Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/20133/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
By Skype for Business	
On 28 May 2021	**On 21 July 2021**

Before

UPPER TRIBUNAL JUDGE OWENS

Between

SECRETARY OF STATE FOR THE HOME OFFICE

Appellant

and

MR JANNATH AHMED
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr Lindsay, Senior Home Office Presenting Officer
For the Respondent: Mr Nath, Counsel instructed by Immigration Aid

DECISION AND REASONS

1. The Secretary of State has appealed against a decision of First-tier Tribunal Judge Munonyede sent on 31 December 2020, allowing Mr Ahmed's appeal on Article 8 ECHR grounds against a decision dated 22 November 2019, refusing this his human right's claim. First-tier Tribunal Judge Chohan granted permission on 1 February 2021.

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2. Both parties requested an oral hearing and did not object to the hearing being held remotely. Both parties participated by Skype for Business. I am satisfied that a face-to-face hearing could not be held because it was not practicable because of Covid 19 and that all of the issues could be determined in a remote hearing. Neither party complained of any unfairness in the hearing and there were no connectivity problems.

Background

3. Mr Ahmed is a citizen of Bangladesh born on 11 October 1980. He entered the United Kingdom in December 2006 as a Working Holidaymaker. Within the expiry of his visa he returned to Bangladesh and applied for entry as a Tier 4 student. He re-entered the UK with leave to remain until 28 February 2015. On 26 February 2015 he applied to extend his student leave but subsequently varied his application to an application to remain outside of the immigration rules. His application was refused with no right of appeal because the appellant had not raised a human rights claim. Additionally, the application was refused on grounds of suitability because it was asserted that he had used a proxy to take his TOEIC test in July 2012.

4. Mr Ahmed submitted a further application for leave, this time asserting that it would be a breach of his Article 8 ECHR private life to remove him from the UK. The application was refused on 2 June 2016. An appeal against the decision was dismissed by First-tier Tribunal Judge Mayall in a decision sent on 11 January 2018 on the basis that Mr Ahmed had acted fraudulently and had used a proxy in the 2012 TOEIC test.

5. On 26 June 2019 Mr Ahmed submitted an application for indefinite leave to remain in the UK based on ten year's continuous lawful residence. The application was refused on 22 November 2019 which is the decision under appeal.

Respondent's decision

6. The Secretary of State decided that Mr Ahmed cannot meet the requirements of the immigration rules in respect of long residence because he has not lived lawfully in the UK for a continuous period of ten years. His leave expired on 21 September 2018 and the requirements of paragraph 276B are freestanding. The application was also refused on the grounds of suitability because the First-tier Tribunal had previously made a finding that Mr Ahmed had cheated in his TOEIC test and therefore that he had knowingly made false representations in 2012 for the purpose of obtaining documents from the Secretary of State. Mr Ahmed did not have a wife or children in the UK and did not meet the requirements of paragraph 276ADE of the rules firstly because the application fell for refusal on the grounds of suitability and secondly because there are no very significant obstacles to reintegration to Bangladesh where he lived for 29 years prior to coming to the UK. There are no exceptional circumstances which would warrant a grant of leave outside of the immigration rules.

7. In his grounds of appeal to the First-tier Tribunal, Mr Ahmed submitted that he had not cheated in the English language test and that it would be a disproportionate breach of his Article 8 ECHR right to private life to remove him from the UK.

The decision of the First-tier Tribunal

8. At the hearing, the judge heard oral evidence from Mr Ahmed. He asserted that he did not cheat in his test and provided evidence of other English language tests undertaken by him. He has attempted to clear his name by contacting ETS to obtain the digital file of his test. He has obtained a copy of the digital recording of the test and the file does not contain his voice, nor is the right length. There is nothing to link the tapes to him. The allegation of fraud has meant that he was unable to pursue his studies.

