



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/12582/2019**

THE IMMIGRATION ACTS

**Heard at Field House
On the 25 July 2022**

**Decision & Reasons Promulgated
On the 13 September 2022**

Before

**UPPER TRIBUNAL JUDGE STEPHEN SMITH
DEPUTY UPPER TRIBUNAL JUDGE BOWLER**

Between

**MISS SABEEN WAHAB
(NO ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S. Karim , instructed by AWS Solicitors.

For the Respondent: Ms A. Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. The Appellant is a citizen of Pakistan, born on 2 January 1975. On 6 November 2020 Upper Tribunal Judge Smith granted the Appellant permission to appeal against a decision of First-tier Tribunal Judge Malcolm dated 31 January 2020 on the basis that the decision of Judge Malcolm involved the making of an error of law with regard to its analysis of allegations made by the Respondent concerning an English language test

which the Appellant claims to have taken in February 2013 (“the ETS issue”).

2. Judge Smith decided that it was appropriate for the ETS issue to be re-determined in the Upper Tribunal. He set aside Judge Malcolm’s decision, but preserved her non-ETS Article 8 findings. Judge Smith’s decision is attached as an annex to this decision.

Immigration history

3. The factual background is summarised in Judge Smith’s decision which is attached as an annex. In short, the Appellant arrived in the UK around April 2006 as a student and her leave was renewed in that capacity until 25 November 2014. An application for further leave to remain was refused on 16 November 2015 on the basis that she had engaged a proxy test taker at an English language test - the Test of English for International Communication or “TOEIC” - on 26 February 2013.
4. The Appellant claimed asylum on 13 April 2017 which was refused. Her appeal against that decision was dismissed on 11 June 2018 and she became appeal rights exhausted on 12 March 2019. The following day she made a human rights claim based on her private life which was refused. It was the refusal of that application which Judge Malcolm dismissed in her decision and which we now address.

Further evidence

5. Judge Smith had directed that any additional evidence should be submitted within 14 days of his decision. A supplementary bundle of 33 pages was submitted late, but Ms Everett did not oppose its admission and we concluded that it was in accordance with the overriding objective to admit it.
6. In addition to this supplementary evidence we have taken into account the documentary evidence provided for the hearing before Judge Malcolm as well as the oral evidence of the Appellant at the hearing before us.

The Appellant’s submissions

7. Mr Karim submitted that the evidence relied upon by the Respondent in this case is notably different from that relied upon in *DK & RK (ETS: SSHD evidence; proof) India [2022] UKUT 00112 IAC*. (We refer to this case as *DK and RK [2022]* given the need also to address *DK and RK (Parliamentary privilege; evidence) [2021] UKUT 00061 (IAC)* which we refer to as *DK and RK [2021]*.) He submitted that in this case there is no project façade report, no analysis from the testing centre, no statistical analysis. Instead, there is simply the look-up tool statement and the standard generic witness statements.
8. In assessing the Respondent’s evidence Mr Karim relies upon the case of *Alam v SSHD [2021] EWCA Civ 1538* to submit that evidence in the APPG

report can be admitted. Although *DK and RK [2021]* concluded that this was not possible, *DK and RK [2022]* did not refer to *Alam*.

9. In response to us asking whether the APPG evidence on which Mr Karim seeks to rely should be excluded in the ordinary way as opinion evidence offered other than as expert opinion evidence, Mr Karim submitted that it should be viewed as effectively expert evidence as the APPG are expert on scrutinising issues.
10. Mr Karim submitted that the Appellant should be found to be credible. The case of *DK & RK 2022* confirms that there is no burden of proof on the Appellant who simply needs to provide a response to the evidence relied upon by the Respondent. The Appellant's circumstances are markedly different to the circumstances of the appellants in *DK and RK [2022]*.
11. The Appellant's listening and reading scores have not been challenged and the evidence shows that only 18 months after the alleged proxy use the Appellant obtained a high mark in a speaking test; although when asked by us, Mr Karim was unable to state the maximum marks available in that later test. Mr Karim submits that the result using the alleged proxy is only equivalent to a B2 score so it is not even at the highest level and therefore not remarkably high.
12. Mr Karim submitted that some weight should be given to evidence from the Appellant's landlord and his wife even though they did not attend the hearing and therefore could not be cross-examined. He submitted that there was good reason for their non-attendance as a result of their ages and infirmities.
13. Mr Karim submitted that the Appellant's use of English in cross-examination was reasonably good. It is to her credit that she has obtained the voice recording from ETS and has disclosed that it is not her voice.
14. Mr Karim submitted that the factors identified in the case of *SM and Qadir v SSHD (EIS- Evidence — Burden of Proof)* [2016] UKUT 00229 (IAC) should be considered; namely: what the person accused has to gain from being dishonest; what he has to lose from being dishonest; what is known about his character; and the culture or environment in which he operated, how the Appellant performed under cross- examination, whether the Tribunal's assessment of their English language proficiency is commensurate with their TOEIC scores and whether their academic achievements are such that it was unnecessary or illogical for them to have cheated. All of those factors point in favour of concluding that the Appellant did not use a proxy. Furthermore, evidence in the bundle shows that the Appellant purchased the tickets she describes in her witness statement to travel to the test centre.
15. In relation to the application of paragraph 276ADE, Mr Karim submitted that account should be taken of the fact that the Appellant has been in the UK for just under 16 years, is a lesbian and an atheist. If it is concluded

