



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case Nos: UI-2022-006161
UI-2022-005047
First-tier Tribunal Nos: HU/57457/2021
HU/57459/2021
IA/16764/2021 & IA/16775/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 29 March 2023

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS SARBJEET
MR SUKHWINDER SINGH

Respondent

Representation:

For the Appellant: Ms J Isherwood, Senior Home Office Presenting Officer
For the Respondent: Mr R Sharma, Counsel, instructed through Direct Access

Heard at Field House on 15 February 2023

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing the appeals of Sarbjeet and Sukhwinder Singh, against the respondent's decision to refuse their applications for leave to remain in the UK.
2. For the purposes of this decision, I shall hereinafter refer to the Secretary of State as the respondent and Sarbjeet and Sukhwinder Singh as the appellants, reflecting their positions as they were in the appeal before the First-tier Tribunal.

Background

3. The appellants are citizens of India and are wife and husband, born on 13 July 1979 and 26 May 1977 respectively. They entered the UK on 16 November 2010, the first appellant with a Tier 4 (General) Student visa and the second appellant with a Tier 4 (General) Student Dependent visa, valid until 28 January 2013.

4. On 28 January 2013 the appellants applied for further leave as a Tier 4 student / student dependent. Their applications were refused on 14 March 2013 under paragraphs 245ZX(c) and (d) of the immigration rules on the basis that the first appellant had failed to produce a valid Confirmation of Acceptance for Studies (CAS). The respondent also made decisions under s47 of the Immigration, Asylum and Nationality Act 2006 to remove the appellants to India. The appellants appealed against the decisions, but the appeals were dismissed in the First-tier Tribunal following a hearing on 26 September 2013.

5. On 11 March 2014 the appellants applied again for leave to remain as a Tier 4 student/ student dependent. According to the respondent's review before the First-tier Tribunal the application was refused on 1 July 2014 and the appellant then made an application on 12 January 2015 which was refused (according to Ms Isherwood's notes that was a human rights application). It was at that time that it came to the respondent's attention that there was no evidence of service of the earlier decision on the appellants, and so the decision was reconsidered and the first appellant was served with a 60 day letter on 18 September 2020. In that letter the first appellant was advised that her Tier 4 sponsoring college's licence had been revoked and that she was therefore no longer in possession of a valid Confirmation of Acceptance for Studies (CAS) and had 60 days to find a new Tier 4 sponsor and submit an application to vary the grounds of her original application.

6. On 19 October 2020, the appellants' solicitors made further representations and provided additional grounds under section 120 of the Nationality, Immigration and Asylum Act 2002 applying for further leave to remain on the basis of long residence in the UK and making an Article 8 human rights claim on private life grounds. In a response of 23 October 2020 the respondent refused to consider the human rights grounds, requiring the appellants to make an application on the appropriate form, and reminded the first appellant that she had until 17 November 2020 to either obtain a CAS and submit a new student application, submit a fresh application in a different category, or leave the UK. On 16 November 2020 the appellants requested an extension of time.

7. In a letter dated 5 March 2021, the respondent advised the first appellant that she believed that false representations had been made in her application and that the TOEIC certificate she had submitted with her Tier 4 application had been fraudulently obtained, with a proxy test taker having taken the English language speaking test on 15 January 2013. The first appellant was invited to respond and make further representations under section 120 of the Nationality, Immigration and Asylum Act 2002.

8. The appellants' solicitors responded on her behalf on 15 March 2021 in a section 120 response, providing a copy of the first appellant's statement, advising the respondent that the voice recording of the first appellant's test had been requested and would be forwarded upon receipt, and requesting that the appellants be granted leave to remain in the UK on the basis of their private life.

9. On 25 March 2021 the respondent advised the appellants that if they wanted to be considered under private life or long residency grounds they would need to make an application and they were given 14 days to vary their application if they wished.

10. On 10 September 2021 the appellants' solicitors obtained the audio files for the first appellant for her TOEIC test on 15 January 2013 at New London College and sent them to the respondent together with a statement from the first appellant confirming that the audio recordings were of her voice and that that proved that there had not been a proxy test taker.

11. On 28 October 2021 the first appellant was interviewed by the respondent, by telephone, so that the respondent could compare her voice, pronunciation and general speaking pace and tone to the digital copies of voice recordings for her test provided by ETS. In a letter of the same date, the respondent concluded that the voice on the voice recordings was not that of the first appellant and provided reasons for so concluding.