9. The judge considered various statements from the Secretary of State, a report from a forensic consultant Dr Harrison obtained by Bindmans solicitors used in other litigation and a report by Professor French also considered in previous litigation. The judge also had regard to a report chaired by the All Party Parliamentary Group ("APPG") on TOEIC dated 18 July 2019 chaired by Stephen Timms MP in which various findings were made in respect of the TOEIC cases and the allegations of cheating.

10. The judge applied Devaseelan (Second Appeals extra territorial effect) Sri Lanka UKAIT 00702. The starting point were the findings of First-tier Tribunal Judge Mayall who had found that Mr Ahmed had cheated. The judge noted that Mr Ahmed has now obtained the digital transcripts of his test and the voice on his test is not him. The judge finds that the APPG findings have thrown considerable doubt on the Home Office's reliance on the evidence from the ETS. The judge considered that this was sufficient evidence to "set aside" the findings of First-tier Judge Mayall.

11. The judge then went on to find that Mr Ahmed was a credible witness who gave compelling and comprehensive evidence in respect of the events leading up to the test, details of the test itself and after the test. The judge could not find any reason why Mr Ahmed would want to cheat.

12. The judge concludes that Mr Ahmed is an honest man who did not act fraudulently at any time. The judge then went onto rely on Ashan v SSHD (Rev 1) [2017] EWCA to find that the removal of Mr Ahmed would breach Article 8 ECHR. Mr Ahmed can meet 276B of the immigration rules because he has resided continuously in the UK since 2009. The judge allowed the appeal on human rights grounds.

Appeal to the Upper Tribunal ('UT')

13. The grounds of appeal are pleaded as follows;

    (1) *Material misdirections in law*

    It is unclear on what basis the judge concluded that he was entitled to depart from the findings of FtTJ Mayall. The judge did not apply properly

the principles in Devaseelan. The judge failed to consider why Mr Ahmed did not provide the evidence earlier. The judge has also failed to assess the new evidence for himself. This is a clear misdirection in law.

Further, the judge has failed to consider holistically the contents of the APPG report and in line with current caselaw. The caveat expressed by Professor French does not nullify his expert conclusion in relation to the 1% false positive rate. The evidence adduced by the Secretary of State along with the findings of FtTJ Mayall are sufficient to discharge the initial burden and the evidential burden.

The judge failed to follow the correct three stage process in assessing the evidence in line with SM and Qadir v SSHD (ETS – Evidence – Burden of Proof [2016] UKUT 00229 (IAC). The witness statements and spread sheets showed evidence of fraud. The judge applied the incorrect test which was not whether Mr Ahmed speaks English but whether on the balance of probabilities he had used fraud. There may be many reasons why an English speaker may wish to cheat as emphasised in MA (Nigeria) v SSHD [2016] UKUT 450 and the judge's finding is contrary to this.

The judge erred in the conclusion in relation to Article 8 ECHR. The judge failed to make findings on whether the appellant's residence in the UK is both lawful and unbroken.

Permission to appeal

14. Permission was granted by First-tier Tribunal Judge Chohan in a decision dated 1 February 2021which is worded as follows;

> "the judge has given reasons as to why the previous judicial decision was departed from. That finding was a matter for the judge. However, although the judge refers to the case of SM and Qadir, there is nothing to suggest that the test in that case was actually applied to the findings made by the judge".

Preliminary Matters

15. Mr Nath applied for an adjournment of the appeal. He submitted that the authority of DK and RK v SSHD (parliamentary privilege, evidence) [2021] UKUT 61 had not settled the issue of the weight to be given to the evidence given by the experts to the APPG which has a bearing on the reliability of the voice recordings. He submitted that a decision is expected imminently from the Upper Tribunal dealing with ETS matters including the evidence given to the APPG committee. His submission was that the Upper Tribunal guidance will deal with various issues which are pertinent to Mr Ahmed and that it would be fair to hear the appeal after the UT guidance was issued. He argued that the grant of permission was limited in that Judge Chohan had indicated that the judge had not erred in the approach to Devaseelan and that this matter was settled. The only remaining issue was the APPG issue. The appellant has limited means and it is in the interests of justice to postpone this appeal until after the Upper Tribunal has given further guidance on the APPG report.

