ as the headline total which included tests which were ‘questionable’ (and upon which,

so far as we understand, the Respondent does not curtail leave to remain or refuse further applications for deception).

33. As to the specific evidence, the look-up tool shows the Appellant's name, date of birth and certificate number with the test results showing as invalid. It contains the test centre as Colwell College and date of test as 28 March 2012. A separate page shows the average results for Colwell College on 28 March 2012 and that of the 43 tests taken, 29 were invalid and 14 were questionable.

34. The Respondent also relies on 'Project Façade – criminal inquiry into abuse of the TOIEC' for Colwell College, Leicester, dated 15 May 2015 which refers to an ongoing criminal investigation and results of two audits at Colwell College with a conclusion of organised and widespread abuse of TOIEC at this test centre.

35. The Appellant's case in relation to the look-up tool was simply an assertion that this was not 'gospel' in terms of evidence and that it was undermined by there being no specific address or detail for Colwell College. We do not find that the look-up tool was undermined by the details it included as to the location of the test centre, nor that there is any basis to consider that the look-up tool itself is not reliable, generally or as to the specific result in this appeal. In terms of the location of the test centre, there is a lack of clear evidence as to whether there was a single Colwell College registered in Leicester which had a separate branch located in London or whether there were two separate Colwell Colleges, one in Leicester and one in London which were not connected or associated.

36. On balance, we find it most likely that the Appellant did register to take his English language test at a Colwell College in London, which was relatively close to his home address, but that this was a branch of Colwell College in Leicester rather than a separate entity. This is because we accept Ms Everett's submission that further to her investigations, whilst there was anecdotal evidence of a London location for Colwell College, there is no evidence of any separate entity licenced to conduct English language tests in London of the same name. We accept there is also no evidence of the licensing conditions for Colwell College in Leicester or whether this included a branch in London, but if it was a separate entity that was not licensed at all, any test taken there would not therefore have been valid for a quite different reason.

37. The Appellant's case in relation to the other information on the same test day from Colwell College and the Project Façade report was in essence that neither could be relied upon as the location of the test centre was unknown and any evidence in relation to Colwell College in Leicester could not reliably be applied to any tests undertaken in London, where the Appellant took his test and where there is at least some evidence of a test centre under that name. We consider this further later on in the decision in relation to the final third stage of the test as we do not consider this evidence to be necessary to find that the first evidential burden has been met by a combination of the generic evidence and the look-up tool relating to the Appellant's specific test.

38. The second stage of the test is then for the Appellant to give an explanation which meets the minimum level of plausibility. We find that he has done so, with details about his test which go beyond a bare denial of deception.

39. The third stage of the test is then whether overall, taking into account all of the evidence, the Respondent has discharged the legal burden of establishing the Appellant used deception in his English language test on 28 March 2012.

40. First, we take into account the detail of the Appellant's account of his English language test. This includes the name and address of the college, why he chose it, how he booked the test, how much he paid for it, details about the speaking and writing tests in particular and how quickly he received his results.

41. The Appellant's account of the TOIEC tests that he said he personally undertook contain some very specific details of the speaking and writing tests, including the number of questions in each and the structure, including the three different aspects of the writing test. However, in contrast to this level of detail, he was unable to recall any of the topics he was personally asked or any other information about the test centre or contents of the test. The differing level of detail of his recollection is fairly stark and the specific detail he did claim to recall was more than one would reasonably expect a person to be able to remember more than ten years after the event. We find on balance, that it is more likely than not that the level of detail in the Appellant's statement about his test on 28 March 2023 was not a genuine recollection of his personal experience, but was simply a recitation of the specific information publicly available in the 'TOIEC User Guide, Speaking & Writing'. The remaining detail of a partial address and cost of the exam is not very detailed or persuasive at all, nor is the recollection of giving his passport for ID which is also referred to in the same User Guide.

42. Secondly, we consider the Appellant's background in the English language. We accept that he had some basic schooling in two modules in English and that he had some exposure to English through TV and films; as well as passing an IELTS test in 2007 and then studying in the United Kingdom. The Appellant has not taken any other English language tests in the United Kingdom other than the ETS tests in 2012, so there is no other formal assessment of his English language ability, albeit he did undertake studies in English between 2010 and 2015, with a record of modules he passed during that time. We note that the Appellant is likely to have needed to use English during his residence here and for work purposes and that he was able to conduct the appeal hearing in English without an interpreter. However, much of that could have been built up since 2012 and any assessment of his English language skills now is of very little weight in assessing his ability when the test was taken.