that the Respondent has not shown that the Appellant used a proxy, the Appellant's appeal should be allowed having regard to the approach taken to historic injustice in the cases of *Ahsan v SSHD* [2017] EWCA Civ 2009, *Khan and Ors v SSHD* [2018] EWCA Civ 1684 and *Patel (historic injustice; NIAA Part 5A) India* [2020] UKUT 351 (IAC). However, in discussing this submission with us Mr Karim acknowledged that the result of the Respondent's policy in a case where a TOEIC allegation is found to be unproven to grant six months leave, means that the Appellant would not be exposed to removal as a result of the appealed decision.

The Respondent's submissions

16. The Respondent relies upon what have become routine witness statements of Rebecca Collings and Peter Millington regarding the investigation into ETS, a witness statement from Sanjay Vaghela, ETS test analysis and ETS SELT Source Data to assert that having used voice verification software ETS confirmed that there is significant evidence to conclude that the Appellant's certificate was fraudulently obtained by the use of a proxy test taker.
17. Ms Everett submitted that the case of *Alam* relied upon by Mr Karim in relation to reference to the All-Party Parliamentary group on TOEIC report ("APPG report"), must be read in the context of the subsequent decision in *DK & RK [2022]*.
18. The Appellant, herself, has listened to the voice recording and confirms that it is not her. The Appellant claims that there must have been some confusion or error, but she had provided evidence in cross-examination that she had provided identification to the centre. There is therefore little reason why the voice recording would have been wrongly allocated.
19. The Appellant's evidence must be considered in the context of her being found to be not credible by Judge Veloso when considering her asylum claim. Furthermore, the Appellant did not take prompt action when she was informed about the allegation and that is behaviour which is inconsistent with that of an innocent person faced with such notification.
20. Ms Everett further submitted that if the voice recording is not that of the Appellant, as she has confirmed, then it must follow that she has not passed the speaking part of the test.
21. If the Tribunal concluded, despite the submissions, that the Appellant should be found to have completed the test herself, the Appellant's claim to stay in the UK relies upon the application of paragraph 276ADE of the Immigration Rules and, in particular, there being very significant obstacles to her reintegration in Pakistan as a result of being lesbian and atheist. However, both of these claimed characteristics were rejected by Judge Veloso, applying the lower standard of proof; and there is no evidence before this Tribunal to justify departing from those conclusions. However, a conclusion in the Appellant's favour regarding the TOEIC test would

result in the Respondent giving her six months' leave in accordance with the Respondent's published policy.

Decision and reasons

22. The decision is being remade solely on human rights grounds and within those grounds the Appellant only relies on her private life rights and not family life in this country. In particular, the Appellant relies upon paragraph 276ADE of the Immigration Rules.

The ETS/TOEIC issue

23. First we must deal with the TOEIC issue which lies at the heart of this remaking. The Respondent relies upon paragraph S-LTR.4.2 which applies where an applicant has made false representations in a previous application for leave to remain or in a human rights claim. Where that paragraph applies an applicant fails the suitability requirements referred to in paragraph 276 ADE(1)(i) of the Immigration Rules.

The law

24. At para 60 of *DK and RK [2022]* the Presidential Panel of the Upper Tribunal identified the first step in the process we should carry out:

"We therefore ask first whether the Secretary of State's evidence would enable a properly-instructed trier of fact to determine that the burden of proof had been discharged on the balance of probabilities. If the evidence at this point would not support a finding that the matter was proved on the balance of probabilities, the appellants would be entitled to succeed in their appeals. If, however, it would support such a finding, the evidence as a whole falls for consideration in order to decide whether the appeals succeed or fail."

