



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/02324/2020**

THE IMMIGRATION ACTS

**Heard at Field House, London
On Friday 20 August 2021**

**Decision & Reasons Promulgated
On Monday 04 October 2021**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

-and-

MR MD SALMAN BIN ALAM

Respondent

Representation:

For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer

For the Respondent: Mr S Karim, Counsel instructed by Liberty Legal Solicitors LLP

DECISION AND REASONS

BACKGROUND

1. This is an appeal by the Secretary of State for the Home Department. For ease of reference, I refer to the parties as they were before the First-tier Tribunal. The Respondent appeals against the decision of First-tier Tribunal Judge Dean promulgated on 24 November 2020 (“the Decision”). By the Decision, the Judge allowed the Appellant’s appeal against the Respondent’s decision dated 3 February 2020, refusing his human rights claim founded on Article 8 ECHR. The Respondent refused the claim on the basis that the Appellant had used a proxy test taker in respect of an English language test

when making an application for student leave in 2011. The Appellant strenuously denies that allegation. This is a so-called “ETS case”.

2. The Judge accepted that the Respondent’s evidence met the evidential burden of demonstrating dishonesty. However, she accepted the credibility of the Appellant’s evidence. That shifted the burden back to the Respondent. The Judge found that the Respondent had not discharged the overall legal burden. In her findings, the Judge made reference to the report of the All-Party Parliamentary Group in relation to the ETS issue (“the APPG Report”). Since the Decision, this Tribunal has considered the admissibility and evidential value of the APPG Report in the reported decision of DK and RK (Parliamentary privilege; evidence) [2021] UKUT 00061 (IAC) (“DK”). The Tribunal concluded that the APPG Report was itself not protected by Parliamentary privilege but that some of the content was. For that reason, the Tribunal considered that if the APPG Report were admitted in evidence, “the Tribunal would be drawn into this forbidden area”. Further, the Tribunal concluded that the opinions of the APPG were not material evidentially in an appeal which had to be determined by the Tribunal considering the individual appeal. The Tribunal did however accept at [23] of the decision that the transcript of the evidence which was given to the APPG by experts might be relevant.
3. The Respondent applied for permission to appeal the Decision in an application dated 1 December 2020. It is not disputed by the Respondent that the application was not in fact made until 9 March 2021. First-tier Tribunal Judge O’Keeffe refused permission on the basis that the application was out of time.
4. When the application was renewed to this Tribunal therefore the first issue for the Judge considering that application was whether there was good reason to admit the application notwithstanding the delay in making the first application. Upper Tribunal Judge Grubb, who considered the application, accepted the Respondent’s excuse that the application had been drafted in time but, due to administrative mix-up, had not been filed. It was thought by the Respondent’s office that the application had been made in time and it was only when the application was chased that the error emerged. Judge Grubb considered that the application involved “an allegation of fraud in the immigration context which is a matter of public interest”. He considered that, other than delay, the Appellant had “not suffered any tangible prejudice”. The Appellant disputes that, as I will come to. Judge Grubb considered it “just to admit [the] application in the interest of justice”.
5. Turning to the substance of the application for permission to appeal, that is based on an overall assertion of a material misdirection of law. The first issue on which it is said that the Judge misdirected herself relates to the weight placed on the Appellant’s English language ability. It is said that the Judge failed to consider that there might be reasons other than inability to speak English which might explain why an appellant would use a proxy test taker. Reliance was placed in this regard on the case of MA (ETS – TOEIC

testing) [2016] UKUT 00450 (IAC) (“MA”). The second issue was the reliance placed on the APPG Report. It is said that the Judge relied on that report as a reason to depart from existing case-law on the ETS issue. It is asserted that the conclusions reached in the APPG Report are inconsistent with the views taken of the expert evidence by panels of this Tribunal and that the preferring of those conclusions by the Judge amounts to an error of law. It is also said that the caveat expressed by Professor French to the APPG does not undermine his evidence as before this Tribunal in ETS cases or nullify his opinion that there is a 1% false positive rate.