16. Mr Lindsay opposed the adjournment. His submission was that the grounds of appeal as pleaded cover the assertion that the decision is not in accordance with the caselaw and that this covers the Upper Tribunal case of RK and DK which has now clarified the law and must be followed. Mr Ahmed has been on notice of these issues and there is no prejudice to him to continue with the hearing. He argued that the grounds are not limited and referred me to the authority of EH (PTA: limited grounds; Cart JR) Bangladesh v SSHD [2021] UKUT 0117 (IAC). The error is the judge's approach to Devaseelan and the approach to the new evidence. There is a further error which infects the Article 8 ECHR findings in any event because the judge has not made findings on how Mr Ahmed meets paragraph 276B of the immigration rules. It is in the interests of justice for the appeal to proceed.

17. I decided to refuse the application to adjourn the appeal. Mr Ahmed is aware of the arguments surrounding the APPG report, indeed his representative is dealing with the litigation. The current caselaw on the APPG parliamentary proceedings is that APPG findings do not amount to evidence that can be relied on in judicial proceedings and I see no benefit for waiting for further guidance on the evidence adduced before the APPG which is unlikely to be issued in the very near future. There is no indication that the judge had before her the APPG transcripts or that she relied on them when making the decision. The judge relied on the findings of the committee. In any event, if I were to uphold the decision, this would be the outcome desired by Mr Ahmed and were I to find that there is an error of law and set aside the decision, Mr Nath would be able to rely on any new guidance in either a re-making or a remitted appeal. There is no prejudice to Mr Ahmed in these circumstances.

18. When making this decision, I also indicated that I did not consider that the grant of permission is limited. Although the wording of the grant of permission indicates First-tier Tribunal Judge Chohan's view that it was for the judge to decide whether to depart from Devaseelan and her indication was that she considered that the error lay in the approach to the authority of SM and Qadir, the grant of permission does not give an express direction that permission is limited, and I am therefore able to consider all grounds in accordance with EH above. In refusing the adjournment, I was also satisfied that there was a manifest error of law in respect of 276B which would render the decision unsustainable in any event.

19. I decided that it was in the interests of justice, particularly with the aim of avoiding delay to proceed with the appeal hearing.

Discussion

Misdirection of law in relation to Devaseelan

20. Mr Lindsay submitted that the judge has misdirected herself in the approach to the findings of the previous judge.

21. He referred me to the wording of the judge at [39] where the judge states;

> "The findings of the learned judge should only be set aside if there are good and compelling reasons for doing so"

22. And again at [42] where the judge states;

> "It is my finding that there is new and compelling evidence before me that I should set aside the findings of Judge Mayall and reconsider whether or not the appellant acted fraudulently. (My emphasis)

23. He submitted that it is not the function of the First-tier Tribunal to "set aside" decisions. That is the task of the Upper Tribunal. The judge had before him a decision from a previous First-tier Tribunal judge who had made factual findings in respect of the ETS issue, having heard detailed evidence from Mr Ahmed. These findings had not been overturned by the Upper Tribunal and the factual findings of First-tier Tribunal Judge Mayall were the starting point in this appeal.

24. In this appeal the new evidence before the judge was the evidence from Mr Ahmed that he had listened to a recording of the test and he was adamant that the recording did not contain his own voice. Mr Ahmed also relied on the findings of the APPG committee to assert that the system for checking the recordings was so flawed that the recording could not be relied on. There is no indication that the transcript was produced either to the Secretary of State or to the Tribunal, nor was there any further expert evidence before the Tribunal. Mr Lindsay's submission is that the judge has failed to treat the previous findings as a starting point, has failed to consider why the new evidence was not produced earlier and failed to engage directly with the new evidence.

