**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: HU/17407/2019 (R)

**THE IMMIGRATION ACTS**

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| **Heard at Birmingham CJC,** | **Decision & Reasons Promulgated** |
| **Parties attending remotely by Skype** | |
| **On 1st September 2020** | **On 14 October 2020** |

**Before**

**UPPER TRIBUNAL JUDGE MANDALIA**

**Between**

**MD TAUKIR AHAD**
**(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

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

Respondent

**Representation:**
For the Appellant: Mr L Youssefian, Counsel instructed by D J Webb & Co Solicitors
For the Respondent: Mr. D Clarke, Senior Home Office Presenting Officer

**DECISION AND REASONS (R)**

1. The hearing before me on 1st September 2020 took the form of a remote hearing using skype for business. The appellant was represented by counsel. The respondent was represented by a Senior Presenting Officer. Neither party objected to a remote hearing. I sat at the Birmingham Civil Justice Centre and the hearing

room and building were open to the public. The hearing was publicly listed, and I was addressed by the representatives in exactly the same way as I would have been, if the parties had attended the hearing together. I was satisfied: that this constituted a hearing in open court; that the open justice principle has been secured; that no party has been prejudiced; and that, insofar as there has been any restriction on a right or interest, it is justified as necessary and proportionate. I was satisfied that it was in the interests of justice and in accordance with the overriding objective to proceed with a remote hearing because of the present need to take precautions against the spread of Covid-19, and to avoid delay. I was satisfied that a remote hearing would ensure the matter is dealt with fairly and justly in a way that is proportionate to the importance of the case, the complexity of the issues that arise, and the anticipated costs and resources of the parties. At the end of the hearing I was satisfied that both parties had been able to participate fully in the proceedings.

2. The appellant is a national of Bangladesh. His appeal against the respondent's decision of 11th October 2019 to refuse his application for leave to remain in the UK was dismissed by First-tier Tribunal Judge Hatton for reasons set out in a decision promulgated on 11th March 2020.

3. The appellant's immigration history is set out at paragraphs [3] to [13] of the decision. For present purposes, it is sufficient to record that the appellant arrived in the UK in March 2009 as a student. In July 2014, the appellant made an in-time application for further leave to remain as a student and that application was refused by the respondent for reasons set out in a decision dated 22nd December 2014. The respondent claimed the appellant had submitted a TOEIC certificate from ETS in support of his previous application of 27th July 2012, which the respondent considered was fraudulently obtained by using a proxy test taker. The appellant issued a claim for judicial review challenging the decision of 22nd December 2014 but permission was refused, and the claim for judicial review was certified as being totally without merit by the Upper Tribunal in January 2016.

4. The appellant then made two unsuccessful applications for an EEA Residence Card as the purported partner of an EEA national. Following refusal of those applications, in June 2017, the appellant made an application for leave to remain on private and family life grounds. That application was refused by the respondent on 11th October 2019 giving rise to the appeal before the First-tier Tribunal.

5. The issues in the appeal are set out at paragraphs [14] to [16] of the decision of the FtT. Judge Hatton considered whether the appellant meets the requirements for leave to remain on private life grounds set out in paragraph 276ADE of the immigration rules. He noted the respondent's decision that the appellant fails to meet the suitability requirements for two reasons. First, the appellant fraudulently obtained a TOEIC certificate by way of deception, and second, the appellant was convicted on 19th August 2019 for three offences of handling stolen goods.

6. At paragraphs [30] to [60], Judge Hatton addressed the allegation made by the respondent that the appellant obtained a TOEIC certificate by deception. At paragraph [34] of his decision, Judge Hatton states:

> "As a starting point, I note that the Appellant's application for permission to apply for Judicial Review was refused and certified as being totally without merit by Upper Tribunal Judge ("UTJ") Storey three years ago, on 28 January 2016, for the following reasons …"

7. At paragraph [35], Judge Hatton stated:

> "Accordingly, I must establish whether there is sufficient evidential basis for departing from the clear and unequivocal findings of UTJ Storey in dismissing the Applicant's judicial review claim of 27 January 2015."

