IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-004524

First-tier Tribunal No: HU/51361/2021 & IA/05600/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

13th October 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

RASUL IGAMBERDIEV
(Anonymity order not made)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mrs M Hodgson
For the Respondent: Mr E Tufan

Heard at Field House on 7 August 2023

DECISION AND REASONS

1. This is the appeal of Rasul Igamberdiev, a citizen of Uzbekistan, against the decision of the First-tier Tribunal of 25 May 2022, itself brought against the refusal of his human rights claim on 12 April 2021.

2. Mr Igamberdiev's application was refused because when seeking leave to remain in January 2013 reliance was placed on an English language test result from New London College dated 6 February 2013; it had come to the Secretary of State's attention that the testing body

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believed that this test result had been procured by a proxy tester. Thus his application was refused on grounds of character and conduct. There were no very significant obstacles to integration in Uzbekistan to call for the grant of leave. Before the First-tier Tribunal Mr Igamberdiev argued that he had been honest at all times and knew nothing of any proxy testing.

3. Mr Igamberdiev's evidence to the First-tier Tribunal was essentially that early in his stay in the UK in 2011 he was diagnosed with Acute Lymphoblastic Leukaemia, requiring emergency treatment by way of sessions of strong chemotherapy. He remained in extreme pain and was told that it was essential that he obtained a bone marrow transplant to save his life, which duly took place in January 2012. For some time thereafter he suffered from a very weak immune system. Prior to his diagnosis he had not only successfully completed two full-time English language courses but had embarked (from September 2010) on a full-time course at Kensington College of Business Campus studying for a BA(Hons) Degree in Business Studies under supervision of the University of Wales. Those Sponsors understandably agreed that he should put his studies ‘on hold’ during his treatment and convalescence. He believed himself fluent in English by 2013 and was unsurprised at his success in the TOEIC test in February 2013. He was shocked to learn in October 2014 that his leave to remain was being curtailed for fraud as he had not paid any additional money at the Test Centre, which he attended in person, and witnessed no wrongdoing there. He had himself obtained the test audio records and confirmed that the voice thereon was not his. He had completed his degree in October 2015 and having lived in the UK for thirteen years wished to remain here. He took the test at New London College simply because the Centre had availability when he looked online. It would be very difficult to re-establish himself in Uzbekistan given the lengthy gap on his CV caused by the fraud allegation.

4. The First-tier Tribunal, having noted that Mr Igamberdiev gave evidence using a wide vocabulary in fluent English and correctly directed itself to the burden and standard of proof, observed that

   (a) The Upper Tribunal in DR & RK India [2022] UKUT 00112 (IAC) had given greater weight to evidence from the Home Office’s witnesses Peter Millington, Rebecca Collins and Adam Sewell, and the Expert Report of Professor French, while the evidence given by Professor Sommer in the APPC proceedings (whose view was that it was unsafe for anyone to be relying on computer files generated by ETS) was apparently given little evidential value. DK & RK was the last word for the moment and established that the Secretary of State’s case need not be watertight to prevail on balance of probabilities. It also indicated that the chain of custody linking entries examined by ETS with the names of the test takers was not absolutely secure and could have been better, that it was virtually inconceivable that the genuine results of honest candidates could

be substituted without any reward even if the technical ability to do so was available, and that it was highly unlikely that any candidate present on one of the occasions when proxies were being used was not fully aware of what was going on.

(b) The Secretary of State had adduced evidence via “Lookup Tools” for 9 January and 6 February 2013, albeit that the TOEIC certificate only mentioned speaking and writing tests on 6 February and listening and reading on 8 February 2013; the Lookup Tool for 6 February 2013 stated that 23 of the 70 tests were demarcated “questionable” and 47 as invalid.

5. Having reviewed the evidence and authorities, the First-tier Tribunal concluded

(a) It did not wholly agree with the *obiter* comments of the Upper Tribunal in DK & RK. The Judge’s own experience suggested that “a law-abiding individual attending a Test Centre with which he is unfamiliar, and who is focussed on his or her own affairs, would [not] inevitably be aware of wrongdoing at that Test Centre … criminals often do things because their criminal inclination or ‘business model’ simply makes it easier or habitual for them to act in certain ways. Having practised as a solicitor for many years, I am aware that criminals do not commit unlawful acts only for immediate financial reward but simply because they can”. The Tribunal entertained concerns that a corrupt institution might routinely use a proxy without a participant’s knowledge.

(b) The fact of established fraud at New London College did not automatically mean that everyone taking a test there was a co-conspirator. This was the case even though Mr Igamberdiev's test result was designated “invalid” rather than “questionable”. Given New London College was involved in organised crime and Mr Igamberdiev acknowledged the voice recording did not contain his voice, there was a serious allegation present here which required rebuttal for his appeal to succeed.