25. Mr Nath's submission is that the judge correctly directs herself to Devaseelan at [38] correctly refers to the "starting point" and acknowledges that First-tier Tribunal Judge Mayall had found that Mr Ahmed used a proxy. The judge at [39] considers the circumstances in which the findings can be 'set aside'. The judge refers to Mr Ahmed's grasp of the English language and later finds that Mr Ahmed had no reason to cheat. The judge at [40] described the new evidence as the copy of the voice recording which the appellant stated was not his own voice. The judge considered the evidence of the criticisms of the voice recognition and false positives and more importantly the evidence that voice files were not adequately linked to candidate's identity and passport numbers. The judge looked at the findings of the APPG Committee on the lack of continuity of evidence. The judge's approach was lawful. She was entitled to find that there was new evidence which would allow her to depart from the findings of the previous judge including the fact that Mr Ahmed came across as an honest man who spoke good English.

My analysis

26. The Devaseelan guidance is as follows;

> 39. In our view the second Adjudicator should treat such matters in the following way.

(1) The first Adjudicator's determination should always be the starting-point. It is the authoritative assessment of the Appellant's status at the time it was made. In principle issues such as whether the Appellant was properly represented, or whether he gave evidence, are irrelevant to this.

40. We now pass to matters that could have been before the first Adjudicator but were not.

(4) Facts personal to the Appellant that were not brought to the attention of the first Adjudicator, although they were relevant to the issues before him, should be treated by the second Adjudicator with the greatest circumspection. An Appellant who seeks, in a later appeal, to add to the available facts in an effort to obtain a more favourable outcome is properly regarded with suspicion from the point of view of credibility. (Although considerations of credibility will not be relevant in cases where the existence of the additional fact is beyond dispute.) It must also be borne in mind that the first Adjudicator's determination was made at a time closer to the events alleged and in terms of both fact-finding and general credibility assessment would tend to have the advantage. For this reason, the adduction of such facts should not usually lead to any reconsideration of the conclusions reached by the first Adjudicator.

(6) If before the second Adjudicator the Appellant relies on facts that are not materially different from those put to the first Adjudicator, and proposes to support the claim by what is in essence the same evidence as that available to the Appellant at that time, the second Adjudicator should regard the issues as settled by the first Adjudicator's determination and make his findings in line with that determination rather than allowing the matter to be re-litigated. We draw attention to the phrase 'the same evidence as that available to the Appellant' at the time of the first determination. We have chosen this phrase not only in order to accommodate guidelines (4) and (5) above, but also because, in respect of evidence that was available to the Appellant, he must be taken to have made his choices about how it should be presented. An Appellant cannot be expected to present evidence of which he has no knowledge: but if (for example) he chooses not to give oral evidence in his first appeal, that does not mean that the issues or the available evidence in the second appeal are rendered any different by his proposal to give oral evidence (of the same facts) on this occasion.

42. We offer two further comments, which are not less important than what precedes then.

(7) The force of the reasoning underlying guidelines (4) and (6) is greatly reduced if there is some very good reason why the Appellant's failure to adduce relevant evidence before the first Adjudicator should not be, as it were, held against him. We think such reasons will be rare. There is an increasing tendency to suggest that unfavourable decisions by Adjudicators are brought about by error or incompetence on the part of representatives. New representatives blame old representatives; sometimes representatives blame themselves for prolonging the litigation by their inadequacy (without, of course, offering the public any compensation for the wrong from which they have profited by fees). Immigration practitioners come within the supervision of the Immigration Services Commissioner under part V of the 1999 Act. He has power to register, investigate and cancel the registration of any practitioner, and solicitors and counsel are, in addition, subject to their own professional bodies. An Adjudicator should be very

> slow to conclude that an appeal before another Adjudicator has been materially affected by a representative's error or incompetence; and such a finding should always be reported (through arrangements made by the Chief Adjudicator) to the Immigration Services Commissioner.
>
> Having said that, we do accept that there will be occasional cases where the circumstances of the first appeal were such that it would be right for the second Adjudicator to look at the matter as if the first determination had never been made. (We think it unlikely that the second Adjudicator would, in such a case, be able to build very meaningfully on the first Adjudicator's determination; but we emphasise that, even in such a case, the first determination stands as the determination of the first appeal.)