8. At paragraphs [36] to [59] of his decision Judge Hatton considered the evidence relied upon by the parties. At paragraph [44] he stated:

> "It is remarkable that the Appellant has not sought to adduce any documentary evidence in rebuttal of UTJ Storey's findings in respect of his human rights appeal before me, especially as three years have now passed since the dismissal of his Judicial Review application (on 28 January 2016)."

9. Judge Hatton also noted, at [45] to [48], that the appellant's representatives had obtained the relevant voice recordings of the tests taken by the appellant at Queensway College on 18th July 2012, but had not sought to instruct an expert to analyse the voice recordings. At paragraph [51], Judge Hatton said:

> "Accordingly, I have no option but to consider that the subjective and objective evidence against the appellant in respect of this matter is highly compelling for the following reasons:"

10. At paragraphs [52] to [56] Judge Hatton sets out five reasons and at paragraphs [57] to [60], he stated:

> "57. Accordingly, I am satisfied that the respondent has discharged their evidential burden to provide prima facie evidence of dishonesty and the appellant has correspondingly failed to provide a satisfactory explanation for his ability to obtain such significantly higher test scores within such a short space of time. On the balance of probabilities, I therefore consider that the appellant utilised the services of a proxy tester for the purposes of facilitating the passing of TOEIC tests by way of deception.
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> 58. In so finding, I note that by his own admission, the appellant left taking the mandatory TOEIC tests "to the last minute" and it was only in June 2012 that he properly applied his mind to it [witness statement, para. 16]. In view of the fact that the appellant's leave was scheduled to expire on 31 July 2012, I consider he was under considerable pressure to pass the requisite tests within such a timeframe, which spurred his ill-conceived attempt to cheat."

11. At paragraphs [61] to [65] of his decision, Judge Hatton referred to the appellant's conviction of handling stolen goods at High Wycombe Magistrates Court on 19th August 2019, for which he received a fine. He found the appellant has provided conflicting explanations regarding the circumstances that led to his conviction. At paragraphs [66] and [67], Judge Hatton concluded:

> "66. Further, I consider the appellant has demonstrated significant dishonesty, not only in relation to the circumstances by which he obtained TOEIC test certificates in 2012, but also regarding the circumstances in which he was convicted of handling stolen goods in 2019.
>
> 67. With regard to all the above circumstances, I am satisfied there is sufficient justification for refusing the appellant's application for leave to remain in view of his failure to meet the suitability requirements under Section S-LTR of Appendix FM of the immigration rules."

12. Having found that the appellant cannot meets the requirements of the immigration rules, Judge Hatton addressed the Article 8 claim outside the rules and concluded the appellant has failed to establish a private life within the meaning of Article 8. Judge Hatton also concluded that the relationship that the appellant claims to have with his uncle, Mr Rahman, is insufficient to constitute a family life within the meaning of Article 8. In any event, Judge Hatton went on to address the private and family life claims made by the appellant, and concluded that the refusal of leave to remain would not constitute a disproportionate interference with the appellant's Article 8 rights.

The appeal before me

13. The appellant advances six grounds of appeal set out in the appellant's grounds for permission to appeal settled by counsel and dated 24th March 2020. Permission to appeal was granted by First-tier Tribunal Judge Scott Baker on 11th May 2020. At the outset of the hearing before me, Mr Youssefian confirmed the appellant no longer relies upon the third ground. That is, the claim that the decision of Judge Hatton is vitiated by procedural unfairness. I address each of the remaining grounds in turn.