43. Thirdly, it was submitted on behalf of the Appellant that he had no need to cheat in the English language test, particularly given his background and education but also as he had sufficient time to take the test before he needed to make a further application for leave to remain and that if he had used a proxy test taker, it was unlikely that he would have failed the reading and listening part of the exam and needed to retake that in May 2012 (with no allegation by the Respondent that deception was used for this test). We attach relatively little weight to this, for the reasons given in MA (ETS – TOIEC testing) [2016] UKUT 450. There are a wide variety of reasons why a person may cheat and it is unlikely that this will be a significant factor.

44. Fourthly, we take into account that the Appellant requested a copy of his recording from ETS and that he accepts that it is not his voice on the recording that he received. The Appellant made a further attempt to obtain more information from ETS which was unsuccessful and it was submitted that he would not have made the request in the first place or followed it up if he had in fact used a proxy test taker as it could help prove the case against him. However, we consider a voice recording which is not of the Appellant to be strong evidence of deception, particularly in the absence of any specific challenge to, for example,

the chain of custody of such evidence (which has not been accepted as an error in other cases such as DK & RK) and the relatively implausibility of a genuine recording of the Appellant being swapped for a false one.

45. Fifthly, we attach some, but not significant weight to the information about tests taken at Colwell College and the Project Façade report given our findings that it was likely that the Appellant registered for his test at a London branch of the same college rather than at an entirely separate entity. It seems relatively unlikely that the same entity would have a significant level of fraud only in one location but none in another. We accept however that what was observed specifically in relation to the premises in Leicester does not automatically apply to anything that may or may not have happened in London and we taken into account the lack of any further information as to what happened to the criminal investigation beyond the relatively brief summary in 2012.

46. Finally, we take into account what we have already said about the generic evidence relied upon by the Respondent and the individual look-up tool in relation to satisfaction of the initial evidential burden.

47. Overall, we find that the Respondent has satisfied the legal burden of proving on the balance of probabilities that the Appellant used deception in his English language test. We find that the look-up tool, generic evidence and the fact that the voice recording is not of the Appellant to be powerful evidence of deception which the Appellant's background and relatively limited account of taking the test, does not undermine or detract from.

48. The second issue in this appeal is whether the Appellant's removal from the United Kingdom would be a disproportionate interference with his right to respect for private and family life. The Appellant can not meet the requirements of the Immigration Rules as he fails to meet the suitability requirements having used deception in a previous application. In any event, the Applicant has not established that he would face very significant obstacles to reintegration in Bangladesh as required by paragraph 276ADE of the Immigration Rules. This is because he has spent the majority of his life in Bangladesh, there is nothing to suggest he no longer speaks the language or that he could not use his skills and experience to re-establish himself there, even if he is unable to re-establish his relationship with his brother or receive support from him.

49. Turning to the five stage approach to the assessment under Article 8, we find that the Appellant has established private life in the United Kingdom since he has resided here from 2010 during which time he studied for a number of years up to 2015 and has some work experience (although no specific details of employment or when have been submitted) and will undoubtedly have built up some friendships as well as his relationship with his cousin with whom he has been living. There is however very little detail in the Appellant's claim as to the nature and quality of his private life here and we have not had our attention drawn to any specific or strong ties beyond his relationship with his cousin. There is however sufficient to engage Article 8 and the Appellant's removal would be an interference with the private life he has established here. Any interference would be in accordance with the law as the Appellant cannot meet the requirements of the Immigration Rules for a grant of leave to remain and would be in accordance with a legitimate aim through the maintenance of immigration control.

50. The final stage is a proportionality balancing exercise. On the Appellant's side, we take into account the private life which he has developed in the United

Kingdom as set out above; albeit little weight is to be attached to this in accordance with section 117B(4) and (5) of the Nationality, Immigration and Asylum Act 2002 as it was developed at a time when the Appellant's leave to remain was precarious and, since 2015 during a time which he has remained unlawfully. On the Respondent's side, we consider the strong public interest in the maintenance of immigration control in section 117B(1) of the Nationality, Immigration and Asylum Act 2002 and that is strengthened considerably in this case given the Appellant has previously used deception to obtain further leave to remain. The Appellant speaks English and is not reliant on public funds, which are neutral factors in the assessment of public interest.

51. Overall, the public interest in removal of this Appellant significantly outweighs the interference with the private life he has established in the United Kingdom and his removal would not be a disproportionate interference with his right to respect for private and family life contrary to Article 8 of the European Convention on Human Rights.

Notice of Decision

For the reasons set out in the decision annexed, the making of the decision of the First-Tier Tribunal did involve the making of a material error of law and as such it was necessary to set aside the decision.

The appeal is remade as follows:

The appeal is dismissed on human rights grounds.