27. In accordance with Devaseelan, the judge's task was to take the previous judge's findings as the starting point. First-tier Tribunal Judge Mayall had heard evidence from Mr Ahmed in 2018 about where he took the test and details of the test itself and found his evidence to be vague. First-tier Tribunal Judge Mayall took into account Mr Ahmed's evidence that he was under time pressure to take the test and that his preparation time was limited and he also gave weight to the fact that the college where Mr Ahmed sat his test, the London College of Media and Technology could fairly be described as a "fraud factory". He noted that Mr Ahmed had made no effort to obtain the voice recording. His findings were at the time found to be lawful and sustainable.

28. The new evidence was a reassertion by Mr Ahmed that he had taken the test himself and did not cheat with more detail about the circumstances of the test. In line with Devaseelan, the judge should have treated this more detailed evidence with great circumspection for the reasons given in the guidance as it presents as an attempt to re-litigate facts which had already been settled. The judge now states that Mr Ahmed's evidence has the "ring of truth" and wholeheartedly believed the account that had already been disbelieved. The judge clearly errs in failing to take the previous judge's assessment of the evidence as a starting point.

29. The additional new evidence before the judge was Mr Ahmed's evidence that he had now obtained the digital recordings of the speaking test and that the voice on the recordings was not him. In his bundle, he enclosed the correspondence between himself and ETS in which he had been emailed digital files relating to his Registration Number. The voice recordings themselves were not produced as evidence to the Tribunal.

30. I am satisfied that contrary to the guidance in Devaseelan, the judge firstly gave no consideration as to why this evidence had not been obtained earlier and why it was not before the previous judge. The test was taken on 18 July 2012. Mr Ahmed was aware of the fraud allegation in 2016. By the time of the previous appeal in 2018 there had been substantial ETS litigation and many others affected had obtained voice recordings so it is unclear why this evidence was not available earlier. The judge did not consider this issue.

31. The judge at [40] appears to have simply accepted that Mr Ahmed's evidence that the digital recording he obtained does not relate to the test that he took because it is not his voice and the recordings are shorter in duration from the test that he took.

32. On any rational reading of this evidence, the fact that the digital recording of the test did not contain Mr Ahmed's voice would seem to be strong evidence to support the previous findings that Mr Ahmed had in fact cheated because if he had taken the test himself, presumably his voice would have appeared on the recording. The judge did not even contemplate this version of the facts or give a reason for rejecting it.

33. In these circumstances, the judge's finding that the recording which did not contain Mr Ahmed's voice amounted to "new and compelling evidence" sufficient to "set aside" the judge's previous findings is not made in accordance with the guidance and is irrational because of the failure to contemplate the alternative scenario in circumstances in this appeal where it was settled law that the Secretary of State had provided sufficient evidence in respect of Mr Ahmed to discharge the initial evidential burden.

34. The final new "evidence" adduced by Mr Ahmed were the findings of the parliamentary committee which were made after the committee heard evidence from various experts in relation to the ETS technology. The other expert evidence had already been considered in detail by the higher courts. The judge relied on the findings of the cross-party committee in a long paragraph at [32] which was a under the heading 'Assessment of the evidence". The judge refers to the committee finding that there were fundamental flaws in the evidence including in the continuity of evidence, as well as failures by the Home Office in considering the evidence and the finding that ETS is a shambles.

35. At [41] the judge gave considerable weight to this evidence stating;

> "The APPG findings(sic) has thrown considerable doubt on the Home Office's reliance on unreliable evidence provided from ETS. The APPG described the TOIEC cases as a shambles".