14. I take the first and second grounds together. The first ground of appeal is that Judge Hatton erred in treating the decision of Upper Tribunal Judge Storey when permission to claim judicial review was refused, as the "starting point". The second ground is that Judge Hatton erred in his assessment of the evidence and his approach to the test of deception. Mr Youssefian submits that at the time of the decision of Upper Tribunal Judge Storey, the relevant legal landscape was very different and has since developed. More fundamentally, in the claim for Judicial Review, Upper Tribunal Judge Storey was only concerned with the question whether the respondent's decision of 22nd December 2014 could be impugned on public law grounds. Upper Tribunal Judge Storey did not make his own assessment of the evidence. Mr Youssefian submits the first error is at paragraph [35], where Judge Hatton considers whether there is sufficient to depart from the

findings of Upper Tribunal Judge Storey. The language used is the language of the 'Devalseelan' guidance. The adverse observations made by Upper Tribunal Judge Storey when he certified the claim for judicial review as totally without merit, appear to have been adopted by Judge Hatton as the starting point for his decision. Mr Youssefian accepts Judge Hatton then appears to go through the evidence before the Tribunal in the paragraphs that follow, but submits the defect is not cured because of the erroneous premise upon which the judge started.

15. Mr Clarke accepts that the matters considered by a judge in a claim for judicial review are intrinsically different to the matters to be considered by a Judge in a statutory appeal. He accepts that Judge Hatton erred in saying that he must establish whether there is sufficient evidential basis for departing from the clear and unequivocal findings of UTJ Storey, but, he submits, that is immaterial because in the paragraphs that follow, Judge Hatton properly considered the evidence before the Tribunal and reached a decision for himself as to whether the appellant utilised the services of a proxy test taker.

16. I have no hesitation in concluding Judge Hatton erred in his self-direction that he must establish whether there is sufficient evidential basis to depart from the findings of Upper Tribunal Judge Storey. The decision of Upper Tribunal to refuse permission to claim judicial review of the respondent's prior decision of 22nd December 2014 was not the starting point. No findings were made by Upper Tribunal Judge Storey. When considering the application for permission to claim judicial review of the respondent's decision of 22nd December 2014, the Upper Tribunal Judge did not reach a decision for himself as to whether the appellant had utilised the services of a proxy test taker, but was concerned with the altogether different question of whether it was open to the respondent to conclude that the appellant had submitted a TOEIC certificate from ETS in support of his previous application, which the respondent considered, was fraudulently obtained by using a proxy test taker. However, I must consider whether that error is material to the outcome of the appeal. At paragraphs [36] to [60] of his decision, Judge Hatton

considered for himself the evidence relied upon by the respondent, the evidence set out in the witness statement of the appellant and his oral evidence before the FtT. It is the way in which the judge analysed the evidence and the test that he adopted, that forms the second ground of appeal.

17. In the second ground of appeal the appellant claims that at paragraph [57] of his decision, Judge Hatton appears to proceed upon the premise that the respondent has discharged the evidential burden to provide prima facie evidence of dishonesty, but then appears to have shifted the burden of proof to the appellant to give an innocent explanation. The appellant claims Judge Hatton was wrong in law to find that the respondent had discharged the burden upon her, because the appellant did not provide an innocent explanation.

18. Mr Youssefian submits it is trite to say the respondent has the burden of proof. He accepts that it was open to Judge Hatton to find, at [57], that he was satisfied that the respondent has discharged the evidential burden to provide prima facie evidence of dishonesty. He submits the judge then fell into error when he went on to say *"... and the appellant has correspondingly failed to provide a satisfactory explanation for his ability to obtain such significantly higher test scores within such a short space of time…".* Mr Youssefian submits Judge Hatton appears to proceed upon the understanding that the burden of proof had shifted to the appellant. He refers to paragraph [57] of the judgment in SM and Qadir v Secretary of State for the Home Department (ETS – Evidence – Burden of Proof) [2016] UKUT 00229 (IAC) in which the Upper Tribunal confirmed that the respondent is making the positive case that the student concerned dishonestly obtained the English language qualification by the use of a proxy test taker, and, at the end of the day, the SSHD bears the burden of proof and that, doctrinally, a legal burden of proof does not "shift". Mr Youssefian submits Judge Hatton should have considered the innocent explanation given by the appellant that satisfied the requirement of a minimum level of plausibility. The burden remained on the respondent to establish that in all the

circumstances, the appellant dishonestly obtained the English language qualification by the use of a proxy test taker.

