



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2022-003506
First-tier Tribunal No: HU/50319/2021
IA/03680/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 22 March 2023

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

MUHAMMAD AWAIS
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M West, Counsel, instructed by Farani Taylor Solicitors
For the Respondent: Mr C Avery, Senior Presenting Officer

Heard at Field House on 12 January 2023

DECISION AND REASONS

Introduction

1. The Appellant appeals against the decision of First-tier Tribunal Judge Hussain (“the judge”), promulgated on 16 May 2022, following a hearing on 17 February of that year (it is to be noted that the judge did not in fact sign off his decision before sending it to promulgations until 15 May 2022). By that decision, the judge dismissed the Appellant’s appeal against the Respondent’s refusal of his human rights claim. That claim was based on Article 8. Specifically, the Appellant asserted that he was the victim of a “historical injustice”, namely that in 2014 he had been falsely accused of obtaining an English language test certificate by deception (what may be described as the well-known “ETS issue”). He sought to rely on that claimed injustice to show that his removal from the

United Kingdom now would be disproportionate because he had been deprived of the opportunity to continue to study or reside in this country in some other lawful way.

The judge's decision

2. The judge addressed the ETS issue and was satisfied that:
 - (a) the Respondent had discharged the evidential burden resting on her;
 - (b) that the Appellant had provided an innocent explanation; and
 - (c) that the Respondent had failed to discharge the legal burden of proof.
3. The judge regarded the Appellant as being a “coherent and trustworthy” witness and that he had provided a “plausible narrative” as to certain matters relating to the two language tests taken on a particular date in 2013.
4. Of relevance in this case is the final sentence of [31]:

“I also take into account the fact that on the certificate issued by TOEIC, it says on the right-hand bottom that ‘TOEIC scores more than 2 years old cannot be reported or validated’, yet no explanation has been given as to how in the present case, TOEIC was able to retrieve many years after the two years when the appellant took his test (January 2013), the voice recordings.”

5. Based on the finding of innocence, the judge found that the Appellant’s human rights claim should not have been refused on suitability grounds. He went on to conclude that the Appellant had failed to show that there were “insurmountable obstacles” to his reintegration into Pakistani society. At [35] the judge said this:

“There was some discussion between the Tribunal and the appellant’s counsel as to the consequence if I was to find against the Secretary of State’s allegation that the appellant has engaged deception in obtaining his TOEIC qualifications. However, whilst I am aware of judicial authorities on the issue and taking into account Counsel’s submissions that the appellant has been the victim of a historical injustice and should be put back where he was, had the injustice not been done to him, in the end of day, the Tribunal is not in a position to tell the Home Office what leave to give to the appellant, if anything at all. The Tribunal can only decide issues before it.”

The grounds of appeal

6. Two grounds of appeal were put forward. First, it was said that the judge simply failed to deal with Article 8 adequately or at all. There was no reference to paragraph 276ADE(1)(vi) of the Immigration Rules and no wider proportionality exercise. Second, the judge erred in not allowing the appeal on the basis of the respondent’s guidance entitled “Educational Testing Service (ETS): Case Work Instructions” Version 4.0 published on 18 November 2020. In this, it was said that where an individual had their appeal dismissed but had been found not to have practised deception in respect of the ETS issue, the Respondent would grant them six months’ leave to remain.

The Respondent's rule 24 response

7. Following the grant of permission, on 27 July 2022 the Respondent provided a rule 24 response. Unfortunately, this fact remained unknown to both Mr West and myself until the hearing itself. Notwithstanding this, I have no reason to doubt that the response was indeed provided on or around the date contained therein.
8. The rule 24 response is of some consequence in this case. It seeks to challenge the judge's findings in relation to the ETS issue. In particular, it asserted that the judge had erred in [31] of his decision when taking into account the apparent fact that scores more than two years old could not be reported or validated and yet the voice recordings could be attained significantly beyond that timeframe. The Secretary of State asserted that it was not for the Respondent to have obtained the voice recordings, but the Appellant. The judge was wholly unclear as to what he meant by the sentence in question. If it had been taken into account against the Respondent's case, it was procedurally unfair as it had not been raised at the hearing and/or it was simply wrong in any event.
9. In addition, the judge's assessment of the ETS issue was inconsistent with the guidance set out in DK and RK (ETS: SSHD evidence; proof) India [2022] UKUT 00112 (IAC), a decision which had been published in March 2022 but to which no reference was made in the judge's decision.

The hearing

10. At the hearing, both Mr West and I took some time to read and consider the rule 24 response. Mr West confirmed that he was happy to proceed. I received helpful oral submissions from both representatives. These are of course a matter of record.
11. At the end of the hearing I reserved my decision.

