IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006448
First-tier Tribunal Nos: HU/54781/2021
IA/11902/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 24 May 2023

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MD JOGLUL MIAH
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr. T Melvin, Senior Presenting Officer
For the Respondent: Mr. G O'Ceallaigh, Counsel, instructed by Lawmatic Solicitors

Heard at Field House on 27 April 2023

DECISION AND REASONS

Introduction

1. The appellant is referred to as the Secretary of State, the respondent as Mr Miah.

2. The Secretary of State appeals against a decision of Judge of the First-tier Tribunal Bunting ('the Judge'), sent to the parties on 25 July 2022, allowing Mr Miah's human rights (article 8 ECHR) appeal.

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Relevant Facts

3. Mr Miah is a national of Bangladesh and is presently aged 38.

4. He arrived in the United Kingdom on 11 January 2010 with entry clearance as a student and was granted leave to enter this country until 31 August 2013. On 18 August 2013 he successfully made an in-time application for leave to remain as a Tier 4 (General) Student.

5. On 6 October 2014 his leave to remain was curtailed by the Secretary of State on the ground that a TOEIC certificate submitted along with his 2013 application had been declared by Educational Training Services (ETS) to be invalid as they considered it to have been taken by a proxy sitter.

6. Mr Miah served representations on 17 November 2020 which were refused by the Secretary of State on 9 August 2021. It is from this decision that the appeal before this Tribunal flows.

The First-tier Tribunal Decision

7. The appeal came before the Judge sitting at Taylor House on 18 July 2022. Both parties agreed at the outset of the hearing that the sole issue before the Judge was whether the Secretary of State had proved that Mr Miah had used a proxy sitter in respect of the TOEIC test. The Judge records the following agreement between the parties at [18] of his decision:

> '18. If he had not, then the appellant had suffered a 'historical injustice' and the refusal would be disproportionate. If he had, the appellant accepted that there were no other grounds that could be put forward to say that the decision was disproportionate, and his appeal would fail.'

8. Mr Miah gave evidence before the Judge and was cross-examined.

9. The Judge considered the evidence relied upon by both parties and found, *inter alia*:

- That Mr Miah was able to pass an exam with a high level of English the year after the test was a point in his favour, at [69].

- That he studied English in Bangladesh was not a point of much significance, at [71].

- The site of the college was not such a distance from his home or employment as to be suspicious, at [75].

- Whilst Queensway College was clearly operating widespread fraud, there must have been genuine test takers present as it was a college open to the public, at [76].

- Mr Miah appeared to be an honest witness, trying his best to assist the Tribunal, at [78].

10. The Judge observed:

> ‘81. He gave a detailed account in his witness statement as to what happened on the day of the test. Although he was cross-examined on this, it was not at any great length and Mr Banham did not make any headway with him or damage his account.
>
> 82. This must be a point of significance. The detail that he has provided was not contradicted by the respondent, nor was he challenged on much of it. The respondent is not obliged to do so, and she can rely on the other evidence (which is formidable) but it means that it is harder to reject the appellant’s account in those circumstances.
>
> 83. Unlike the appellants in DK and RK, I see no reason on the appellant’s evidence to disbelieve him. His account of choosing which test to take, and the taking of it, appeared plausible and detailed.’

11. The Judge turned to the reported decision of *DK and RK (ETS: SSHD evidence: proof)* [2022] UKUT 112 (IAC) at [83] to [90] of his decision. He then observed:

> ‘91. Moving from the general to the particular case, that does not mean that this appellant must be disbelieved, but that you have to look at all the other evidence (pointing towards and away from their account) before making a final finding.
>
> 92. I do not consider that it is straightforward. The general evidence of the respondent is clear and strong. It raises a case to answer and makes it, all other things being equal, ‘overwhelmingly likely’ (para 119) that the appellant used a proxy.’

12. The Judge then proceeded at [94] to [96] to consider what evidence “an innocent appellant could provide to rebut the allegation” of fraud. Having considered the evidence in the round the Judge concluded:

> ‘97. If the burden of proof was the criminal one, then I would have no hesitation in saying that it was not discharged. If it was for the appellant to prove that ETS systems in this case was wrong, then I do not consider that he can do so.
>
> 98. Nonetheless, his evidence was clear, detailed and consistent. There was nothing in it that I consider implausible or straining in credulity. There is nothing that points away from the appellant and he appeared to be a credible witness.
>
> 99. In those circumstances I feel bound to say that he has answered the case put forward by the respondent and that, therefore, the respondent has not proved on the balance of probabilities that

there was not an error and that the appellant must therefore have used a proxy.'