12. The appellants' applications were then refused by the respondent in decisions dated 19 November 2021. The second appellant's application was refused in line with that of the first appellant, as her dependent. In the decision refusing the first appellant's application, the respondent confirmed that she had not achieved the relevant points under Appendix A and C of the immigration rules as she did not have a valid CAS, since her Tier 4 sponsor was not on the relevant register of sponsors. She therefore could not meet the requirements of the immigration rules as a Tier 4 (General) Student Migrant. In addition it was considered that the test results for the English language test taken on 15 January 2013 at New London College had been confirmed by the ETS as having been obtained through deception, by the use of a proxy test taker. The data from ETS confirmed that 65% of the tests taken at that college on the same morning as the appellant had been deemed invalid and 35% were questionable, and accordingly none of the test results for the college were "released". The respondent advised further that the first appellant had failed to provide evidence to support her claim to have attended and undertaken the test herself and that, further to her interview on 28 October 2021, it was concluded that the voice on the voice recordings was not her voice. The respondent therefore concluded that false representations had been made in relation to the first appellant's application and the application was refused under paragraph 322(1A) of the immigration rules. The respondent went on to consider the appellant's Article 8 private life claim and concluded that she did not qualify under paragraph 276ADE(1) of the immigration rules, that her application fell for refusal on grounds of suitability under S-LTR.1.6 as a result of false representations having been made and that there were no exceptional circumstances justifying a grant of leave outside the immigration rules.

13. The appellants appealed against the respondent's decision and the appeals were heard by First-tier Tribunal Judge Adio on 18 August 2022. The appeals were heard remotely, via CVP. Both appellants gave oral evidence before the judge, as did a witness Kamaljit Singh Chauhan, the appellants' landlord and friend. The judge accepted, on the basis of the evidence before him, that the respondent had met the evidential burden of proof, but he found that the first appellant had provided a plausible innocent explanation and he accepted her evidence of having taken the test herself without a proxy. The judge therefore found that the appellant did not fall foul of the suitability provisions in the rules and that paragraph 322 did not apply. He found that both appellants qualified under the immigration rules and that the respondent's decision was wrong with reference to paragraph 245 in assessing the public interest. He concluded that it would be disproportionate for the respondent to remove the

appellants from the UK and that leave to remain should be granted. He accordingly allowed the appellants' appeals.

14. The respondent sought permission to appeal against that decision to the Upper Tribunal on the grounds that the judge had made a material misdirection of the law, provided a lack of adequate reasoning and failed to resolve conflicts of fact and opinion on material matters. It was asserted that the judge had failed to apply the facts in the first appellant's case to DK and RK (ETS: SSHD evidence; proof) India [2022]UKUT 112, that he had wrongly taken into consideration the first appellant's other qualifications and proficiency in English without applying DK and RK, that he had failed to consider the evidence of widespread cheating at New London College, that he had failed to provide adequate reasoning for accepting that the voice recording was of the first appellant's voice and that he had failed to consider that the appellant was also refused leave because she did not have a valid CAS as her sponsoring college was not on the Tier 4 sponsor register.

15. Permission was granted in the First-tier Tribunal on the basis that Judge Adio had arguably erred by permitting the first appellant's English language proficiency to operate as a key factor in concluding that she had provided an innocent explanation to rebut the respondent's allegation of cheating.

Hearing and Submissions

16. The matter then came before me. Prior to the hearing Mr Sharma produced a Rule 24 response/ skeleton argument. Both parties made submissions.

17. Ms Isherwood submitted that the first appellant's circumstances were the same as those in DK and RK and involved the same college as RK in that case, in which it was found that there had been overwhelming fraudulent activity. The college where the appellant had taken her test, North London College (NLC) was described at [119] of DK and RK as a fraud factory. Judge Adio had referred to DK and RK but had not applied the legal points therein. He had considered the appellant's position at the hearing before him and how she gave her evidence, and had focussed on her proficiency in English, on the fact that she had done a lot of studying for the test and how she travelled to the test centre, but had not considered the lack of detail she gave as to how she took the test at the relevant time. He had failed to address the fact that the appellant's TOEIC certificate had been found to be invalid rather than questionable and had failed properly to grapple with the voice recording issue, having not been provided with the recording himself. Ms Isherwood submitted further that the judge had failed to consider that the appellant had been given an opportunity in September 2020 to obtain a CAS but had not produced one. The decision therefore needed to be set aside and the matter remitted to the First-tier Tribunal to be heard again.