Discussion and conclusions

12. I remind myself of the need to exercise appropriate restraint before interfering with the decision of a First-tier Tribunal Judge, particularly when they have heard and considered a variety of evidential sources and made findings of fact.
13. I will begin with the Appellant's challenge, before addressing the rule 24 response.
14. In my judgment, it is clear that where an individual asserts that they are the victim of a historical injustice and there is some proper evidential and/or legal basis for this, the First-tier Tribunal is bound to address it and, depending on findings made, take it into account when considering the outcome of an appeal based on Article 8: see Patel (historic injustice: NIAA Part 5A) India [2020] UKUT 00351 (IAC). It is not sufficient for findings of fact on the ETS issue to be made but then for nothing else to follow therefrom. If, as occurred in the present case, a judge finds in favour of an Appellant, they are then obliged to factor this into the Article 8 assessment, which will involve a balancing exercise (assuming that private and/or family life and interference have been established).
15. The judge did not undertake this task. With respect, he rather ducked the issue at [35] when effectively saying that the consequences of this finding on the ETS

issue were a matter solely for the Respondent in terms of any leave which may have been granted following the final determination of the appeal. That failure to have considered the historical injustice point was an error of law.

16. It is right to say that there was very little, if anything, in terms of the Appellant's circumstances which might have justified a successful outcome, other than the finding on the ETS issue. I have hesitated as to whether the judge's error was indeed material, but have concluded that it was. A proper consideration of the ETS issue could (not would) have resulted in the appeal being allowed. On that basis, I set the judge's decision aside.
17. I turn now to the Respondent's rule 24 response and a challenge to the ETS findings. I appreciate that what I say about this will have an impact on the very findings which I have discussed above.
18. I accept that the judge regarded the Appellant as being a credible witness and this was based on the evidence as a whole. Matters taken into account by the judge included the narrative relating to the test day itself and, one assumes, the overall impression given by the Appellant at the hearing. Despite this, I am satisfied that there is an error in [31], specifically relating to the sentence quoted earlier at paragraph 4 of my decision.
19. Putting aside the question of whether the Respondent's representative at the hearing was made aware of the judge's concern as to what was stated on the TOEIC certificate, it is an undisputed fact that it was the Appellant who obtained the voice recordings, not the Respondent, and that this was done far beyond the two year time limit apparently stated on the test certificate. As a matter of logic, if the judge had concerns about the ability to have obtained such recordings after a significant period of time, it would have counted *against* the Appellant and *not* the Respondent. It would, or at least could, have gone to potentially undermine the reliability of the Appellant's evidence. The judge was unclear in [31] as to why he had a concern about the time limit. However, I agree with Mr Avery to the extent that the clear implication is that the concern counted against the Respondent. I say this in particular because the judge had already referred to the absence of other evidence emanating from the Respondent earlier in the same paragraph.
20. Reading the relevant passages sensibly, I am satisfied that the judge's concern in relation to the time limit was being factored in as something which undermined the Respondent's position, thereby either positively supporting the Appellant's case, or at least not causing his case any difficulties.
21. Mr West urged me to conclude that any uncertainty or error committed by the judge in this regard was not material. I have considered this submission carefully. Whilst appreciating that the judge viewed the "totality of the evidence", the two year issue did feature in the single paragraph which dealt with both the Respondent's case and the Appellant's innocent explanation. It was not the sole factor, nor was it described as a particularly significant one. However, in my view, it was a consideration deemed to be material by the judge. I find that the judge failed to explain by way of legally adequate reasons why he was taking the two year factor into account and/or why it undermined the Respondent's case as opposed to the Appellant's. Overall, the error could (not would) have made a difference to the outcome of the ETS issue.

22. The second point arising from the rule 24 response is the decision of DK and RK itself. This was published in March 2022 at a time when the judge's decision had not been signed off (i.e., the judge was still seized with the appeal). The decision was plainly relevant to the ETS issue with which he was still concerned. That decision is not referred to at all, nor did the judge seek to obtain written submissions from the parties, or indeed to have reconvened the hearing. I am satisfied that the points raised in the rule 24 response relating to what was said in DK and RK were directly relevant to the ETS issue in the present case. This included the point about the apparent two year time limitation and the reliability of voice recording (the Appellant has accepted that the voice on recording was not his). I regard the judge's failure to address DK and RK as a material error of law. On this basis, the judge's findings on the ETS issue cannot stand.

Disposal

23. In light of my conclusions, this is a case which does require remittal to the First-tier Tribunal for a complete rehearing with no preserved findings of fact. At the remitted hearing the live issues will obviously include those relating to the Respondent's allegation that the Appellant practised deception in obtaining the English language test certificate. Consideration will need to be given to the evidence as a whole, together with the implications of DK and RK (2). All of this must be the subject of clear fact-finding and a full balancing exercise under Article 8.

Notice of decision

The decision of the First-tier Tribunal involved the making of material errors of law. That decision is set aside.

This appeal is remitted to the First-tier Tribunal.

Directions to the First-tier Tribunal

- (1) This appeal is remitted to the First-tier Tribunal (Taylor House hearing centre) for a complete rehearing with no preserved findings of fact;
- (2) The remitted hearing shall be conducted by a judge other than First-tier Tribunal Judge M B Hussain.

H Norton-Taylor
H Norton-Taylor

Judge of the Upper Tribunal
Immigration and Asylum Chamber

8 February 2023