G Jackson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

17th April 2024

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003547

First-tier Tribunal No: HU/57346/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

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Before

UPPER TRIBUNAL JUDGE JACKSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MD ASHRAFUR RAHMAN CHOWDHURY
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Ms A Everett, Senior Home Office Presenting Officer
For the Respondent: Mr M West of Counsel, instructed by Liberty Legal Solicitors LLP

Heard at Field House on 23 October 2023

DECISION AND REASONS

1. This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by video, using Teams. There were no technical difficulties for the hearing itself and the papers were all available electronically.

2. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Graves promulgated on 14 July 2023, in which Mr Chowdhury's appeal against the decision to refuse his human rights claim dated 6 October 2022 was allowed. For ease I continue to refer to the parties as they were before the First-tier Tribunal, with Mr Chowdhury as the Appellant and the Secretary of State as the Respondent.

3. The Appellant is a national of Bangladesh, born on 4 May 1984, who first entered the United Kingdom as a Tier 4 (General) Student on 3 October 2010. He

had further leave to remain as such granted to 15 February 2014. On 18 May 2013 the Appellant's leave to remain was curtailed to expire on 17 July 2014. A later application for leave to remain as a student was granted to 30 May 2015. The Appellant's latest application for leave to remain was made on 10 September 2021 on human rights grounds, it is the refusal of this application which is the subject of this appeal.

4. The Respondent refused the application the basis of (i) suitability grounds, that the Appellant had previously relied on a false document/false representations, namely a false English language test certificate), (ii) the requirements of the Immigration Rules in Appendix FM and paragraph 276ADE not being met; and (iii) there being no other basis upon which leave to remain should be granted outside of the Immigration Rules.

5. Judge Graves allowed the appeal in a decision promulgated on 14 July 2023 on all grounds. In summary, it was found that the Respondent had not discharged the burden of proof to establish any deception by the Appellant and although he did not meet the requirements of the Immigration Rules for a grant of leave to remain, the Respondent's policy was to grant a short period of leave such that overall the refusal would be a breach of Article 8 of the European Convention on Human Rights. I deal below with the detailed reasons for those findings.

The appeal

6. The Respondent appeals on three grounds as follows. First, that the First-tier Tribunal erred in law in finding that the Appellant took his English language test in London, against the evidence and in circumstances where the Respondent maintained the test was taken in Leicester. Secondly, that the First-tier Tribunal erred in law in failing to consider the Respondent's application for an adjournment due to staff sickness, such that there was not a fair hearing. Lastly, that the First-tier Tribunal erred in law in failing to adjourn this appeal pending the cases of Varkey and Joseph.

7. In a rule 24 response, in summary the Appellant opposed the appeal on the basis that there was no evidence of any application to adjourn on either basis and on the facts, it was open to the Judge to conclude that the test centre was in London.

8. At the oral hearing, on behalf of the Respondent, Ms Everett did not pursue the first or the second grounds of appeal. She reiterated that the grounds were not included in bad faith, but it was accepted that there was no evidence of any application to adjourn such that the appeal could not succeed on either of these grounds.

9. On the second ground of appeal, the issue was identified as a live issue of where the English language test was taken but there was no clear finding by the First-tier Tribunal as to whether it was in Leicester or London; which makes the remaining findings unsafe. It was accepted that there was no documentary evidence of a test centre address either way before the First-tier Tribunal.

10. On behalf of the Appellant, Mr West submitted that the First-tier Tribunal had adequately considered the issue of deception with clear findings on the evidence that the Respondent had not discharged the burden of proof on her. In so doing, it was recognised that the initial evidential burden had been satisfied as in the cases of SM & Qadir v Secretary of State for the Home Department (ETS –

Evidence – Burden of Proof) [2016] UKUT 00228 (IAC) and RK and DK (ETS: SSHD evidence, proof) [2022] UKUT 00112. However, the Respondent did not attend the hearing before the First-tier Tribunal to challenge the evidence further and instead the Judge asked appropriate clarification questions and expressly approached the evidence with caution.

11. In terms of the Respondent's evidence, in the main this was the usual generic evidence and the look-up tool but without anything specific to show that the location was Colwell College in Leicester to which the Project Façade report relied upon related. The background evidence was not specifically in relation to the Appellant and there was no supporting evidence of the Appellant's test being taken in Leicester. The Respondent was aware of the Appellant's claim that he had taken his test at Colwell College in London as this was contined in his witness statement prepared months before the hearing, being consistent with his evidence or walking to the venue. In addition, a Colwell College in London was mentioned in Ahsan v Secretary of State for the Home Department [2017] EWCA Civ 2009. The Respondent's review did not address or rebut this position; nor was the Respondent's position properly advanced before the First-tier Tribunal. In the absence of a representative for the Respondent, the First-tier Tribunal properly considered the refusal letter and written submissions for the substance of why the appeal was resisted.