25. *DK and RK [2022]* makes clear that the general evidence provided by the Respondent showing fraudulent activity in a number of ETS centres is overwhelming and that the relevance of this is that it provides the context for evaluation of the evidence overall, making individual allegations more plausible than they would otherwise be. Furthermore, the voice recognition process was found to be clearly and overwhelmingly reliable in pointing to an individual test entry as the product of a repeated voice. By "overwhelmingly reliable" the Upper Tribunal did not mean conclusive or infallible, but in general there is said to be no good reason to doubt the result of the analysis. Similarly, there was found to be every reason to suppose that the ETS evidence linking voice recordings to candidates is likely to be accurate. However the individual case can never be proved by evidence of generality (see paras 67-75, 103-107 and 117).

26. *DK and RK [2022]* also makes clear that there is no reason to consider that anybody other than the candidates and the test centres in collusion would have wanted to falsify results in this way. What would be needed would be a process after a candidate's genuine entry that could substitute an entry consisting of answers given by a proxy tester. There was no evidence that this could be technically achieved or that anyone did act in this way (paras 122-123).

27. This brings us to the conclusions of *DK and RK [2022]*:

"126 ...[the analysis of the voice recording evidence leads] to the virtual exclusion of suspicion of relevant error by ETS, and the virtual exclusion of motive or opportunity for anybody to arrange for proxy entries to be submitted except the test centres and the candidates working in collusion.

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..

...

129. In these circumstances the real position is that mere assertions of ignorance or honesty by those whose results are identified as obtained by a proxy are very unlikely to prevent the Secretary of State from showing that, on the balance of probabilities, the story shown by the documents is the true one. It will be and remain not merely the probable fact, but the highly probable fact. Any determination of an appeal of this sort must take that into account in assessing whether the respondent has proved the dishonesty on the balance of probabilities."

28. Mr Karim urged us to consider the APPG report relying upon *DK and RK [2021]*. However, *DK and RK [2022]* makes clear that the Presidential Panel had already decided in the earlier case that the report itself was inadmissible. The admissible evidence relating to that report is contained in what was said to the APPG by those who gave evidence to the APPG. That evidence though should only be considered in the context of the fact that there was no attempt by the APPG to ensure that what was said by those who spoke to it bore the safeguards applicable to evidence before a court or tribunal, including being amenable to challenge by way of cross-examination. Moreover, in *DK and RK [2022]* the Upper Tribunal concluded (at para 92) that: "we cannot find anything in the way of facts in the transcript substantially to undermine the existing evidence adduced by the Secretary of State."

29. We have considered Mr Karim's argument that the failure to refer to the Court of Appeal's decision in *Alam* means that we are still able to take the

APPG report into account despite the clear statements in *DK and RK [2022]*.

30. In *Alam* Lord Justice Underhill noted that in *DK and RK [2021]* a Presidential Panel of the Upper Tribunal had decided that the APPG report was inadmissible for two reasons:
 - a. reference to the report would contravene article 9 of the Bill of Rights because the views of the APPG about information which had been provided to the Home Affairs Select Committee and Public Accounts Committee would draw the Tribunal into the forbidden area of Parliamentary proceedings;
 - b. the views of the APPG constituted inadmissible opinion evidence.
31. As contemplated in Lord Justice Underhill's judgement, the Upper Tribunal later proceeded in *DK and RK [2022]* to admit a transcript of the oral evidence from experts to the APPG for the reasons we have already set out.
32. Mr Karim submitted that *Alam* says that the Upper Tribunal were wrong in *DK and RK [2021]*. We do not agree that the Court of Appeal went so far. The decision in *DK and RK [2021]* was specifically addressed, but *Alam* was not an appeal of that decision. Instead, it was a judicial review assessing whether Dove J was correct in his approach to the evidence in the APPG report where: the Secretary of State raised no positive objection to the admissibility of the APPG report for the purposes for which Mr Karim sought to rely on it in the case of *Alam*; there had been no Respondent's Notice contending that Dove J was wrong to do so; and the Respondent's counsel confirmed that he was taking no point on admissibility. While Lord Justice Underhill comments (in para 14) that the APPG report does not in itself constitute Parliamentary proceedings, that is consistent with the conclusion of the Upper Tribunal in *DK and RK [2021]* as summarised above. Furthermore, the conclusion that the views of the APPG constituted inadmissible opinion evidence is not disturbed. We do not accept Mr Karim's submission that the APPG views should be treated as expert opinion; it is otiose to set out in this decision more than to note that the APPG members do not purport in anyway to be acting as experts as that term is recognised in court proceedings.
33. Importantly, Lord Justice Underhill made clear the limitations of the decision in *Alam* (at para 31):

"I should emphasise the very limited basis for our decision. I can understand that tribunals and practitioners might welcome some general guidance on the proper approach to the ETS data in the light of the evidence which the three expert witnesses gave to the APPG; but it will be apparent that this appeal is not a suitable vehicle for such guidance... I would certainly not wish our very case-specific reasoning to inhibit any wider analysis that the UT may undertake in the pending appeal in DK and RK."

