



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/03755/2019 (V)

THE IMMIGRATION ACTS

Heard at Field House via Skype for Business
On Thursday 25 March 2021

Decision & Reasons Promulgated
On Thursday 25 March 2021

Before

UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

-and-

MR IRFAN SARDAR MUHAMMAD

Respondent

Representation:

For the Appellants: Mr S Walker, Senior Home Office Presenting Officer

For the Respondent: Mr R Sharma, Counsel instructed by M & K Solicitors

DECISION AND REASONS

BACKGROUND

1. The Secretary of State is the appellant in this appeal. For ease of reference, however, I refer to the parties as they were in the First-tier Tribunal. The Respondent appeals against the decision of First-tier Tribunal Judge Steer promulgated on 2 December 2020 (“the Decision”). By the Decision, the Judge allowed the Appellant’s appeal against the Respondent’s decision dated 13 February 2019, refusing his human rights claim based on his private life in the UK. The claim was made in the context of an application for

indefinite leave to remain (“ILR”) based on ten years’ continuous lawful residence in the UK.

2. The Appellant is a national of Pakistan. He came to the UK in March 2004 as a student. His leave in that category was extended to August 2012. He then sought leave as a Tier 1 (Entrepreneur) Migrant. Whilst that application was pending, he completed his period of ten years in the UK. The Respondent accepts in her decision that the period of residence was lawful. However, the Respondent rejected the application on the basis that an English language test certificate used in support of an application in 2012 had, she asserted, been obtained using a proxy test taker. This is therefore a so-called ETS case.
3. Based on the ETS allegation, the Respondent refused the application on the basis that it would be undesirable to permit the Appellant to remain in the UK (paragraph 276B(ii) of the Immigration Rules – “the Rules”) and that the general grounds of refusal apply (paragraph 276B(iii) of the Rules). In addition, the Respondent refused the human rights claim on suitability grounds (paragraph S-LTR of the Rules).
4. As an appeal against a refusal of a human rights claim, the only ground of appeal available to the Appellant is that the Respondent’s decision breaches his rights under section 6 Human Rights Act 1998 (on the basis that refusal is a breach of his right to respect of his private life under Article 8 ECHR). Notwithstanding that the appeal could not be allowed or dismissed solely on a determination of the ETS allegation, that was accepted by both parties to be the central issue in the appeal.
5. The Appellant’s appeal came first before First-tier Tribunal Judge E B Grant who, in a decision promulgated on 21 May 2019, dismissed the Appellant’s appeal. However, by a decision promulgated on 19 February 2020, Deputy Upper Tribunal Judge Bagral found there to be an error of law in Judge Grant’s decision. She therefore set aside Judge Grant’s decision and remitted the appeal for a de novo hearing before another Judge.
6. So it was that the appeal came back before Judge Steer. In short summary, the Judge found that the Respondent had discharged her initial evidential burden as she had “adduced sufficient evidence, raising an issue, as to whether the Appellant used a proxy test taker” ([27] of the Decision). However, at [28] of the Decision, the Judge made findings in relation to the Appellant’s credibility and concluded that the Respondent had not discharged her legal burden (in other words that the Appellant had discharged the evidential burden which had shifted to him and the Respondent’s evidence was not strong enough thereafter to satisfy the legal burden). Having so concluded, the Judge found that the Appellant meets the requirements for ILR on grounds of long residence and proceeded to allow the appeal on human rights grounds.
7. The Respondent challenges the Decision on one ground only albeit formed of two parts. Since that is pleaded relatively shortly, I set it out in full as follows:

"1. It is respectfully submitted that FTTJ Steer errs in finding the APPG report is capable of allowing departure from current caselaw dealing with the ETS issue and subsequently therefore capable of displacing the SSHD's evidence. It is asserted that the report only reiterates what certain experts expressed, and has been judicially considered in the joined case of **MA/Saha/Mohibullah (UTT) [2016]**. It is asserted that its conclusion is not consistent with decisions reached by the UT where the Presidential panels considered all appropriate evidence, including that of the SSHD who was not heard by the APPG [All Party Parliamentary Group]. It is respectfully asserted that the decision to prefer the views of the APPG amounts to an error of law for the reasons explained by Stanley Burnton J in **OGC v ICO**, [57]

"It was the duty of the tribunal to determine the issues before it judicially, on the basis of the evidence and arguments before the tribunal.. The select committee had arrived at its view on the evidence before it, and not on the evidence that was before the tribunal. Indirectly, in relying on the opinion of the select committee, the tribunal relied on evidence that was not before it and failed to make its decision only on the basis of the evidence and submissions before it."