19. Mr Clarke submits that having been satisfied that the respondent had discharged the evidential burden to provide prima facie evidence of dishonesty, the spotlight switched to the appellant, to raise an innocent explanation, namely an account which satisfies the minimum level of plausibility. Here, Judge Hatton found, at [57], that the appellant had failed to provide a satisfactory explanation for his ability to obtain such significantly higher test scores within such a short space of time. Mr Clarke submits that at paragraphs [36] to [50] of his decision, the judge refers to the evidence specific to the appellant and the tests he claimed to have taken that was before the Tribunal. At paragraphs [51] to [58], there is a summary by Judge Hatton explaining why he found the respondent had discharged the evidential burden upon her and why found the appellant had not discharged the evidential burden of raising an innocent explanation.

20. I reject the claim that Judge Hatton erroneously proceeds upon the basis that the burden of proof had shifted to the appellant. As set out in SM and Qadir, in certain contexts the evidential pendulum swings three times and in three different directions. The 'evidential burden' is not to be conflated with the legal burden of proving that the TOEIC certificate had been procured by dishonesty. It is common ground that the legal burden of proving dishonesty rests upon the respondent throughout.

21. Judge Hatton found the respondent's evidence, much of which was specific to the appellant and the tests he claimed to have taken, sufficed to discharge the evidential burden of proving that the TOEIC certificates had been procured by dishonesty. The spotlight thereby switched to the appellant. There was an evidential burden on him, of raising an innocent explanation. Here, Judge Hatton found the appellant had not discharged the evidential burden on him to raise an innocent explanation, namely an account which satisfies the minimum level of plausibility. At paragraph [57] of his decision Judge Hatton was in my judgment

addressing the evidential burden upon the appellant. The legal burden rested on the respondent throughout to establish, on the balance of probabilities, that the appellant's *prima facie* innocent explanation is to be rejected, but as Judge Hatton was not satisfied that the appellant had provided a satisfactory explanation *(i.e. an account which satisfies the minimum level of plausibility)* it follows that the question whether the respondent has established that the innocent explanation is to be rejected, did not arise. There was no further transfer of the evidential burden to the respondent; *SM & Qadir*, at [57] and *MA*, at [59]. If any further reasons were required for the conclusion that the respondent has discharged the legal burden of proof that rests on the respondent, they are set out at paragraphs [58] and [59] of the decision. Although there is no reference to the decision of the Upper Tribunal in SM and Qadir, I am quite satisfied that Judge Hatton considered the evidence of the respondent and the appellant adopting 'the evidential pendulum' and it was open to him to conclude, on the balance of probabilities, that the appellant utilise the services of a proxy tester, for the reasons set out in the decision.

22. As I have already said, the third ground of appeal is no longer relied upon. The fourth ground of appeal is that Judge Hatton failed to take into account material evidence, and had regard to matters that are immaterial. The appellant claims the criticism made by Judge Hatton regarding the failure to adduce evidence regarding the voice recordings is unwarranted when the appellant had accepted that the voice in the recording he had obtained was not his, and thus there was nothing to gain by analysis of the voice recording by an expert. Furthermore, in support of the appeal the appellant relied upon three separate independent reports from the National Audit Office, the All Parliamentary Party Group and the House of Commons Committee of Public Accounts, 'English language tests for overseas students', that were critical of the respondent's evidence and its reliability. The appellant submits there is no reference at all to any of those reports and Judge Hatton failed to engage with the evidence relied upon by the appellant.