6. Upper Tribunal Judge Grubb granted permission on the substance of the application in the following terms:

“... 3. It is arguable that in reaching his findings in the appellant’s favour on the fraud/deception issue, the judge erred in law by admitting, and relying upon, the All Party Parliamentary Group (“APPG”) report following DK and RK (Parliamentary privilege; evidence) [2021] UKUT 61 (IAC). Whether any error, if established, was material will be a matter that will need to be addressed. All grounds are arguable.”

7. The Appellant filed a Rule 24 Reply dated 15 June 2021 taking issue with the Respondent’s grounds and with Judge Grubb’s decision to extend time. Annexed to the Rule 24 Reply was a transcript of the evidence given by the experts to the APPG. No objection was taken to the admission of that evidence.
8. The matter came before me to determine whether the Decision contains an error of law and, if I so concluded, to either re-make the decision or remit the appeal to the First-tier Tribunal to do so. At the end of the hearing, following oral submissions made by Mr Tufan and Mr Karim, I indicated that I did not find there to be an error of law in the Decision and that I would provide my reasons in writing for that conclusion following the hearing which I now turn to do.

DISCUSSION

Extension of time

9. I begin with Judge Grubb’s decision to extend time. Issue is taken by the Appellant with Judge Grubb’s view that the extension of time would not prejudice the Appellant. It is said that he was prejudiced because, if the application had been made and considered earlier, then this Tribunal’s decision in DK would not have been reported and could not have been relied upon by the Respondent in her appeal against the Decision.
10. I do not consider that to be an attractive argument. First, the Respondent’s grounds do not themselves refer to DK as that decision was not in being. A Judge even without the benefit of the decision in DK could readily have formed the view that the APPG Report was either not

admissible or could not carry evidential weight and reached the same conclusion that the Judge had arguably erred by relying upon it.

11. Second, I accept that the change in the legal position following DK is not entirely the same as a case where a change is said simply to recognise what the law has always been. That is the position as regards admissibility, but I accept not in relation to evidential weight. However, the Appellant has the opportunity still to rely on the evidence given to the APPG. He is still able to argue as he has that the Judge did not err in giving some weight to the record of the evidence even if not to the report itself.
12. Third, a decision to extend time by a Judge is largely a discretionary matter. Judge Grubb recognised that the Appellant might be said to be prejudiced by the fact of delay but balanced that against what he saw as the importance of the issue at stake. There is no error made by the Judge when exercising his discretion.

The APPG Report

13. I begin with what is the second issue raised by the Respondent as that is the main reason for Judge Grubb's grant of permission. Further, if the Judge has erred in this regard, it is still necessary to consider whether the error is a material one.
14. The Judge refers to the APPG Report at [23] to [26] of the Decision as follows:

“23. The APPG Report states that ‘all the experts agreed that the evidence provided by ETS to the Home Office was questionable’ with all but one expert agreeing that it ‘contained fundamental flaws that should make it impossible to take decisions based on [that] evidence alone’ (page 10). Like the APPG, I find that that is precisely what the Respondent has done which I find undermines her claim that the Appellant used deception to obtain the TOEIC certificate.

24. The APPG Report also points out that there was no reliable evidential trail linking each recording to the person who sat the test. In the emails between the Appellant and ETS's legal representative (outlined in paragraph 22 above) I find that this is exactly the experience of the Appellant. He was unable to get an audio recording which verified that it was actually his test that had been supplied.

25. Furthermore, the APPG Report states that in relation to audio files expert witnesses identified ‘a lack of continuity of the evidence’ which no ‘chain of custody’ which I find goes against the veracity of the Appellant's ETS test result.

26. The experts who gave evidence to the APPG all raised ‘serious concerns’ about the reliability of the spreadsheets sent by ETS to the Home Office ‘echoing the findings of the Home Affairs Select Committee, the National Audit Office and legal experts (APPG Report, page 14, paragraph 1.1). I find this evidence casts doubt upon the credibility of the evidence relied upon by the Respondent in accusing the Appellant of dishonesty. In evidence before the APPG it was demonstrated that fundamental parts of the ETS data-set were incorrect. I therefore find that, without more, the Respondent cannot be sure that the data linking each student to a fraudulent test is either correct or reliable. I further find that because this casts doubt on the accuracy of the ETS test results it therefore

undermines the reliability of the test outcome claiming the Appellant's test was invalid."

