IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-001681

First-tier Tribunal No: HU/52327/2021
IA/06694/2021

THE IMMIGRATION ACTS

Decision & Reasons Promulgated
On 28 February 2023

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MD ATIK ULLAH

Respondent

Representation:
For the Appellant: Ms S Rushforth, Senior Home Office Presenting Officer
For the Respondent: Mr M West instructed by Kalam Solicitors

Heard at Cardiff Civil Justice Centre on 26 January 2023

DECISION AND REASONS

Introduction

1. Although this is an appeal by the Secretary of State, for convenience I will refer to the parties as they appeared before the First-tier Tribunal.

2. The Secretary of State appeals against a decision of the First-tier Tribunal (Judge C H O'Rourke) dated 29 March 2022 which allowed the appellant's appeal against the respondent's decision made on 15 May 2021 to refuse his application for leave based upon his private and family life under the Immigration Rules and Art 8 of the ECHR.

Background

3. The appellant is a citizen of Bangladesh who was born on 5 May 1985. On 26 January 2011, he was issued with entry clearance as a Tier 4 (General) Student valid until 31 May 2013. He entered the UK on 9 March 2011.

4. On 1 February 2012 the appellant's leave was curtailed to 1 April 2012 as his sponsor's licence was revoked.

5. On 18 April 2013, the appellant applied for leave to remain as a Tier 4 (General) Student. Leave was granted valid from 24 December 2013 until 22 August 2015.

6. On 22 January 2015, the appellant was served with form IS151A as he was deemed to be an immigration offender as he had submitted false documents, namely a fraudulently obtained TOEIC document (English language certificate) in his application for leave to remain.

7. On 20 August 2015, the appellant applied for leave to remain based upon his private and family life under Art 8. This was refused on 6 February 2016 with an out of country right of appeal. An application for judicial review of that decision was made on 15 May 2016 but permission was refused on 27 March 2017.

8. On 23 October 2020, the appellant again made an application for leave to remain on the basis of his private and family life under Art 8. He relied upon his relationship with his partner in the UK and his (and their) private life in the UK under the Rules (Appendix FM and para 276ADE) and outside the Rules under Art 8.

9. On 14 May 2021, the Secretary of State refused the appellant's application. The respondent was not satisfied that the appellant fell within para EX.1 in Appendix FM as there were not "insurmountable obstacles" to family life continuing in Bangladesh or within para 276ADE(1)(vi) as there were not "very significant obstacles" to his integration on return. In addition, the respondent was satisfied that the appellant's application under the Rules fell within the refusal ground in the "suitability" provisions in Section S-LTR. 4.2 of Appendix FM, namely the appellant had made false representations in his previous application for leave in April 2013. He had submitted a fraudulently obtained English language certificate from ETS which had been invalidated on the basis that he had used a proxy test-taker. The respondent also rejected the appellant's claim outside of the Rules under Art 8.

The Appeal to the First-tier Tribunal

10. The appellant appealed to the First-tier Tribunal. In a decision dated 29 March 2022, Judge O'Rourke allowed the appellant's appeal under Art 8 outside the Rules.

11. First, the judge accepted, indeed it was conceded by the appellant's counsel, that the requirement of para EX.1 was not met. The appellant could not, therefore, succeed under the 'partner' rule in Appendix FM. There were not "insurmountable obstacles" to the family life of the appellant and his partner continuing in Bangladesh ([24]).

12. Secondly, the judge rejected the respondent's claim that the appellant had used deception, namely had submitted a fraudulently obtained TOEIC test ([25}).

13. Thirdly, the judge found that the appellant's removal would be disproportionate and a breach of Art 8.

14. The judge made no finding in respect of para 276ADE(1)(vi), perhaps because the appellant's counsel made no submissions in respect of private life ([23(ix)]).