36. It is not clear whether the judge actually had the transcript of the APPG hearings before her, but it seems not, as the transcript was served on the Upper Tribunal the day before the error of law hearing and did not appear in the appellant's original bundle.

37. The headnote of DK and RK states as follows;

> (1) Although the Upper Tribunal is not bound by formal rules of evidence, it cannot act in such a way as to violate Parliamentary privilege, whether that be to interfere with free speech in Parliament or by reference to the separation of powers doctrine. The Tribunal cannot interfere with or criticise proceedings of the legislature.
>
> (2) Courts and tribunals determine cases by reference to the evidence before them and not by reference to the views of others, expressed in a non-judicial setting, on evidence which is not the same as that before the court or tribunal. Indeed, even

> if the evidence were the same, the court or tribunal must reach its own views, applying the relevant burden and standard of proof.

38. I am also satisfied that the judge misdirected herself when considering the findings of the committee as evidence on which she could rely and give weight to. The conclusions of the committee regarding the ETS shambles and continuity of evidence were the views of the committee after an investigation in a non-judicial setting protected by parliamentary privilege. Mr Nath did not make any submissions in respect of this point.

39. I recognise that DK and RK was not published until 17 March 2021 and so the law in this respect was not clarified at the date of the appeal hearing. However, the law has now been clarified and as explained in DK and RK the findings of the parliamentary committee is not evidence which can be used in the proceedings before the Tribunal for the reasons set out in DK and RK. Since the judge relies heavily on the findings of the APPG report in relation to the reliability of the voice recordings to find that Mr Ahmed did not commit fraud, the decision is materially flawed.

40. I am therefore satisfied that the first part of the grounds are made out. There is a misdirection in law in respect of Devaseelan and the approach to the new evidence and a misdirection in law in treating the APPG findings as evidence. These errors are material, because they have a fundamental bearing on the outcome of the appeal. If the judge had decided she could not re-visit the findings of First-tier Tribunal Judge Mayall, the suitability criteria would have continued to apply to Mr Ahmed, he would not have been able to satisfy the requirements of the immigration rules and the findings that he had used fraud would have been relevant to the proportionality exercise.

Error regarding paragraph 276B of the immigration rules

41. Finally, I am also in agreement with Mr Linsday that the judge's approach to 267B is also fundamentally flawed. Having found that Mr Ahmed did not cheat in the TOIEC test the judge jumps to a finding that Mr Ahmed can meet the requirements of the long residence rules. Mr Nath's only submission on this point is that the judge notes that Mr Ahmed has not left the UK and finds he has been here for ten years. Mr Nath was unable to add anything further to this submission. I am satisfied that the judge's approach was entirely irrational. Mr Ahmed has not had leave to remain since 12 September 2018. He has not accrued ten year's continuous lawful residence in the UK and even if the finding that he did not use a proxy test taker was sustainable, he would still not have completed ten year's lawful residence in the UK. I am satisfied that this error is also material to the outcome of the appeal.

42. Having found that there are material errors of law I do not go on to consider the grounds in relation to the burden of proof.

Disposal

43. Mr Lindsey and Mr Nath both submitted that the appeal should be remitted to the First-tier Tribunal. I am of the view that given the extent of the errors in relation to the factual findings that no findings should be preserved, and that the decision should be set aside in its entirety. While mindful of statement 7 of the Senior President's Practice Statements of 10 February 2010, it is the case that the Tribunal will need to consider the further evidence in respect of the voice recording and there will be some guidance from the Upper Tribunal as to the approach to the evidence put before the APPG which will no doubt be relevant to this appeal. I am therefore in agreement with this course of action.

Decision

44. The decision of the First-tier Tribunal involved the making of an error of law.

45. The decision is set aside.

46. The findings are set aside in their entirety.

47. The appeal is remitted to the First-tier Tribunal for a de novo hearing in front of a judge other than First-tier Tribunal Judge Munonyedi.

Signed Date

UTJ Owens
Upper Tribunal Judge Owens **15 July 2021**