12. Mr West noted that there was no ground of challenge of perversity and there were adequate reasons in the decision for finding the anomaly between the Project Façade report and the Appellant's claim as to the location of the test centre. It was accepted that it was possible that there was more than one branch of Colwell College and the evidence relied upon by the Repsondent could not readily be read across to a different site outside of Leicester. Overall, the issue was considered in detail and it was rationally open to the First-tier Tribunal to reach the conclusion that it did. It was submitted that given that the Appellant was found to be credible, it must have been accepted that he took the test in London and therefore the conflict was identified and resolved in the Appellant's favour when the decision is read as a whole.

Findings and reasons

13. The only live ground of appeal in this case is as to whether the First-tier Tribunal properly resolved a conflict of fact between the parties as to whether the Appellant took his test at Colwell College in Leicester or Colwell College in London. This is important as the finding is relevant to the assessment of the Appellant's credibility and as to the weight to be attached to the Respondent's evidence and Project Façade report in particular. As such, the finding is crucial to the remainder of the findings as to deception and ultimately whether the Respondent has discharged the burden of proof in this case.

14. The Appellant's claim before the First-tier Tribunal was that he took his English language test at Colwell College, near Aldgate East in East London and less than a half an hour walk from where he was living in East London at that time. He had attended the test centre in person. The Respondent's case was that the test was taken at Colwell College in Leicester and relied on supporting evidence as to evidence of widespread fraud at that College/location. It is not in dispute that this was a clear conflict of evidence between the parties.

15. In the First-tier Tribunal decision, the background evidence and authorities relied upon by the Respondent was set out in reasonable detail in paragraphs 20

to 30 of the decision, with reference to the initial evidential burden being met by the Respondent in those authorities. In paragraph 32 of the decision, the Judge notes that the name and address of the college does not appear on the Appellant's TOIEC certicates, but the look up tool identified the test venue as Colwell College. The look up tool matches the test certificate numbers, although some anomalies in the look up tool were noted, including that there were two entries and the Appellant's nationality was not completed. In paragraphs 36 and 37, the Judge identifies the potential relevance of the conflict of evidence in that the audit and investigation may not relate to the same venue the Appellant attended or may have moved venue with different staff and raised questions as to whether this was even the same college. These matters were identified as potentially affecting the weight to be given to the Respondent's evidence. Without making any specific findings, the Judge sets out concerns about the discharge of the initial burden on the Respondent on the facts of this case in paragraph 41 (repeated in a similar way in paragraph 48) and goes on in paragraph 42 to stated that he has considered all of the evidence in the round before him. Thereafter there is consideration of the Appellant's innocent explanation and a finding in paragraph 51 that he presented as 'generally credible'. The overall finding is in paragraph 52 that in the particular circumstances of this case, and given the concerns the Appellant raised, there was sufficient doubt about the quality of the evidence relied upon by the Respondent that the burden of proof is not discharged.

16. The First-tier Tribunal decision does not at any point make a finding as to where the Appellant took his test. The conflict in the evidence is identified and its importance to the weight of other evidence expressly noted, but the conflict is never actually resolved. I do not consider the submission that it must have implicitly been found that the Appellant took his test in London to be well founded from reading the decision as a whole or from the somewhat generic statement that the Appellant was generally credible. In any event, I do not find that the First-tier Tribunal could make a rational finding on credibility in the round in the absence of a finding on where the Appellant took his test – if it was found to be in Leicester, then that would necessarily have undermined his account. If in London, then that undermined at least in part the Respondent's evidence. The finding would be key to the overall assessment one way or another.

17. In these circumstances I find the First-tier Tribunal materially erred in law in failing to resolve a key conflict of fact as to where the Appellant took his English language test. That failure undermines the weight attached to the other evidence as to deception before the First-tier Tribunal and the overall conclusions not just as to the Appellant's credibility but also whether the Respondent met the initial or overall burden of proof to establish deception. As such, the decision of the First-tier Tribunal must be set aside and the appeal heard de novo as all relevant findings are infected by the error of law.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of a material error of law. As such it is necessary to set aside the decision.

I set aside the decision of the First-tier Tribunal.

Listing directions

1. The appeal to be relisted for a face to face hearing on the first available date before UTJ Jackson with a time estimate of two hours.

2. Any further evidence on which the Appellant wishes to rely must be filed and served no later than 14 days before the relisted hearing. An up to date written statement is required to stand as evidence in chief for the Appellant and any other person giving oral evidence.

3. Any further evidence on which the Respondent wishes to rely must be filed and served no later than 14 days before the relisted hearing.

G Jackson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

3rd December 2023