The Appeal to the Upper Tribunal

15. The Secretary of State sought permission to appeal on three grounds. Ground 1 challenged the judge's self-direction on the burden of proof and his assessment of the appellant's 'innocent explanation'. Ground 2 contended that the judge failed to give adequate reasons why the appellant's ability to speak English supported his 'innocent explanation'. Ground 3, which it is accepted is parasitic on Grounds 1 and 2, challenged the decision to allow the appeal under Art 8.

16. On 29 April 2022 the First-tier Tribunal (Judge Lodato) granted permission to appeal on all three grounds.

17. The appeal was listed for hearing at the Cardiff CJC on 26 January 2023. The appellant was represented by Mr West and the respondent by Ms Rushforth. I heard oral submissions from both representatives. Ms Rushforth relied upon the Grounds and Mr West also relied upon a rule 24 response dated 24 May 2022.

The Judge's Decision

18. The central issue in the appeal was whether the appellant had used deception in his application for leave in April 2013 because he had submitted a fraudulently obtained TOEIC certificate issued by ETS.

19. The respondent's case was that he had because he used a proxy to take parts of the test. His test had been invalidated by ETS as the software analysis showed that on the recording of the test it was not his voice. The respondent relied upon the usual generic material and the 'look-up' tool which indicated his test had been invalidated (see submissions [22(i)-(ii)] and [22(ix)]). The appellant maintained an 'innocent explanation', namely that he had attended the test centre in West London – he lived in East London – and had taken the test personally (see submissions [23(ii)-(v)]).

20. The judge summarised the relevant evidence at [16] (which was undisputed) and at [17]-[19] (which was disputed):

> "16. The Appellant has a grade 5 certificate, with distinction, in spoken English, obtained in October 2020 [70] and gave evidence in excellent English at this Hearing. His solicitor wrote to the test provider, ETS, in August 2021, asking for further information and ETS replied on 30 August 2021 and also for copies of the voice tape of the exam-taker, which were provided and which the Appellant said is not him.
>
> …
>
> 17. The Appellant denied that he used deception to obtain the TOEIC certificate; that he had been informed by others of the 'true' nature of the test centre he selected, or that he was told that the test result would be 'guaranteed'. He said that in 2011 he was required to have a test certificate to extend his visa, as the college he was then studying with had lost its certification and having looked around, chose Charles Edward College in Hounslow. He booked the test himself, paying £150 in cash and having to provide a copy of his passport. He was challenged as to why, as he was living in East London at the time, he chose a test centre on the other side of the City and said that this was

because it was the location where he could take the test soonest, as the requirement was urgent, as otherwise his visa would have lapsed. On 15 November 2011, he attended at the centre, was given a security code to log in and entered the exam hall. There were about twenty other candidates in the room. He then first took the speaking test, followed by the writing test.

18. He said that from childhood, he was keen to be proficient in English, studying it as a core subject in school, to equivalent of GCSE level and therefore would not have either felt or had any need to evade sitting the test. From the outset of his time in UK, he had multinational friends, for whom the common language was English.

19. His solicitor had attempted to upload the voice recordings to the Tribunal's case management system, but there was no facility to do so."

21. Having set out the submissions, the judge reached his findings at [25(i)-(iv)] as follows:

25. TOEIC Test. I find that the Respondent has not satisfied the evidential burden on it to rebut the Appellant's 'innocent explanation' and I do so for the following reasons:

(i) The Appellant's account was not seriously challenged. It would be nothing out of the ordinary to travel across London by Tube to take a test, if by doing so, it could be done as quickly as possible. I agree with Mr West that if, instead, the Appellant had been travelling out of London, to say Southampton then a more convincing explanation would have been required.

(ii) While I note that fluency in English (particularly many years after having taken the test) is not of itself a conclusive factor, it is nonetheless relevant. The Appellant, based on his school reports, did study English to a reasonable degree, in Bangladesh and many native Bangladeshis will speak English, due to their Country's long association with UK. While, no doubt, some applicants who could speak English to the exam standard, nonetheless chose to cheat, as the cost of doing so was not much greater (if at all) than the normal fee and the result was 'guaranteed' and while that suspicion may be levelled at the Appellant, I have no evidence to assume that this was the situation in his case.