15. Having made those comments about the APPG Report, the Judge reached the following conclusion at [27] of the Decision:

"Accordingly, looking at the totality of the evidence before me, together with my findings in paragraphs 14-26 above, I find that the Respondent has not discharged the legal burden placed upon her of proving dishonesty."

16. I can readily accept that much of what is said at [26] of the Decision involves an error by the Judge. She should not have relied upon the APPG Report in relation to what it has to say about proceedings before the Home Affairs Select Committee or the National Audit Office as both are subject to privilege (see [13] and [17] of the decision in DK). It is also difficult to see how and why weight should be given to what are described by the Judge as "legal experts". Those persons are no more than those solicitors and barristers who had conducted cases against the Secretary of State and who therefore understandably were likely to express adverse views about the ETS evidence.

17. However, with the exception of those matters, even following DK, it is not clear that the Judge made any error by referring to the APPG Report. Much of the reliance placed on it turns on the views of the experts. Those views are expressed in the transcript of their evidence upon which weight could be placed even following DK.

18. It is also necessary to set the Judge's reference to the APPG Report in context. She had by this stage already accepted that the Respondent had discharged her evidential burden by reason of what she was told by ETS as confirmed by evidence which, perhaps unusually, was in this case filed by the Appellant as the Respondent had failed to submit it (see [13] to [16] of the Decision).

19. That the generic evidence coupled with evidence about an individual's test results meets the evidential burden on the Respondent is entirely consistent with decisions of this Tribunal (see SM and Qadir v Secretary of State for the Home Department (ETS - Evidence - Burden of Proof) [2016] UKUT 00229 (IAC) - "SM and Qadir"). However, as is equally clear from (ii) of the headnote in SM and Qadir the general evidence is not of itself sufficient to discharge the legal burden if an appellant's evidence satisfies his burden. Having found as she did that the Appellant in this appeal had satisfied his evidential burden, the Judge's conclusion that this could not be overcome by the generic evidence is consistent with conclusions of this Tribunal in other reported cases and is not fundamentally influenced by the APPG Report. The Judge could just as easily have reached the conclusion which she did at [27] of the Decision based on existing case law and without any reference to the APPG Report.

English language ability and other factors

20. As Mr Karim submitted and I accept, what is said by the Judge at [23] to [26] of the Decision is merely a bolstering of her previous conclusions about the reliability of the evidence in this case. That brings me on then to the first issue raised by the Respondent concerning the weight given by the Judge to the Appellant's English language ability. This and the other factors relied upon are also relevant to the materiality of any error made by reference to the APPG Report.

21. The Judge referred to the Appellant's English language abilities at [17] to [20] of the Decision as follows:

"17. The ETS results show the Appellant scored 140 in his speaking and writing tests. However, the Appellant disputes the allegation that the score of 140 in both tests was achieved using a proxy test taker. In particular he points to the fact that in order to obtain a CAS for his course at the University of Sunderland, he needed a higher score and so took the test again and obtained slightly better results (Appellant's bundle, page 56).

18. The disputed test took place on 15 November 2011. Two months later on 18 January 2012, the Appellant took the test again and, as stated on the University of Sunderland CAS achieved *inter alia* 170 in speaking and 160 in Writing. I find that these results are consistent with the Appellant having achieved a score of 140 two months previously because they illustrate a slight, but not significant, improvement. I further find that these subsequent results undermine the Respondent's claim that the Appellant used deception in the November 2011 test because they are in line with his level of attainment in that earlier test.

19. I note that on the basis of the language test taken in January 2012 the Appellant went on to study for a BSc in International Tourism and Hospitality Management at the University of Sunderland later that year and went on to graduate in July 2015. I find that he would have been unable to do that if he did not have sound English language skills and instead had to rely on a proxy, something he could not do at university. The full transcript of his degree results shows that in his first academic year he obtained good results which I find are consistent with someone who had appropriate English language skills (Appellant's bundle, page 37).

20. The Appellant first learnt of the allegation of dishonesty and fraud when the Respondent refused his application for further leave in July 2016. At the time the Appellant was studying for a Master of Science degree in International Tourism Management at Glasgow Caledonian University. He graduated in November 2016."