34. We are therefore satisfied that the decision in *Alam* did not disturb the conclusions reached by the Upper Tribunal in *DK and RK [2021]*. *Alam* did not purport to set out the correct approach to consideration of ETS data. That was left to the Upper Tribunal in *DK and RK [2022]*. Given the limited scope of the decision in *Alam* there was no need for reference to it in the decision of *DK and RK [2022]*.
35. We are fortified in our conclusions about the interaction of *Alam* and *DK and RK [2022]* and the admissibility of the APPG report by the decision in *SSHD v Akhter [2022]* EWCA Civ 741 (see paragraphs 29, 30 and 32).

Application of the law in this appeal

36. Mr Karim submitted that the Respondent has provided less weight of evidence in this appeal than was provided in *DK and RK [2022]* such that the Respondent has not discharged the burden of proof on her, particularly when regard is had to the differing circumstances of the Appellant in this case.
37. Turning first to the evidence relied upon by the Respondent in this appeal, that evidence consists of the ETS look-up tool data showing the statistics for the Eden College centre on 27 February 2013, ETS Source date showing an “invalid” test result for the Appellant; a witness statement from Sanjay Vaghela who is a Home Office employee and senior caseworker addressing the evidence relied upon by the Respondent in this case, as well as the standard witness statements of Rebecca Collings and Peter Millington.
38. Contrary to Mr Karim’s assertion, there is evidence in the original bundle relied upon by the Respondent in this case of the project façade criminal enquiry into abuse of the TOEIC at Eden College. There are also statistics in the look-up tool showing that 73% of the tests taken on 27 February 2013 were “invalid” and 28% were “questionable”.
39. The witness statements relied upon by the Respondent explain what is meant by the Appellant’s “invalid” test shown in the ETS evidence (as further described in detail in *DK and RK [2022]*).
40. We are therefore satisfied that the Respondent has provided evidence which is capable of showing that a proxy took the test for the Appellant.
41. The decision of the Court of Appeal in *Akhter* makes clear that, unless there is good reason which would inevitably mean fresh evidence, the conclusions of the Presidential Panel in **DK and RK [2022]** must be taken into account by us even though the case is neither “starred” nor a Country Guidance case.
42. We therefore take account of the conclusions reached by Presidential Panel in relation to the evidence regarding the likelihood of matters such as false positives and the operation of ETS. .

43. Furthermore, we also have regard to the fact that the Presidential Panel concluded that evidence of fraudulent activity in a number of ETS centres (including the Eden College where the Appellant attended) is overwhelming. The relevance of this is that it provides the context for the evaluation of the evidence overall, making individual allegations more plausible than they would otherwise be.
44. However, the Respondent's evidence should not be viewed in isolation. Instead we turn as stated in *DK and RK [2022]* to consider whether the Respondent's evidence is otherwise contradicted by credible evidence, or is the subject of any material undermining its effect in this Appellant's case.
45. In the Appellant's witness statements she has given details of the journey which she undertook to the test centre as well as details of the arrangements at the test centre and in the exam room as well as details of the content of the test modules. She has provided further evidence in bank statements showing travel costs which support her claim to travel to the test centre. However, we consider that evidence of travel to the centre does little to undermine the Respondent's case given that the proxy taking situations described in detail in the *DK and RK [2022]* decision specifically include attendance by the person claiming to do the test as well as any proxy.
46. The Appellant has provided evidence of numerous qualifications obtained in the UK between 2006 and 2013 as well as evidence of school exams in English and other subjects. She obtained a bachelor of arts from Allama Jabal Open University in Pakistan in 2000 which she describes as having passed with "satisfactory grades"; and a Master of Computer Science from Al Khair University in Pakistan in 2004. While we take into account that some level of English would be required for her school exams and more particularly for the qualifications obtained in the UK, none of them provides any basis for us to understand the level of spoken English which would have been required (if any).
47. A test report for an English language test taken on 4 December 2014 gives the Appellant a score at that point of nine for speaking (five for listening, seven for reading, five for writing) but there is no explanation of the maximum score available, or indeed how that would relate to an ETS score of 190 as shown on the disputed TOEIC certificate. It is in any event nearly 18 months later than the challenged test.
48. As Mr Karim himself recognised at the hearing the Appellant exhibited reasonably good English in cross-examination (but no more). However, any assessment in such a form is beset with problems, not least the fact that the hearing was more than nine years after the disputed test during which time the Appellant has continued to live and study in the UK.
49. Mr Karim urged us to recognise that the Appellant had no good reason to use a proxy given her qualifications, family background and circumstances

