IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-004852

First-tier Tribunal No:
HU/58056/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

17th October 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE JARVIS

Between

AKBAR ALI
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms M. Hodgson, Counsel instructed by Abbott & Harris Solicitors
For the Respondent: Mr D. Clarke, Senior Home Office Presenting Officer

Heard at Field House on 22 September 2023

DECISION AND REASONS

Introduction

1. The Appellant in this case is the Secretary of State for the Home Department, but in order to maintain consistency with the decision of the First-tier Tribunal, I shall refer to the parties as they were during those proceedings.

2. The Respondent appeals against the decision of First-tier Tribunal Judge G Clarke (and hereafter "the Judge"),, promulgated on 25 July 2022, who allowed the Appellant's appeal against the Respondent's decision to refuse the Appellant's human rights application by way of a refusal decision dated 7 December 2021.

3. Permission to appeal was initially refused by Judge Aziz on 3 September 2022 but was later granted by Upper Tribunal Judge Jackson on 24 November 2022. In that later decision, Upper Tribunal Judge Jackson found it arguable that the Judge had erred by taking into account the All Party Parliamentary Group report ("the APPG report") despite that report being predominantly inadmissible in Tribunal proceedings.

The Judge's findings

4. One of the core issues before the Judge was the Respondent's assertion that the Appellant had used deception in his application for Leave to Remain made on 19 April 2012 by relying upon a TOEIC certificate which ETS cancelled on the basis that they concluded that the person recorded in the speaking test was not the Appellant. The Respondent specifically contends that, in light of the evidence from ETS, the Appellant's speaking test (taken on 20 February 2012) was carried out by a proxy test taker.

5. The Judge summarised the Respondent's position from para. 42 onwards and noted that the Respondent had provided the ETS cancellation of the Appellant's test result on the basis that it is 'invalid' (para. 48) and that the general evidence from 22 February 2012 showed that, of the six speaking tests taken on that date at the International School of Business Studies, four were classified as *questionable* and two as *invalid* (para. 49).

6. At para. 52, the Judge made reference to an earlier decision of the Upper Tribunal in SM and Qadir v Secretary of State for the Home Department [2016] UKUT 00229 (IAC) ("SM") and concluded at para. 54 that the Respondent had satisfied the initial burden in respect of the allegation of fraud.

7. At paras. 55 to 65, the Judge went on to consider whether or not the Appellant had provided an innocent explanation to rebut the Respondent's allegation of dishonesty and concluded that the Appellant was a credible witness (at para. 64).

8. From paras. 66 to 70, the Judge then observed that the burden shifted to the Respondent to prove that the innocent explanation should be rejected (para. 66). Further, at para. 68, the Judge made reference to the Upper Tribunal's decision in DK and RK (Parliamentary privilege; evidence) [2021] UKUT 00061 (IAC), ("DK and RK 2021").

9. In the same paragraph, the Judge noted that the Upper Tribunal had held that the APPG report (dated 18 July 2019) is itself not admissible to the Tribunal but also observed that the Upper Tribunal had indicated that the

transcripts of the evidence given by Professors Sommer, French and Dr Harrison (on 11 June 2019) to that group should be admitted.

10. Crucially to the Respondent's current appeal, the Judge made the following material findings:

> *"69. Even when I ignore the evidence that was given to the All Party Parliamentary Group, I find that, to use the language of the Upper Tribunal in SM and Qadir, the Respondent's evidence "wilts" even further in this appeal before me because there is no challenge to the other aspects of the Appellant's test.*
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> *70. On the specific facts of this case, the Respondent has failed to provide credible and reliable evidence of why I should reject this Appellant's innocent explanation as to why he did not cheat. The All Party Parliamentary Group Report indicates that even experts relied on by the Home Office have undermined the reliability of the Respondent's evidence. I find that the Respondent has failed to adduce any credible evidence that would prompt me to reject the Appellant's explanation. I therefore find that the Respondent has failed to prove the allegation of fraud and deception."*

The Respondent's challenge

11. The Respondent's challenge is a straightforward one: it is argued that the Judge materially erred by making findings in respect of the contents of the APPG report (dated 18 July 2019) at para. 70, despite a Presidential panel of the Upper Tribunal finding that the report itself was not admissible, in DK and RK 2021

12. Allied to that challenge is the additional submission that the Judge did not direct themself to the later associated Presidential guidance decision in DK and RK (ETS: SSHD evidence, proof) India [2022] UKUT 112 (IAC) ("DK and RK 2022").