(iii) The Appellant's efforts to obtain the voice tapes, in his stated desire to prove that he took the test, but, nonetheless, his subsequent voluntary admission that the voice is not his, are not, I agree, the acts of somebody seeking to deceive.

(iv) **MA** seriously calls into question the retention of data by ETS and the deficiencies in its 'chain of custody' system. In other words, ETS (and, in turn, the Respondent), is unable to show any nexus between the data supplied and the unique ID of individual candidates, with the risk of mis-matching, which, the Tribunal takes judicial notice of, is currently the subject of further external investigation."

22. Having made this finding, the judge went on at [26]-[31] to find that the appellant's removal would be a disproportionate interference with his family life.

Discussion

1. Ground 1

23. Relying on Ground 1, Ms Rushforth submitted that the judge had wrongly referred at [25] to not being satisfied that the respondent had discharged the "evidential burden" to rebut the appellant's 'innocent explanation'. She submitted this confused the 'evidential burden' on the appellant to raise the 'innocent explanation' and the legal burden on the respondent, if the 'innocent explanation' had been properly raised, to disprove it and establish dishonesty.

24. Mr West submitted that the phraseology of the judge at [25] was wrong but it was not material. The judge noted the submissions of the appellant's representative at [23(ii)] which correctly set out the burden of proof being on the respondent and that, on the basis of the generic evidence, it was then for the appellant to raise a "plausible account" as an 'innocent explanation' which once established, left the legal burden of proof on the respondent.

25. Both representatives referred me to the leading UT decision on ETS cases of which this appeal is an example: DK & RK (ETS: SSHD; proof) India [2022] UKUT 112 (IAC) (Lane J, President; Judge Ockelton, VP) (hereafter "DK and RK"). That decision was, coincidentally, promulgated on the same day as the hearing in this appeal, namely 25 March 2022. The judge, perhaps for that reason, was unsurprisingly not referred to it. It establishes certain important points of principle and the proper approach to matters of proof. The decision, however, importantly draws together the previous case law. Neither representative suggested the decision was other than relevant to the issues raised in this appeal.

26. The essential conclusions of the UT are set out in the judicial headnote:

> "1. The evidence currently being tendered on behalf of the Secretary of State in ETS cases is amply sufficient to discharge the burden of proof and so requires a response from any appellant whose test entry is attributed to a proxy.
>
> 2. The burden of proving the fraud or dishonesty is on the Secretary of State and the standard of proof is the balance of probabilities.
>
> 3. The burdens of proof do not switch between parties but are those assigned by law."

27. Ms Rushforth is undoubtedly correct that the legal burden of proof was upon the respondent to prove dishonesty on a balance of probabilities. The judge's reference to "evidential" burden on the respondent was not, however, wholly incorrect as the UT in DK and RK made clear at [49]-[53]:

> "49. We must consider the burdens in the present case. In an immigration appeal, the burden of proof is placed by law on the appellant, save in respect of a small number of issues where it is placed on the Secretary of State. Dishonesty by the appellant is

one such issue. It is not for the appellant to disprove it but for the Secretary of State to prove it.

50. Difficulties arise because the phrase "the evidential burden" appears to be used in two different senses. Where it is used of a burden on a party who does not have the (legal) burden of proof, it means that a matter that might otherwise come into consideration in discharging that burden does not fall for consideration at all unless the party with the evidential burden adduces sufficient evidence to raise the matter. To take an example from the criminal law (it is not easy to identify examples in the field with which this Tribunal usually deals) provocation as a defence to a charge of murder has to be disproved by the Crown in order to secure a conviction: but no disproof of it is necessary unless there is sufficient evidence to raise the defence as an issue: Mancini v DPP [1942] AC 1.