generally, but *DK and RK [2022]* warns that there are numerous reasons why a person who could pass a test might nevertheless decide to cheat even if they have qualifications or characteristics which would indicate otherwise.

50. Turning to the Appellant's evidence in her witness statements and orally at the hearing, she maintains that she took the speaking test and that she did not use a proxy. She has sought to provide evidence of her reliability as a witness of good character in witness statements provided by her landlord and landlady. However, we give those statements reduced weight given that neither the landlord nor landlady attended the hearing and therefore could not be cross-examined. Mr Karim submitted that account should be taken of the fact that the landlord and landlady could not attend the hearing because they are 90 years old with limited mobility and 80 years old with medical problems respectively. However, the tribunal is frequently attended by older people with mobility and medical problems. In addition, there is the facility for witnesses to participate remotely, yet no application to do so was made. In any event, the witness statements of the landlord and landlady at the highest described the Appellant as honest, helpful and reliable and to have studied for her English tests. Their credibility assessments must be considered by us in the context of the evidence overall.
51. In particular, we cannot ignore the fact that the Appellant was found to be lacking credibility by Judge Veloso when dismissing her asylum appeal. We recognise that a person may be found to be lacking credibility on some matters, but be found to be credible on others. However, Judge Veloso's credibility findings are relevant, particularly where the Appellant continues to maintain that she is a lesbian and atheist, both of which were rejected by Judge Veloso. We consider that the Appellant's credibility in the context of this appeal must also be considered in the light of her response to discovering that her test was invalid.
52. At the very least the Appellant would have learnt that the test result was challenged in the Respondent's refusal dated 16 June 2015 of her application to remain in the UK made in November 2014. Although an attempt was made to apply for judicial review in April 2016, which was rejected as being out of time, there is little other evidence of action taken by the Appellant in response to what we would have expected to have been serious news for a person who had honestly taken the tests. A person with a Master's degree and numerous qualifications in marketing, business administration and management might reasonably be expected to be able to write a letter to Eden College and/or ETS asking for an explanation of how the certificate previously issued to her was now said to be invalid.
53. Since the hearing before Judge Malcolm the Appellant has obtained a copy of part of the voice recording and her evidence is that it is not her voice. That means that we are in the territory of the Appellant effectively saying

that in some way the wrong recording was allocated to her identity. *DK and RK [2022]* tells us that that is highly unlikely to have occurred.

54. Considering the evidence overall as explained, we therefore reach the conclusion that the Respondent's evidence is not contradicted by credible evidence, or is the subject of material undermining its effect in this Appellant's case such that the Respondent should be found to have failed to discharge the burden of proof upon her.
55. This means that the Appellant cannot qualify for the right to remain in the UK under paragraph 276ADE of the Immigration Rules as a result of paragraph 276ADE (1)(i) and paragraph S-LTR 4.2.

Article 8 beyond Para 276ADE

56. Moving on to consider the Appellant's claim relying upon her Article 8 rights generally, we recognise that the requirements of the Immigration Rules and the statutory provisions are said to reflect the Respondent's position as to where a fair balance is struck for the purpose of applying those rights.
57. The Article 8 analysis (other than in relation to the TOEIC matter) was preserved by Judge Smith and we are satisfied that the evidence before us now does not lead us to a different conclusion. Judge Malcolm found as follows:
 - a. The consequences of the removal of the Appellant to Pakistan would potentially engage Article 8. However, the interference with the Appellant's human rights would have the legitimate aim of the maintenance of effective immigration controls and of public confidence in their maintenance;
 - b. the Appellant has lived in the UK since 2006. She no longer has ties with Pakistan but has spent the majority of her life in that country. She has returned twice to Pakistan – the last occasion being in 2011;
 - c. the Appellant is familiar with the culture and way of life in Pakistan;
 - d. there was no reason to deviate from the findings made by Judge Veloso who had concluded that the Appellant had not shown that there would be very significant obstacles to reintegration on her return to Pakistan, given, in particular, that Judge Veloso rejected the Appellant's claim to be lesbian and atheist;
 - e. the Appellant has a private life in the UK, but her stay in this country has been, at best, precarious such that little weight can be given to it in the proportionality assessment;
 - f. her ability to speak English and the financial support she receives are neutral factors in the proportionality assessment;
 - g. the Appellant can have no expectation to remain in the UK and no exceptional circumstances can be identified.