22. I accept that the Tribunal in MA did point to other reasons why even an appellant fluent in English might nonetheless engage in deception (see [57] of the decision in that case relied upon in the Respondent's grounds). Nonetheless, as the Tribunal made clear there and in SM and Qadir the assessment whether an appellant has engaged in deception is intrinsically fact sensitive. Mr Karim drew my attention to [69] of the decision in SM and Qadir which makes reference to the sorts of factors which might be relevant.

23. In this case, the Judge did not engage in the exercise cautioned against by the Tribunal in SM and Qadir at [80]. She did not focus on the Appellant's

language ability at the hearing but rather his ability taken in the context of what occurred at the time of the TOEIC test in 2011 and the Appellant's overall academic achievements. That was a permissible approach. They were not irrelevant factors.

24. What the Judge says at [18] of the Decision is particularly relevant. As Mr Karim pointed out, the Appellant's scores in the test in 2011 were quite low. This was not a case where the Appellant had achieved very high scores by using a proxy test taker. For that reason, he had to re-take the test in order to obtain a CAS for his course. The scores which he achieved in that test (which was not impugned and which he took shortly after the TOEIC test) were similar to those achieved in the 2011 test. That the Appellant had to and did re-take the test at around the time of the impugned test was relevant to the Judge's consideration.
25. As Mr Karim submitted and I accept, the Respondent's challenge in this regard is directed at the weight which the Judge placed on this evidence. That was a matter for the Judge. She has not erred by placing weight on this aspect and the Respondent's grounds are merely a disagreement with the findings made based on the evidence.
26. I return then to the point about continuity of evidence made by the experts to the APPG. That is a point which arose in this case. As the Judge says at [21] of the Decision, the Appellant "went to considerable lengths to obtain the audio tapes of his November 2011 speaking test". The Appellant produced correspondence in that regard and a transcript of the content of the audio tape which he subsequently received. The Judge notes at [21] of the Decision that "the content of the audio tapes bears no relation to a language test". In circumstances where the Respondent relied on the outcome of an examination of the audio recording, that comment is obviously significant.
27. The Judge goes on at [22] of the Decision to say more about the circumstances surrounding the audio tapes as follows:

"The Appellant also states that the content and voice file were deleted but then reinstated (Appellant's Witness Statement, paragraph 8). Additionally the Appellant states that it is not his voice on the audio files. The Appellant raised this with ETS legal representatives on a number of occasions and asked for the full test audio with verification that it was the Appellant's test recording (Appellant's bundle, pages 72-730. The correspondence ended with an email from the Respondent's representative, dated 3 August 2020, stating that they had provided the information requested and that ETS was not a party to the Appellant's litigation and they could be of no further assistance. Although perhaps understandable, it is unhelpful to the Appellant who I find made his best endeavours to obtain verified audio recordings of his test in November 2011."
28. I accept of course that it would be unsurprising that the Appellant's voice would not appear on the audio file if, as the Respondent asserts, he had used a proxy test taker. However, what the Appellant says occurred in his

case is consistent with what was said by the experts to the APPG about the difficulties of establishing whether a recording properly belongs to an individual due to the deficiencies in evidence about continuity. I have already made the point that the Judge would have been entitled, even post DK, to have regard to the evidence given to the APPG by the experts which is in line with what is said in the APPG Report as recorded at [23] to [25] of the Decision. Particularly in the circumstances which arose in this case as set out in the Appellant's evidence, the Judge was entitled to place weight on the lack of continuity in relation to the audio file.

29. The Judge therefore provided reasons at [17] to [22] of the Decision for accepting the Appellant's case. She was bolstered in her findings by what the experts had told the APPG, and she was entitled to have regard to that evidence if not the report itself. As is pointed out in the Appellant's Rule 24 Reply at [16] to [18], those views are consistent with the opinions of the experts as recorded in the case-law relating to ETS cases.

30. Any error in relation to the Judge's reference to the APPG Report as exists at [26] of the Decision is therefore not material.

CONCLUSION

31. For the foregoing reasons, I am satisfied that there is no error of law in the Decision. I therefore uphold the Decision with the result that the Appellant's appeal remains allowed.

DECISION

The Decision of First-tier Tribunal Judge Dean promulgated on 24 November 2020 does not involve the making of an error on a point of law. I therefore uphold the Decision.

Signed: L K Smith

Upper Tribunal Judge Smith

Dated: 24 August 2021