2. Further, the caveat expressed by Professor French, does not undermine his expert conclusion or diminish it to the extent that it nullifies the 1% false positive rate. As such it is asserted that the SSHD's evidence is sufficient to meet both the initial and subsequent burden required to demonstrate fraud and to find otherwise on this basis alone is to err in law.

Permission to appeal on the above grounds is respectfully sought.

An oral hearing is requested."

8. By a decision dated 8 January 2021, First-tier Tribunal Judge Chohan refused permission to appeal in the following terms so far as relevant:

"... 3. There is no substance in the grounds. It is clear from the judge's decision that the judge accepted that the appellant had put forward an innocent explanation, which had not been displaced by the respondent. It is not the case that the judge did not follow established case law. In my view, the findings made by the judge were open to the judge on the facts and evidence available.

4. The grounds are nothing more than a disagreement with the judge's findings. There is no arguable error of law."

9. Following a renewed application to this Tribunal on the same ground, permission to appeal was granted by Upper Tribunal Judge Perkins on 22 January 2021 in the following terms:

"1. The First-tier Tribunal Judge believed the Appellant's evidence that he took a TOEIC test and it is not an error of law per se to believe a witness but it is arguable that the Judge's findings were infected by an unlawful evaluation of the APPG report, see in particular paragraph 28(iv) and 20(xv) of the Decision and Reasons. It may be that both parties will have to make very full submissions about the extent to which the matters set out in paragraph 28(iv) of the Decision and Reasons contributed to the Judge's decision.

2. I give permission on all grounds."

10. So it is that the matter comes before me to determine whether the Decision contains an error of law and, if I so conclude, to either re-make the decision or remit the appeal to the First-tier Tribunal to do so. The hearing was listed to be heard remotely. Neither party objected to that course. The hearing was attended by representatives for both parties and the Appellant himself. The hearing proceeded with no technical difficulties.
11. Following a concession made by Mr Walker that there is no error of law in the Decision, I confirmed my agreement with that concession, found there to be no error of law in the Decision and upheld the Decision with the result that the Appellant's appeal remains allowed. I indicated that I would provide my reasons in writing which I now turn to do.

DISCUSSION AND CONCLUSIONS

12. Mr Walker conceded that the Respondent's ground of appeal did not disclose an error of law in the Decision. That was on the basis that, although there was mention of the APPG report in the Decision, the Judge had determined the appeal on the basis that the Respondent's evidence nonetheless satisfied the initial evidential burden but went on to conclude that the Appellant had satisfied his evidential burden, in other words, that the Appellant's evidence that he sat the TOEIC test himself was credible. Mr Walker accepted that the Judge had taken into account the relevant case-law when assessing the "generic evidence" and that her conclusion was based on credibility findings which were open to her.
13. In order to set my reasons in context, I set out the Judge's findings in full as follows:
 - "27. As above, the Respondent has an evidential burden to first adduce sufficient evidence to raise an issue, as to the existence or non-existence of the fact in issue. I find that in producing the generic witness statements of Peter Willington [sic] and Rebecca Collings, the witness statement of Gopen Sethukavalar, and the Look-up Tool extract specifically relating to the Appellant's test certificate, dated 21 August 2012, the Respondent has adduced sufficient evidence, raising an issue, as to whether the Appellant used a proxy test taker, and has discharged that evidential burden.
 28. I find that the Appellant has raised an innocent explanation, an account which satisfies the minimum level of plausibility for the following reasons:
 - i. He provided a plausible account that was not challenged in cross-examination, detailing how, and why, he had chosen the TOEIC, as the test to take, and LCMT, as the centre at which to take the test, how he had travelled to LCMT, producing supporting evidence from a friend and what had happened at the test centre, producing supporting evidence in the form of the letter dated 16 August from LCMT, and the ETS certificate with the Appellant's photograph.
 - ii. Further, the Appellant produced unchallenged oral, and supporting documentary, evidence of his proficiency in the English Language, dating from his secondary education in Pakistan, including certificates at secondary and higher secondary education level, and at degree level, in Pakistan, and English language test certificates gained in Pakistan and, since 2004, in the UK.

iii. The Appellant requested his voice recording from ETS and then made every reasonable attempt to engage with the Respondent and ETS (AB 24-28) and the Respondent failed to respond to the Appellant's enquiry (AB 29 and 24), as to how the Home Office was able to identify the recording as related to him, and how the recording had been received.