58. The little weight referred to by Judge Malcolm does not mean no weight and, in assessing that weight, we take into account the fact that the Appellants' private life has now been established over a period of nearly 16 years. Yet, on the other side of the proportionality scales is the weight to be given to the public interest in effective immigration control.
59. Given the findings above and the weight of interests on each side of the scales, we are satisfied that there are not exceptional circumstances which render refusal of leave to remain a breach of Article 8 because it would result in unjustifiably harsh consequences for the Appellant.
60. We therefore conclude that removal would not amount to a disproportionate interference with his right to private life for the purpose of Article 8(2) of the European Convention. Consequently the Appellant's removal in consequence of the decision would not be unlawful under section 6 of the Human Rights Act 1998.

DECISION

The appeal is DISMISSED on human rights grounds.

Signed

Date 17 August 2022

T. Bowler

Deputy Upper Tribunal Judge Bowler

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.
3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.
4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically)**.
5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is “sent’ is that appearing on the covering letter or covering email

Annex



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/12582/2019

THE IMMIGRATION ACTS

**Heard remotely at Field House
On 7 October 2020 via Skype for
Business**

Decision & Reasons Promulgated

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Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

**MISS SABEEN WAHAB
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S. Karim, Counsel, instructed by AWS Solicitors

For the Respondent: Mr T. Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS (V)

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was V (video). A face to face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing.

The documents that I was referred to are in the appellant's and respondent's bundles from before the First-tier Tribunal, the grounds of appeal, the grant of permission to

appeal, and exchanges of written submissions by the parties, the contents of which I have recorded.

The order made is described at the end of these reasons.

The parties said this about the process: they were content that the proceedings had been conducted fairly in in their remote form.

1. This is an appeal against a decision of First-tier Tribunal Judge Malcolm promulgated on 31 January 2020, dismissing an appeal by the appellant, Sabeen Wahab, against a decision of the respondent to refuse her human rights claim.

Factual background

2. The appellant is a citizen of Pakistan born in 1975. She arrived in this country in or around April 2006 as a student. Her leave was renewed in that capacity until 25 November 2014. She had applied, in time, for further leave to remain, but that application was refused on 16 November 2015, and she was served with documents as an overstayer. The application had been refused on the basis the appellant had engaged a proxy test taker at an English language test she took on 26 February 2013 at Eden College in London, administered by the company Educational Testing Service (“ETS”). The test was known as the Test of English for International Communication, or “TOEIC”.
3. The appellant claimed asylum on 13 April 2017. The claim was refused. Her appeal against the refusal was dismissed by Judge Veloso on 11 June 2016, and the appellant exhausted all available avenues of appeal against that decision on 12 March 2019. On 13 March 2019, the appellant made a human rights claim based on her private life. That application was refused, and it was the appellant’s appeal against that refusal decision which was heard before Judge Malcolm.
4. A central issue in the appeal, and the only matter which falls to be considered in this tribunal, related to the allegations made by the respondent concerning the English language test the appellant claims to have taken in February 2013. At [86], the judge recorded the position of the appellant is being, “quite simply that she did personally attend at the test centre... to sit the test”. To that end, noted the judge, the appellant had provided an account of having done so, which featured “a great deal of detail of the make up of the tests undertaken by her”. There was no cross-examination by the respondent of the narrative given by the appellant: [83].
5. At [92], the judge said that the question of whether the appellant undertook the test herself was a matter of considering the evidence which have been provided and the credibility of the appellant. She went on to state that the fact that the appellant had given detailed information as to

her travel to the test centre, her attendance at the test centre, the number of people present, and the composition of the test “arguably does not take matters much further forward”. The judge said that the allegation the appellant faced was that she had used a proxy test taker; that allegation did not necessarily mean that the appellant did not attend herself, nor that she was not present when the test was undertaken on her behalf: see [93].