51. When, however, an evidential burden is said to lie on the party that has the (legal) burden of proof on an issue, it cannot be a matter of making the matter an issue: *ex hypothesei* it already is an issue.

52. What is identified here is a test of whether the party with the burden of proof has adduced sufficient evidence to enable a finding of fact in that party's favour. To put that another way, might the trier of fact find the matter proved on the basis of the evidence if that evidence were uncontroverted? Looking again at a criminal trial, this is the test applied at "half time", when the prosecution case is closed. If at that point the evidence adduced is insufficient to found a conviction, the defendant is entitled to a verdict of not guilty and, more relevantly for the purpose of the present proceedings, is not put to the trouble of having to put a case to counter the accusation.

53. It is, as the Privy Council pointed out in Jayasena v R [1970] AC 618 624, better not to call the evidential burden (in either sense) a burden of proof, because an evidential burden can be discharged by evidence falling far short of proof. Evidential burdens have, however, this in common with the burden of proof: they do not really shift, because their placing can be ascertained in advance of the proceedings. The existence of an evidential burden in the first sense is a matter of law; an evidential burden in the second sense exists as it were in the background of every legal burden."

28. In this appeal, therefore, there was an "evidential" burden on the respondent – as the party with the legal burden – to adduce evidence such that, without explanation, would be sufficient to discharge the legal burden of proving a dishonest deception, i.e. that the appellant used fraud in obtaining his certificate. In this appeal it was accepted that the generic evidence together with the 'look up' tool evidence, was sufficient to do that (see submission of appellant's counsel recorded at [23(ii)]). That was also the position confirmed by the UT in DK and RK. It was then for the appellant, if he wished, to raise a plausible account of an 'innocent explanation' which would then require the respondent on all the evidence to establish dishonesty and, in effect, rebut (or disprove) the appellant's 'innocent explanation'. Given that it was accepted that the respondent had done

enough through the generic and 'look up' tool evidence, the judge was, in effect, considering whether the respondent had discharged the legal burden upon her of rebutting (disproving) that 'innocent explanation'. The language of the judge in [25] was, as Mr West accepts, at the very least unfortunate, but it is clear that the judge realised what he was doing, namely considering whether the respondent had done enough to rebut the 'innocent explanation' in order to discharge the burden of proving dishonesty.

29. In reaching that position the judge had, of course, to accept that the appellant had raised a "plausible" account of an 'innocent explanation'. Subject to the sustainability of the reasoning in [25], it is plain that the judge did accept that on the basis of the appellant's evidence when, as he noted at [25(i)], the appellant's account "was not seriously challenged". At least, that appears to be so, to the extent that it was suggested the appellant had acted somehow perversely in travelling to a test centre in West London when he lived in East London. The judge clearly gave credence to the appellant's explanation and quite detailed evidence (set out at [17]) why he did that in his reasons at [25]. Perhaps the judge could have more explicitly 'squared the circle' but, reading the decision as a whole, it is plain he accepted the appellant's account having heard his oral evidence which was subject to cross-examination. This was highly relevant to whether his account was "plausible" and then a significant factor in determining whether, that being the case, the respondent had rebutted or disproved the 'innocent explanation' in order to establish dishonestly.

30. In substance, therefore, the judge did not fall into error in understanding and applying the correct burden of proof.