Grounds of Appeal

13. The Secretary of State's challenge before this Tribunal is succinct:

> 'The Tribunal found 'The fact that something is inherently very unlikely to have happened means that there are very strong reasons to disbelieve someone who says that the contrary did, in fact happen(89).
>
> The evidence shows that for any individual picked at random who had been 'flagged' by ETS it is overwhelming likely that they are dishonest(90)'.
>
> The respondent notes that the Tribunal accepts a proxy was used then goes on [to] allow the appeal.
>
> It is unclear how The Tribunal reached **that** finding and its submitted that it lacks reasoning and amounts to an error in law.
>
> PTA is sought.'
>
> [Emphasis added]

14. Judge of the First-tier Tribunal Parkes granted permission to appeal by a decision dated 17 August 2022, reasoning, *inter alia*:

> '3. It is arguable that the Judge's reasons for finding that the Appellant had provided an acceptable explanation for finding that the Home Office evidence was not sufficient to discharge the standard of proof is flawed and inadequate.
>
> 4. The grounds disclose arguable errors of law and permission to appeal is granted.'

Discussion

15. At the outset of the hearing Mr Melvin quite properly accepted that the grounds of appeal were in error by asserting that [89] and [90] of the First-tier Tribunal decision constituted findings of fact. It is clear that the Judge was simply identifying points of guidance identified by the Upper Tribunal in the reported decision of *DK and RK*.

16. Mr O'Ceallaigh argued, as a preliminary submission, that consequent to such error there was no arguable ground before this Tribunal. He submitted on behalf of Mr Miah that the key word in the second to last sentence - "that" - relates to the mistaken observation as to findings of fact being made at [89] and [90] of the decision.

17. Having carefully considered the grounds of appeal, I am satisfied that the contention "It is unclear how The Tribunal reached that finding …" is directed to the sentence above, namely, "The respondent notes that the

Tribunal accepts a proxy was used then goes on [to] allow the appeal." It would not compromise the clear meaning of the word "that" to associate it with the sentence above. I therefore find there is an arguable ground of appeal before this Tribunal.

18. Turning to the ground of appeal itself Mr Melvin noted by his very helpful submissions that at its heart the Secretary of State's case was, in accordance with the Upper Tribunal decision in *Joseph (permission to appeal requirements)* [2022] UKUT 00218 (IAC), that she simply does not understand why the Judge allowed the appellant's appeal.

19. On careful consideration of the decision, I am satisfied that the Secretary of State cannot make out her case. The appellant carefully identified his case before the Judge as being that whilst he accepted his voice could not be heard on the recording provided by ETS, the only answer for that situation was that the wrong recording was provided.

20. His reasoning in respect of the appellant's case is identifiable from [92] onwards. He expressly detailed his understanding that the general evidence provided by the respondent as to the recording and the use of fraud at the testing centre was clear and strong. He then turned his mind to what evidence Mr Miah could provide to establish that there had been a failure by ETS to provide the correct recording. He was satisfied, and gave adequate, lawful reasons in support of his conclusion, that the appellant was an honest witness who was trying his best to assist the Tribunal. He was satisfied that Mr. Miah had adequately explained why he decided to attend Queensway College, which was not such a distance from his home address or where he was working. Further, he was satisfied that Mr. Miah had given a detailed account in his witness statement as to what happened on the date of his test. The Judge was reasonably permitted to note that whilst the Presenting Officer cross-examined Mr Miah on this point, "it was not at any great length" and the Presenting Officer "did not make any headway with him or damage his account".

21. It is abundantly clear that by [97] of the decision the Judge had very firmly in mind Mr Miah's case that ETS had provided the wrong recording. That was the entirety of the positive case advanced on behalf of Mr. Miah. The Judge accepted that if the burden of proof was that of the criminal standard, namely beyond reasonable doubt, he would have had no hesitation in finding that Mr. Miah had not discharged the burden upon him. However, as is clear at [98] and [99] of the decision, the Judge assessed the evidence to the appropriate standard and concluded that the appellant had answered the case put forward, noted as "that ETS systems in this case was wrong", at [97], and so properly allowed the appeal in such circumstances.

22. I am satisfied upon considering the decision in the round that the Judge clearly had the appellant's case in mind and gave cogent and adequate reasons for concluding that the appellant had met the burden placed upon him. Whilst another Judge may have concluded differently, it cannot

properly be said that no reasonable judge, properly directing themselves to relevant law and fact, could not have reached the same decision.

23. In those circumstances I am satisfied upon reading the decision in its entirety that it is clear the Secretary of State has been made aware as to why she lost the appeal before the First-tier Tribunal.

24. The Secretary of State's appeal before this Tribunal is properly to be dismissed.

Notice of Decision

25. The decision of the First-tier Tribunal dated 25 July 2022 does not contain a material error of law. The decision therefore stands.

26. The Secretary of State's appeal is dismissed.

27. No anonymity direction is made.

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

5 May 2023