6. The judge noted that the appellant’s asylum claim, which had been based on her sexuality, threats she claimed to have received, and her claim to be an atheist, had been found to be not credible. That she had been found to lack credibility at a previous hearing before the first-tier tribunal “is a matter which cannot be overlooked” [96]. The judge was also concerned that the appellant had not pursued other avenues of redress relating to the ETS allegations against, but instead have submitted an unsuccessful asylum claim. This, said the judge, “does have a bearing” when considering the credibility of the appellant in relation to the English language test issue. This led to the judge making a significant finding at [100] in the following terms:

“Given my concerns about the credibility of the appellant I am not satisfied that the evidence given by the appellant of having personally sat the test can be accepted.”

7. That led the judge to reject, at [101], the appellant’s account of having attended the test centre herself and having sat the test personally.
8. In light of those findings, the judge approached the Article 8 balancing issue. She found there would be no “very significant obstacles” to the appellant’s reintegration in Pakistan, and that it would not be disproportionate to remove her back to that country. The appeal was dismissed.
9. Permission to appeal was granted by First-tier Tribunal Judge Gumsley on the basis that the judge had arguably failed properly to address the three-stage process relating to the transfer of the evidential burden to the appellant, in light of the overall obligation on the respondent to discharge the legal burden of proving that the appellant had engaged in dishonesty. It was also arguable that the judge had failed to provide sufficient reasons for rejecting the appellant’s evidence.

Submissions

10. The only finding of the First-tier Tribunal that has been challenged relates to the finding that the appellant used a proxy test taker at the test on 26 February 2013. Mr Karim accepts that the remaining Article 8 findings reached by the judge were properly open to her. The appellant pursues this challenge due to the significance of the findings of deception which have been made in relation to her.
11. On behalf of the appellant, Mr Karim submitted that the judge’s application of the established “three-stage” test for establishing

dishonesty was unclear. There is no challenge to the judge's finding that the respondent had discharged the initial evidential burden, such that the appellant was required to provide an innocent explanation, satisfying the minimum level of plausibility. He submits that it is not clear, however, whether the judge directed herself as to whether the proffered innocent explanation met the minimum standards of plausibility, such that the evidential pendulum would swing back to the respondent, or whether the judge effectively transferred the legal burden to the appellant to demonstrate why she had not cheated. He relies upon the judge's operative conclusions at [100] whereby the judge, having found that the appellant may well have attended with a proxy test taker, and noting her general lack of credibility pursuant to the findings of the First-tier Tribunal in the asylum claim, to demonstrate that the judge failed properly to analyse the appellant's evidence pursuant to the evidential pendulum.

12. Mr Karim submits that in reaching that finding, it is not clear whether the judge took into account the motive and potential consequences to the appellant of having cheated in the English test, nor her general proficiency in the English language, as evidenced by her academic record from English medium teaching, and her performance in other English tests she took at or around the same time. Those were relevant factors which the judge should have considered, yet failed to consider, he submits.
13. Nor was it open to the judge, submits Mr Karim, to hold against the appellant the fact that she had not sought to challenge the ETS decision until a relatively late stage on the chronology of her immigration history. It was not until the Court of Appeal's decision in Khan v Secretary of State for the Home Department [2018] EWCA Civ 1684, on 17 July 2018, that it was established that an in-country appeal was the only appropriate forum within which to challenge an allegation of deception of the sort made in the present matter.
14. Mr Karim also submits that it was not open to the judge to describe the significance she did to the asylum decision. That was an appeal relating to a different factual matrix, assessed pursuant to a different legal standard, concerning wholly distinct issues. It was not open, he contends, for the judge simply to import and transpose the findings of the first-tier tribunal on that occasion to this appeal in its very different context.
15. Finally, Mr Karim submits that it was an error for the judge not to have relied upon a report from the All-Party Parliamentary Group on TOEIC. Although that report was not before the judge, nevertheless as a specialist tribunal it was incumbent upon the judge to take it into account. As authority for that proposition, Mr Karim relies upon MM (unfairness; E & R) Sudan [2014] UKUT 105 (IAC), the second paragraph of the headnote to which reads:

“(2) A successful appeal is not dependent on the demonstration of some failing on the part of the FtT. Thus an error of law may be found to have occurred in circumstances where some material evidence, through no fault of the FtT, was not considered, with resulting

unfairness (E & R v Secretary of State for the Home Department [2004] EWCA Civ 49).”