23. Mr Youssefian submits that in the appellant's skeleton argument, Judge Hatton had been referred to the decision of the Upper Tribunal in MA (ETS – TOEIC testing) [2016] UKUT 00450, in which the Upper Tribunal referred to expert evidence that highlights that there are enduring unanswered questions and uncertainties relating in particular to systems, processes and procedures concerning the TOEIC testing, the subsequent allocation of scores and the later conduct and activities of ETS. In MA, the respondent had relied upon a greater volume of evidence that was both general and specific that had contributed significantly to the presentation of a more focused and considerably more substantial case against the appellant. Mr Youssefian submits that here, there was no truly specific evidence relating to the appellant before the First-tier Tribunal. Furthermore, the appellant had also sought to establish that the evidence relied upon by the respondent was not reliable by reference to the independent reports that the judge fails to engage with at all. Mr Youssefian submits the reports cast doubt on the reliability of the methods adopted by ETS and where the legal burden rested with the respondent, the Judge should have considered that evidence, which was capable of undermining the core evidence relied upon by the respondent. He submits Judge Hatton fails to engage with any of the reports that were relied upon by the appellant and which raised serious concerns regarding the reliability of the ETS evidence relied upon by the respondent. Mr Youssefian referred to the evidence relied upon by the respondent relating the tests completed at Queensway College on 20th June 2012 and 18th July 2012. He drew attention to entries that demonstrate that on both 20th June 2012 and 18th July 2012, individuals achieved low scores for 'speaking', but nevertheless, it was determined that the test was 'invalid'. He submits it is unlikely that an individual that engages in deception by the use of a proxy test taker, would achieve such low scores and that undermines the reliability of the process and procedure adopted when considering whether a test score is invalid. Mr Youssefian submits Judge Hatton referred to the criminal investigation against Queensway College (i.e. Project Façade) but that is not even handed objective material. He submits that all these matters taken together materially affected the outcome of the appeal.

24. Mr Clarkes quite properly acknowledges there is no reference in the decision of Judge Hatton to the reports that were relied upon by the appellant. He submits the reports are not independent reports that undermine the evidence that the Court of Appeal and the Upper Tribunal has accepted, is sufficient to discharge the evidential burden that initially rests upon the respondent. He submits the reports are not specific to the appellant, and it was open to the Judge to reach his decision based upon the evidence that was specific to the appellant.

25. Although Judge Hatton makes no reference to the reports that were relied upon by the appellant, the evidence relied upon by Judge Hatton and referred to in his decision, is more specific to the appellant than the All Party Parliamentary Group report which addresses the ETS system more generally and widely, and expresses criticisms of the ETS evidence so that it is impossible to take decisions based on that evidence alone. Judge Hatton had set out the evidence that was specific to the appellant and the two dates upon which he took tests at Queensway College at paragraphs [37] to [43] of his decision. At paragraph [40], Judge Hatton referred to the increase in the test scores achieved by the appellant for speaking and writing between 20th June 2012 and 18th July 2012. At paragraph [41], Judge Hatton said it is remarkable that the appellant was able to make such a significant leap in attainment from 20th June 2012 to 18th July 2012. He noted, at [42], that the appellant's witness statement provides no reason or explanation for his ability to obtain much higher results within such a short space of time, and at [43], he said:

> "During his oral evidence, the appellant claimed that after taking the 20 June 2012 tests, he undertook additional preparation through book learning and following online guidance via the Internet and YouTube. Further, friends and teachers in his college helped him improve his spoken English. I note that the appellant has not sought to adduce any evidence from the individuals who purportedly assisted him in this process."

26. At paragraph [49], Judge Hatton referred to the ongoing criminal investigation against Queensway College which indicated that between 20th March 2012 and 5th February 2014, of the 2793 TOEIC speaking and writing tests, 70% were identified as invalid and the remaining were identified as being questionable. Judge Hatton

noted that significantly, there were no tests during that period that were released as valid. To put that in context, Judge Hatton referred, at paragraph [50] to the evidence in relation to Bloomsbury and Westminster public test centres, in which just 0.28% of the speaking and writing tests were said to be invalid.