18. Mr Sharma submitted that the judge had addressed himself to the principles in DK and RK and had noted the strength of the respondent's evidence and the findings made about the appellant's college, NLC. He was aware of the fact-sensitive approach that was required and he gave reasons for according weight to the evidence in the appellant's favour. The judge did not find rely on the appellant's proficiency in English as a reason why she would have needed to use a proxy, but considered it together with multiple other factors as he was entitled to do. The judge considered the voice recordings and was entitled to take account of the fact that the respondent was merely making an assertion but had not provided any expert evidence. The Secretary of State's complaint about the judge's findings on the appellant's TOEIC certificate was therefore not made out. As for the issue of the CAS, the judge had dealt with that at [20] and was entitled to find that that was not material. It was not surprising that

the appellant's sponsor no longer had a licence and that she could not obtain a new CAS some seven and a half years after her application had been made. The judge was therefore right to find that the respondent should grant the appellant some form of leave under Article 8 to enable her to seek to regularise her stay. That was consistent with the guidance given in Ahsan v The Secretary of State for the Home Department [2017] EWCA Civ 2009 whereby the Court of Appeal found that the remedy for the injustice caused by the delay arising from a false allegation of cheating was to grant a period of leave.

Discussion

19. As Mr Sharma properly observed, there are two issues in this case: the first is the issue of the judge's findings on the TOEIC certificate and the allegation of deception and the second issue is the CAS and the judge's decision to allow the appeal under Article 8.

20. Turning first to the allegation of fraud in relation to the first appellant's TOEIC certificate, I note, as Mr Sharma properly identified, that Judge Adio did indeed direct himself to the principles in DK and RK, at [11] of his decision, and that, at [14], he had regard to the evidence of cheating in the TOEIC tests at New London College. However I agree with Ms Isherwood that the judge did not actually apply the legal principles in DK and RK nor engage with the evidence of the extent of NLC's involvement in the fraudulent activities as set out in DK and RK.

21. In DK and RK the Upper Tribunal found that the burden of proof did not switch between parties but were those assigned by law and said at [60]:

"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. With that in mind, we turn to the evidence before us."

22. Although, at [11], the judge recorded the Upper Tribunal's direction about the burden of proof in DK and RK, what he did in practice was inconsistent with that direction. He considered the respondent's generic evidence, including the evidence about New London College, only in so far as it established a *prima facie* case for the respondent, but did not then go on to consider it when assessing the evidence as a whole. There was no indication at all in his findings at [15] to [18] that he actually engaged with the factual findings in DK and RK about the NLC's fraudulent practices and the extent of that fraud and neither did he engage with the information in the look-up tool and consider it in the context of the evidence as a whole. Indeed, his consideration of the NLC's involvement in the fraud at [14] was rather sparse and at no point did the judge ask himself how the level of fraud employed by NLC reflected upon the appellant's own position. Rather, he focussed instead upon extraneous factors such as the appellant's proficiency in English and her success in a subsequent IELTS test. With regard to the voice recordings, he simply rejected the respondent's analysis and accepted the appellant's assertion that the voice was her own without having been provided with the voice recordings and without any independent evidence to support that assertion. It is clear, therefore, that the judge failed to undertake a

holistic assessment of the evidence in its relevant context. In the circumstances it seems to me that the judge's findings and conclusions in regard to the allegation of fraud are legally flawed and cannot be sustained.

23. Aside from the above, and absent the fraud allegation, I agree with Ms Isherwood that the judge erred in law in his Article 8 assessment. At [20] the judge proceeded in that assessment on the basis that the appellant qualified under the immigration rules and found that the respondent was wrong with reference to paragraph 245. The first appellant had failed to provide a CAS in an application made at a time when she had no leave and it is not clear, therefore, how the judge considered that she met the requirements of the immigration rules. Mr Sharma submitted that the judge's decision was consistent with the findings in Ahsan, where the Court of Appeal found that in a human rights appeal where the applicant had been found not to have cheated he/she should be put back into the position he/she would have been in had the adverse decision not been made. However I do not see how that assists the first appellant in circumstances where she had already been given a period of leave to enable her to find a new sponsor and submit a new CAS but had not done so. It seems to me that what the judge ought to have done was to undertake a full Article 8 assessment and that he erred in law by allowing the appeal on the basis that he did.

24. Accordingly, I find that Judge Adio's decision cannot stand and has to be set aside in its entirety. Both parties agreed that the appropriate course in such circumstances would be for the matter to be remitted to the First-tier Tribunal to be heard *de novo* by a different judge.

Notice of Decision

25. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside. The appeal is remitted to the First-tier Tribunal to be dealt with afresh, pursuant to section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and Practice Statement 7.2(a), before any judge aside from Judge Adio.

Signed: S Kebede
Upper Tribunal Judge Kebede

Judge of the Upper Tribunal
Immigration and Asylum Chamber

16 February 2023