16. On behalf of the respondent, Mr Melvin contends that at [78] to [101] the judge correctly identified the relevant factors, reaching a finding that was open to her on the facts. The judge had recorded submissions made by the appellant’s then counsel, in particular those outlined at [73], concerning the innocent explanation relied upon by the appellant. Pursuant to MA (ETS - TOEIC testing) [2016] UKUT 450 (IAC) at [57], there is a range of reasons why a person may choose to cheat in an English language test, and the fact that they have a degree of proficiency in the language does not necessarily mean that they would not do so.
17. Mr Melvin also submits that it is not open to the appellant to seek to rely on the evolving litigation history relating to ETS matters, given it was not argued before the first-tier tribunal that she was prevented from challenging the allegations in an appropriate forum by the understanding of the legal framework which then prevailed.
18. Finally, the APPG report now relied upon by the appellant was not before the judge below. It is not an error of law, Mr Melvin submits, for a judge not to consider something that she was not invited to consider.

Discussion

19. It is common ground that the approach to analysing allegations of deception raised by the Secretary of State must follow a three-stage approach. While the legal burden remains upon the Secretary of State at all times, she nevertheless bears an initial evidential burden of raising an allegation of deception, such that it is appropriate to expect an appellant to respond. When the initial evidential burden is discharged, the appellant is subject to an evidential, rather than legal, burden, to provide an innocent explanation satisfying the requirement that it must meet minimum levels of plausibility (see, for example, Muhandiramge (section S-LTR.1.7) [2015] UKUT 675 (IAC) at [10.b]). If an appellant provides such an innocent explanation, the evidential pendulum swings back to the respondent to refute the innocent explanation proffered.
20. I accept Mr Karim’s submissions that it is not clear if or how the judge applied the three-stage test. At [100], the judge said that she was not satisfied that the innocent explanation provided by the appellant “can be accepted”. As Mr Karim submits, the test is not whether the explanation “can be accepted”, but whether it provided an answer to the Secretary of State’s allegations that satisfied the minimum level of plausibility such that the evidential burden transferred back to the respondent. The appellant had provided a detailed account of having attended the test herself, outlining what took place. Significantly, there was no challenge to that account by the presenting officer during cross-examination: see [83].
21. The analysis of the judge at this stage in the phased analysis of deception amounts to the wholesale rejection of the appellant’s account,

as though the appellant were subject to the legal burden to disprove the allegation, rather than being subject to the relatively modest requirement to provide an innocent explanation such that the burden transferred back to the respondent.

22. Of course, it may well have been that, had the judge accepted the explanation at stage two of the process, the respondent would have been able to refute the innocent explanation on similar bases to those which the judge relied upon in order to find against the appellant. However, the judge's analysis does not support that construction of her findings, and consequently involved the making of an error of law.
23. In light of the above findings, it is not necessary to consider the remaining submissions of Mr Karim in detail, save for two observations.
24. First, it was, in principle, open to the judge to have concerns about the appellant's credibility arising from Judge Veloso's adverse decision, as Mr Melvin submits. I reject Mr Karim's submissions that the fact that decision concerned an asylum appeal meant that it was of no relevance. It was plainly of some relevance; there had been judicial findings that the appellant lacked credibility. Those findings could not bind the judge, but, as the judge rightly noted, they could not be "overlooked", and did have a bearing. It may have been helpful for the judge to have articulated the adverse credibility findings in further depth, but it was not irrational for her to place some reliance on the decision, and to factor it into her analysis.
25. Secondly, it was not an error of law for the judge not to consider the APPG report, which was not before her. MM (Sudan) is authority for an entirely different proposition, namely when some form of procedural failure results in material being kept from the consideration of the judge, for example due to an administrative failure by the tribunal's staff. It does not concern the situation where, as here, there is third party evidence that an appellant, who was legally represented, did not choose to rely on before the judge below.
26. The decision of Judge Malcolm involved the making of an error of law in its analysis of the ETS issue. Those findings are set aside. There was no challenge to the remaining Article 8 analysis, which I preserve.
27. Mr Karim submitted that, in the event I found there to be an error of law on the ETS issue, it would be appropriate either to remit the decision to the First-tier Tribunal, or to remake the decision in this tribunal. Due to the fact I have partially preserved the decision of the First-tier Tribunal, it will be appropriate for the ETS issue to be redetermined in the Upper Tribunal.
28. The appeal is allowed to that limited extent.

Notice of Decision

The decision of Judge Malcolm is set aside, with her non-ETS Article 8 findings preserved. The decision will be remade in this Tribunal at a face to face hearing. Time estimate 3 hours. No interpreter required.

If the appellant wishes to make an application under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 to rely on additional evidence, she must do so within 14 days of being sent this decision.

No anonymity direction is made.

Signed Stephen H Smith

Date 13 October 2020

Upper Tribunal Judge Stephen Smith