The error of law hearing

13. I heard detailed oral submissions from Ms Hodgson who, in summary, argued the following:

    a. Although the Judge did not make reference to DK and RK 2022, the Judge nonetheless applied the learning from that decision when assessing the competing evidence - she submitted that it cannot be an error of law for a Judge to fail to mention a case which they nonetheless apply in substance.

    b. Ms Hodgson also emphasised that the Judge had found that the Respondent had made out the initial burden and had otherwise made detailed and lawful findings in respect of the Appellant's own credibility and that this had not been directly challenged by the Respondent.

Findings and reasons

14. I have no difficulty at all in accepting Ms Hodgson's submission that there cannot be an error of law in a decision simply because the Judge did not make express reference to a particular authority but nonetheless applies the ratio/guidance of that decision.

15. However, as I indicated during the hearing, that submission is not, in my judgement, sufficient to rebut the criticism made by the Respondent in respect of the Judge's assessment of the competing evidence.

16. It is clear that the Presidential guidance in DK and RK 2022 is not referred to at all by the Judge in the decision despite the fact that it was promulgated in March 2022, around 3 to 4 months before the hearing of this appeal at the First-tier Tribunal.

17. Neither Ms Hodgson nor the Presenting Officer on that occasion provided the Judge with the decision but nonetheless it is clear that the Respondent relied upon DK and RK 2022 at para. 6 of her review, referred to by the Judge at para. 32.

18. I disagree with Ms Hodgson's implied contention that DK and RK 2022 should be read only as guidance in respect of the legal approach to the assessment of evidence where deception is alleged. I certainly agree that part of the Presidential decision seeks to clarify the relatively intangible nature of the burden of proof in such proceedings, see for instance para. 60, but it is also clear that the decision gives detailed guidance about a number of key issues, including: the nature of ETS evidence; the processes used by ETS in assessing the recordings of TOEIC speaking tests and the impact of the admissible transcripts of the various experts from the APPG report on the general weight to be given to ETS evidence.

19. Importantly, in respect of the Respondent's challenge to this judgment, the Upper Tribunal in DK and RK 2022 concluded that, on the basis of the detailed and expert evidence before them, there was no good reason to doubt the processes or analysis of the recordings of speaking tests carried out by ETS, see para. 103.

20. At para. 117, the Presidential panel further concluded that:

> "…The evidence the Respondent relies on in these cases is not shown to be unreliable in any general sense. On the contrary, the very limited concerns that have been raised tend to show that as a class the evidence is highly reliable, although not necessarily wholly free from error. All that the Appellants' and intervenor's arguments show in reality is that the evidence upon which the Respondent relies has a similar feature to almost all evidence in almost all cases: it is not infallible."

21. The Upper Tribunal also made clear findings that the various forms of expert evidence adduced, (including the experts' transcripts used in the

APPG report which are admissible in the Tribunal), did not materially impact upon the weight to be given to an ETS assessment of particular invalidity:

> "89. The difference between the caution employed by Professor Sommer, in particular, in expert opinions for court use and in what he said at the APPG session is striking. In the former circumstances he is cautious about reaching conclusions on the basis of the evidence available to him, as can be seen in the material before us including his description of the material available in another case. In the APPG proceedings, however, he is content to begin his narrative by saying that "it was unsafe for anybody to be relying upon computer files generated by ETS and used by the Home Office as a sole means of making a decision". On the other hand, he was not able, he admits even in that context, to "identify specific points at which things had gone wrong", but that "the administrative arrangements and the audit trails were simply not present".
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> ...
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> 92. Even without all those considerations, however, we cannot find anything in the way of facts in the transcript substantially to undermine the existing evidence adduced by the Secretary of State. The conversation really only expands on the possibility that the evidence could have been different. Professor French and Dr Harrison adhere to their previous assessments. Professor Sommer strengthens his opposition to the Home Office, but without adducing any factual or evidential basis justifying what appears to be a change of opinion about the general reliability of the evidence: and even if it is not a change of opinion, it would be clearly wrong for us to regard what he said there as in any way contradicting or superseding his evidence before us."

22. Bringing this together it is clear that these further aspects of the Presidential guidance are crucial to any assessment of the competing evidence before a Tribunal.

23. In this case, the Judge says on two occasions in para. 70 that the Respondent's evidence is not "credible or reliable". Ms Hodgson sought to downplay these findings but in my judgement it is abundantly clear that the Judge impermissibly went further than the transcripts of the expert evidence to the APPG, contrary to DK and RK 2021.

24. Not only that, but I find that the Judge has failed to provide any explanation for the conclusion that the Respondent's evidence is not "*credible"*. Such a finding constitutes a serious allegation against the Respondent and indeed, (albeit the Judge did not provide any reasons for this finding), the view given by Professor French whose report was included within the Respondent's evidence.

25. In light of the Presidential guidance in DK and RK 2022 it is simply not possible for a Judge to lawfully conclude that the Respondent's (ETS) evidence is materially impacted by any of the testimony given by the three experts to the APPG in 2019.

26. This of course does not mean that new evidence could not potentially shine new light on the issues in these kinds of appeals and additionally the Upper Tribunal is clear that the ETS/Respondent's evidence is not infallible,

but it is simply not permissible for a Judge to conclude that the Respondent's case *lacks credibility* on the basis of precisely the same evidence which was before the Presidential panel in DK and RK 2022.

27. The Judge's finding about the lack of 'credibility' of the ETS/Respondent's evidence is also difficult to understand in circumstances where the Judge earlier concluded that this same evidence was sufficient to establish the initial allegation of fraud (see para. 49).

28. I also find that the Judge's assessment of whether or not the Appellant provided an innocent explanation is further infected by the Judge's heavy reliance upon SM, see for instance the Judge's criticism of the evidence of Peter Millington and Rebecca Collings at para. 53; as well as the finding at para. 69.

29. It is clear from the judgment in DK and RK 2022 that the Upper Tribunal's view on the Respondent's evidence in such cases has evolved somewhat since 2016, see for instance:

> *"127. Where the evidence derived from ETS points to a particular test result having been obtained by the input of a person who had undertaken other tests, and if that evidence is uncontradicted by credible evidence, unexplained, and not the subject of any material undermining its effect in the individual case, it is in our judgment amply sufficient to prove that fact on the balance of probabilities.*
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> *128. In using the phrase "amply sufficient" we differ from the conclusion of this Tribunal on different evidence, explored in a less detailed way, in SM and Qadir v SSHD. We do not consider that the evidential burden on the Respondent in these cases was discharged by only a narrow margin..."*

Notice of Decision

30. I therefore conclude that the Judge's assessment of the Respondent's evidence was materially flawed by a failure to lawfully apply DK and RK 2021 and the absence of any consideration of DK and RK 2022. I set aside the decision of the Judge in its entirety.

DIRECTIONS

In respect of remaking of the decision, I reject Ms Hodgson's submission that the Judge's findings on the Appellant's credibility should be preserved. As I have explained these findings are materially infected by the Judge's outright rejection of the Respondent's evidence and the failure to consider it as the evidential background when analysing the credibility of the Appellant's evidence, as per para. 60 of DK and RK 2022.

(1) In light of my findings the appeal requires full fact-finding and I therefore remit the matter to the First-tier Tribunal to be heard by a judge other than Judge G Clarke.

I P Jarvis

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

5 October 2023