(c) In determining whether that allegation was in fact rebutted, relevant considerations were that Mr Igamberdiev had mastered conversational English at Uzbek State World Languages University, studied from 2010 to 2014 in the UK on a degree course taught in English passing degree-level examinations in corporate strategy, contemporary issues in management, financial reporting, marketing, international marketing and e-marketing, his Sponsor supporting his ongoing immigration applications; he had been employed part-time in a capacity which required him to speak English on a regular basis.

(d) There was no obvious reason why a person with Mr Igamberdiev's ostensible command of English would cheat in their exam,

acknowledging the possibility that there might be reasons so to do beyond language proficiency but noting the absence of any evidence that he had ever engaged in dishonest conduct whether of a criminal nature or otherwise. He had given a plausible account of choosing New London College to take the test and provided information as to events that day. Notwithstanding that the Look-up tool was now accepted by the Upper Tribunal as “amply sufficient” to discharge the Secretary of State’s burden of proof, reviewing the evidence as a whole, in this particular case dishonesty was unproven.

6. The Secretary of State sought permission to appeal on the basis that the First-tier Tribunal had effectively “overturned” the conclusion in DK & RK notwithstanding that the Respondent had provided evidence that it was not the voice of Mr Igamberdiev on the tape in question; that authority established that the Secretary of State’s evidence was in general amply sufficient to discharge the burden of proof upon her.

7. The Upper Tribunal granted permission to appeal on 24 October 2022 on the basis that the judge had arguably failed to provide adequate reasons for departing from the conclusions of DK & RK both as to the prevalence of fraud at New London College and as to the reliability of the respondent’s evidence.

8. For Mr Igamberdiev Mrs Hodgson submitted that the two-stage consideration mandated in DK & RK had been loyally followed here, that the First-tier Tribunal’s conclusions were open to it and not irrational, and that it was unsurprising the Secretary of State’s case was found wanting given the attribution of a test that had not been taken by Mr Igamberdiev to him. For the Respondent Mr Tufan submitted that the First-tier Tribunal had failed to recognise the very high threshold now created by DK & RK for a challenge to a TOEIC dishonesty allegation backed by a Look-Up Tool to succeed.

Decision and reasons

9. On this appeal the Secretary of State essentially contends that the First-tier Tribunal failed to have proper regard to the high threshold that a successful appeal must attain given the cogency which the Upper Tribunal via attributes to her evidence. The difficulty with that submission is that the First-tier Tribunal was fully aware of the implications of DK & RK and indeed directed itself that the Secretary of State’s evidence was in general amply sufficient to discharge the burden of proof upon her: and was thus fully cognisant of the essential *ratio* of that decision as recorded at (1) of its headnote. The Judge expressly noted that New London College was involved in organised crime and that Mr Igamberdiev accepted that his voice was not that on the test recording linked to his records with the College. I conclude that the Judge was fully aware of the strength of the Secretary of State’s

generic evidence and its linkage to Mr Igamberdiev's particular test results.

10. One oddity of the materials supplied is that one of the Revised ETS Lookup Tools in the Secretary of State's bundle attributes a test taken on 9 January 2013 to Mr Igamberdiev, who denies taking a test on that date. The Secretary of State's pre-appeal hearing review addresses this matter by stating it to be irrelevant given that the ETS Lookup Tool for 6 February 2013 would be sufficient to make good her case. Doubtless this is in principle correct; but it does not encourage confidence in the decision making or the cogency of Home Office record-keeping that there is no evidence whatsoever that Mr Igamberdiev took a test on 9 January 2013.

11. As famously stated by Megarry J when evoking the essence of natural justice in John v Rees [1970] Ch 345, 402:

> 'It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. 'When something is obvious," they may say, 'why force everyone to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start.' Those who take this view do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events.'"

12. The point being made was of course in relation to fairness, not strictly speaking the legal principle at the centre of this case. However, Megarry J's example of the law's occasional encounter with charges at first sight ostensibly unanswerable, which were ultimately completely answered, is a reminder that appeals are to be determined on the evidence, not via generalised mantra. Implausible events may well be found to have taken place. As set out above, there were multiple strands of Mr Igamberdiev's evidence which impressed the First-tier Tribunal, ranging from his general good character, the fact that he was studying a degree in English at the time, the lack of any rationally detectable motivation to cheat given his facility in the English language, and his detailed recollection of the day of the test. Those considerations were reasonably found to outweigh the matters upon which the Secretary of State relied.

13. In conclusion, I do not consider that the Judge made any material error of law: all relevant evidence was considered, his conclusions are not irrational, and the cogency of the Home Office evidence was expressly acknowledged and considered.

Decision:

The appeal is dismissed.

Deputy Upper Tribunal Judge Symes
Immigration and Asylum Chamber

10 October 2023