27. In reaching his decision Judge Hatton considered the subjective and objective evidence against the appellant to be highly compelling for the five reasons set out at paragraphs [52] to [56] of his decision;

> "52. First, the objective evidence strongly indicates there was widespread cheating occurring at Queensway College during the period in which the appellant purportedly took his tests.
>
> 53. Second, the objective evidence confirms there were exceedingly high levels of cheating on both dates which the appellant purportedly took his tests, especially on the second date i.e. 18 July 2012.
>
> 54. Third, the objective evidence also confirms there was a very significant increase in respect of the Appellant's test results from 20 June 2012 to 18 July 2012.
>
> 55. Fourth, the appellant did not provide any reason or explanation for his ability to obtain such significantly higher scores during such a short space of time until the date of his appeal hearing. Further, I consider the belated explanation provided for the first time during his hearing to be unconvincing, especially as it was not supported by any documentary evidence [see above].
>
> 56. Fifth, in spite of having had ample opportunity to obtain his own documentary and/or expert evidence in an attempt to rebut the respondent's findings, the appellant has refrained from doing so, without reason or explanation."

28. The respondent's case against the appellant relates to the tests undertaken on 18th July 2012, but the evidence concerning the scores relating to the first test, were plainly relevant. Judge Hatton made an overall assessment of the evidence relevant to the appellant rather than simply referring to, and relying upon the generic evidence of the respondent. Judge Hatton considered the subjective and objective evidence, relying in particular upon the subjective evidence concerning the tests said to be completed by the appellant, in the round, and reached conclusions which were open to him on the evidence and with adequate reasons being given for those findings. At a general level, Judge Hatton referred to the clear evidence of cheating at Queensway College, where the appellant claims to have been examined.

Subjectively, Judge Hatton had regard to the clear evidence regarding the significant increase in the test scores achieved on 18th July 2012 and rejected the appellant's account of events. The general and more widespread concerns referred to in the reports that were relied upon by the appellant do not undermine the intrinsically fact specific assessment made by Judge Hatton. It had been open to the appellant to obtain evidence specific to him to undermine the matters relied upon by the respondent, but as Judge Hatton said, the appellant did not do so. For example, the respondent had expressly referred to the increase in the appellant's test scores and it was open to the appellant to adduce evidence to support his claims, but he did not do so.

29. The fifth ground of appeal is that Judge Hatton failed to make a finding as to whether the appellant's conviction for handling stolen goods, in and of itself, meant that he fell foul of the suitability requirement in the immigration rules. In light of my conclusions regarding the other grounds of appeal that I have already considered, it is sufficient for me to say that it was plainly open to Judge Hatton to conclude at paragraphs [66] and [67] as follows:

> "66. Further, I consider that the appellant has demonstrated significant dishonesty, not only in relation to the circumstances by which he obtained TOEIC test certificates in 2012, but also regarding the circumstances in which he was convicted of handling stolen goods in 2019.
>
> 67. With regard to all the above circumstances, I am satisfied there is sufficient justification for refusing the appellant's application for leave to remain in view of his failure to meet the suitability requirements under Section S-LTR of Appendix FM of the Immigration Rules"

30. Finally, the appellant claims that the errors of law relied upon, infected the First-tier Tribunal's overall assessment of the Article 8 claim. For the reasons I have already set out, I reject the claim that there was a material error of law in the analysis of the evidence or the test applied by Judge Hatton in reaching his conclusion that the suitability requirement set out in Appendix FM of the immigration rules is not met by the appellant.

31. The assessment of an Article 8 claim and the consideration of whether removal is proportionate, is always a highly fact sensitive task. Having found the immigration rules cannot be met, Judge Hatton considered the Article 8 claim outside the immigration rules at paragraphs [68] to [99] of his decision. In the end, upon my reading of the determination as a whole, it is quite clear that the conclusions of Judge Hatton as to the Article 8 appeal, were supported by reasons open to the judge on the evidence before the Tribunal, and the findings made. The findings and conclusions reached by Judge Hatton were neither irrational nor unreasonable in the *Wednesbury* sense, or findings and conclusions that were wholly unsupported by the evidence.

32. In my judgement there is no material error of law in the decision of First-tier Tribunal Judge Hatton and it follows that I dismiss the appeal.

**Notice of Decision**

33. The appeal is dismissed and the decision of F*t*T Judge Hatton promulgated on 11th March 2020 stands.

Signed *V. Mandalia* Date: 5th October 2020

**Upper Tribunal Judge Mandalia**