iv. On the evidence provided by the Respondent, and the expert evidence, as detailed at paragraph 20 above, the Appellant's test result could be deemed invalid even where there had been no proxy match, if the test provider was found to be one from which many other invalid certificates emanate (Peter Willington [sic] witness statement, dated 23 June 2014, paragraph 47), there was no evidence of the chain of custody of the voice file held by ETS, there were concerns with the lack of editing to remove extraneous noises, insufficient training and the lack of foreign accent familiarity and an absence of cross-checking facilities to identify in which voice tests were mis-ascribed to individuals and no evidence that the Respondent ever checked for errors or anomalies, and could know how many people have been wrongly identified as having obtained their certificate fraudulently.

29. I take into account the information detailed in the extract from the Look-up Tool, but, for the reasons I have given in paragraph 28 above, I find that the Respondent has not discharged the legal burden of proving deception on the part of the Appellant, by proving, on the balance of probabilities, that the explanation provided by the Appellant should be rejected. For the reasons given above, I find that the Appellant did take the test, as claimed, and the decision to refuse the Appellant leave to remain is a breach of his right to private life under Article 8, as he meets the requirements for indefinite leave to remain on the ground of long residence."

[my emphasis]

14. The sub-paragraph which I have emphasised above is one of those identified in the grant of permission to appeal as giving rise to a possible error of law. That grant also refers to [20] of the Decision to which sub-paragraph [28(iv)] also cross-refers. Paragraph [20] summarises the submissions made on behalf of the Appellant in the form of short points numbered (i) to (xvi). The cross-reference to [20] at [28] of the Decision is not precisely identified. However, in substance, it relates to [xi] to [xvi] as follows:

"... xi. In his report, dated 20 April 2016, in respect of ETS voice recordings, Professor Peter French expressed concerns with the lack of editing to remove extraneous noises (3.2.4), the insufficient training (3.3.2) and the lack of foreign accent familiarity (3.3.4), which, along with the general concerns, suggested that the Respondent's evidence was unreliable.

xii. In his submission, dated 30 December 2016, Professor Peter Sommer stated '*Looking at the records supplied by the ETS to the Home Office in relation to cases we concluded that there was an absence of cross-checking facilities to identify in which voice tests were mis-ascribed to individuals. It seems reasonable to conclude that the 'ETS lists' are not a reliable indicator of whether or not a student in fact cheated.*'

There was insufficient evidence of any purportedly fraudulent behaviour.

xiii. The Guardian ran a series of articles in 2019.

xiv. The Respondent's handling of the ETS TOEIC scandal had been criticized by the National Audit Office in its investigation into the responses to cheating in English Language tests report. The report found that there was no evidence that the Respondent ever checked for errors or anomalies, the ETS findings that the majority of tests were suspicious, and there was no way that the Respondent could know how many people have been wrongly identified, as having obtained their certificate fraudulently.

xv. In the APPG Report on TOEIC, dated 18 July 2019, paragraphs 1 and 4, the Respondent's decision-making process was criticized, as flawed, with a lack of independent critical analysis of the information received. Further, there was criticism of the lack of metadata available from ETS to link voice recordings to tests, which was important in relation to the weight (if any) to be given to voice recordings. In the report, the experts confirmed that Professor French's comments about the 'error rate' are only correct based on the assumption that the information provided by ETS and the individual institutions was reliable and it was found that the evidence was lacking sufficient reliability.

xvi. Most recently the House of Commons Committee of Public Accounts stated, *'The Home Office's pace of response to the issue of cheating has been either full throttle or too slow, with no middle ground. It has been quick to act on imperfect evidence, but slow in responding to indications that innocent people may have been caught up in its actions.'*

15. This Tribunal has recently had cause to consider the status and impact of the APPG as evidence in the case of DK and RK (Parliamentary privilege; evidence) [2021] UKUT 00061 (IAC) ("DK"). The headnote reads as follows:

“(1) Although the Upper Tribunal is not bound by formal rules of evidence, it cannot act in such a way as to violate Parliamentary privilege, whether that be to interfere with free speech in Parliament or by reference to the separation of powers doctrine. The Tribunal cannot interfere with or criticise proceedings of the legislature.

(2) Courts and tribunals determine cases by reference to the evidence before them and not by reference to the views of others, expressed in a non-judicial setting, on evidence which is not the same as that before the court or tribunal. Indeed, even if the evidence were the same, the court or tribunal must reach its own views, applying the relevant burden and standard of proof.”