2. Ground 2

31. That then leads to Ground 2 (together with the final paragraph in Ground1) which challenges the judge's reasons for finding that the respondent had not establish dishonesty. Ground 2 solely relies upon the judge's reasons in [25(ii)] where he referred to the appellant's facility in English. Ms Rushforth relied upon [57] of MA (ETS – TOEIC testing) Nigeria [UKUT 450 (IAC) (McCloskey J, President and UTJ Rintoul) where the UT said this:

> "Second, we acknowledge the suggestion that the Appellant had no reason to engage in the deception which we have found proven. However, this has not deflected us in any way from reaching our main findings and conclusions. In the abstract, of course, there is a range of reasons why persons proficient in English may engage in TOEIC fraud. These include, inexhaustively, lack of confidence, fear of failure, lack of time and commitment and contempt for the immigration system. These reasons could conceivably overlap in individual cases and there is scope for other explanations for deceitful conduct in this sphere. We are not required to make the further finding of why the Appellant engaged in deception and to this we add that this issue was not explored during the hearing. We resist any temptation to speculate about this discrete matter."

32. It is important to note precisely what the UT said. The UT had already found the deception in that appeal to be proved. Further, the UT did not say that such evidence was irrelevant, just that it had to be treated with caution because there may be a number of explanations why a person – even if proficient in English – might use of proxy test-taker.

33. In this appeal the judge was plainly alive to the points made by the UT in MA. At [25(ii)], the judge noted that the evidence of proficiency was not a "conclusive factor" – as indeed it was not – and noted there might be reasons why a proficient speaker would use a proxy test-taker but the evidence did not lead the judge to accept that was the case in this appeal. In reaching that view, the judge had, after all, heard the appellant's explanation and its testing in cross-examination. The judge is best placed to reach an assessment of the appellant's evidence and his veracity. An appellate tribunal or court should be most reluctant to interfere with that assessment made following the forensic process. I see no proper basis for doing so on this issue.

34. Ms Rushforth also criticised the judge's reasoning in [25(iii)], which she characterised as 'bordering on the perverse', to treat the appellant's admission that it was not his voice on the tape as supporting his account that he did not cheat. If that was the real substance of the judge's reasoning in [25(iii)], then there might be some merit in this criticism. Faced with the tape, the appellant (whether truthful or not) might well not sensibly seek to claim it was his voice. But, that is not in my view the real gist of what was being said by the judge. Part of the evidence in this appeal was that the appellant's representatives had obtained the tape from ETS (see [19]). In that context, it was open to the judge to take into account that this was an occurrence which had, at least, some congruence with an appellant who clamed he had actual taken the oral part of the test. In my judgment, the judge cannot properly be criticised in his reasoning in [25(iii)].

3. A Further Point

35. Finally, in her oral submissions, Ms Rushforth criticised the judge's reasoning in [25(iv)] in relation deficiencies in the 'chain of custody'. Ms Rushforth, perhaps, sought to raise this because of what was said in DK and RK at [114]-[125]. The point was not raised in the Grounds. Mr West objected to the respondent's reliance on a matter not in the grounds of appeal. I agree that it should have been or, if the respondent wished, she could have sought to amend the grounds but no such application was made. The point, however, is an evidential one and was in dispute at the hearing (see [25(iv)]). The UT in DK and RK reached its views on the basis of the evidence in those appeals. The judge made his findings on the basis of the evidence before him. I was not informed to what extent the evidence differed. The UT plainly had detailed submissions on this issue. The judge, in this appeal, had much more limited submissions and does not record an express oral submission on this point made by the respondent. I am not persuaded that, on the evidence before the judge, his reasoning in [25(iv)] was unsustainable or sufficient to undermine the judge's finding that the respondent had not discharged her legal burden of proof to prove dishonesty.

4. Ground 3

36. It was accepted before me that Ground 3 fell away if the judge's finding, that the respondent had not established dishonesty by the appellant, was sustainable. I agree. The judge's reasoning and conclusions at [26]-[31] are adequate and cogent and not Wednesbury unreasonable or irrational.

Decision

37. For the above reasons, the decision of the First-tier Tribunal to allow the appellant's appeal under Art 8 did not involve the making of an error of law. That decision, therefore, stands.

38. The respondent's appeal to the Upper Tribunal is, accordingly, dismissed.

Andrew Grubb

Judge of the Upper Tribunal
Immigration and Asylum Chamber

31 January 2023