16. The substance of the decision in DK now makes clear that a Judge should not have regard to the views of the APPG nor, because they are protected by Parliamentary privilege, to the reports of the National Audit Office and Public Accounts Committee (to which reports the Judge in this case also made reference). The Tribunal in DK did however go on to accept that, subject to verification of the accuracy of the reporting of the opinions of the experts, the evidence of those experts as given to the APPG could be taken into account. I accept that, since DK is a very recently reported decision, there is as yet no confirmation of the accuracy of what is reported to have been said by the experts to the APPG.

17. Nevertheless, I have formed the view that Mr Walker's concession in this case is rightly made for reasons which follow.

18. First, the Judge accepts at [27] of the Decision that the Respondent has discharged her initial evidential burden. As such, the Judge does not reach any different view from that expressed by this Tribunal following consideration of the “generic evidence” in cases such as SM and Qadir (ETS – Evidence -Burden of Proof) [2016] UKUT 229 (IAC) (“SM”) that the evidence is, as recorded at [27], sufficient to discharge that evidential burden.
19. Second, as SM also makes clear and as the Judge directed herself at [19] of the Decision, the issue thereafter is whether an appellant has provided an innocent explanation. The Judge carried out that assessment at [28] of the Decision. The findings at [28(i)] to [28(iii)] are directly concerned with the Appellant’s own credibility. It was for those reasons that the Judge found that the Appellant had provided an innocent explanation.
20. Third, the relevance of what is said at [28(iv)] is to consider why, if the Appellant was telling the truth, ETS had nonetheless decided that the Appellant’s certificate should be categorised as invalid. In this case, that also involved consideration why, if the Appellant was telling the truth, the voice recording said to emanate from his taking of the test was not of his voice. It was in that context that the deficiencies identified by the expert evidence were considered. However, the expert evidence and even the “generic evidence” of the Respondent’s own witnesses accepts that there are some false positives and some evidential difficulties which may mean that, in some cases, a person accused of deception is innocent of it. It is for that reason, as the Judge records at [26] of the decision, that it has been accepted by this Tribunal and the High Court that the “generic evidence” may not always be sufficient to discharge the legal burden of proof.
21. Further, the evidential deficiencies identified at [28(iv)] of the Decision when cross-referred back to [20] show that the evidence on which the Judge relied in that regard does not come from the APPG report but, for the most part, from evidence given by experts in 2016 in earlier test cases (see [20(xi)] and [20(xii)]). I would accept that one of the reasons given (regarding the lack of checking by the Respondent relies on the report of what was said by the National Audit Office as recorded at [20(xiv)]). However, the majority of reasons at [28(iv)] rely on evidence to which the Judge was entitled to have regard, coupled with findings made in earlier cases about the substance of the expert evidence as noted at [26] of the Decision. It cannot sensibly be said that the one reason given which does rely on evidence to which the Judge should not have had regard makes any difference.
22. Finally, there is no merit to the assertion made at [2] of the grounds that the “generic” and expert evidence is sufficient to meet the legal burden where an “innocent explanation” advanced by an appellant is accepted as credible at least not in all cases. As the former President of this Tribunal observed in MA (ETS – TOEIC testing) [2016] UKUT 00450 (IAC), “[t]he question whether a person engaged in fraud in procuring a TOEIC English language proficiency qualification will invariably be intrinsically fact sensitive”. The Judge considered at [29] of the Decision whether, having accepted the Appellant’s evidence, she could find the legal burden discharged. It was open to her on the evidence as accepted and viewed as a whole, and for the reasons given, to reject

the Respondent's case. Paragraph [2] of the grounds is no more than a disagreement with the Judge's conclusion.

23. For those reasons, I am satisfied that there is no error of law in the Decision. The Respondent now concedes this. I therefore uphold the Decision. The Appellant's appeal remains allowed.

CONCLUSION

24. For the foregoing reasons, I am satisfied that there is no error of law disclosed by the grounds. Accordingly, I uphold the Decision with the result that the Appellant's appeal remains allowed.

DECISION

The Decision of First-tier Tribunal Judge Steer promulgated on 2 December 2020 does not involve the making of an error on a point of law. I therefore uphold the Decision. The Appellant's appeal remains allowed.

Signed: *L K Smith*

Upper Tribunal Judge Smith

Dated: 25 March 2021