



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002328

First-tier Tribunal No: HU/53063/2021

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On 19 June 2023**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

**M N WOHHAB AL-AZAD
(NO ANONYMITY ORDER MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Zane Malik KC, Counsel
For the Respondent: Mr Nicholas Wain, Senior Home Office Presenting Officer

Heard at Field House on 1 June 2023

DECISION AND REASONS

Introduction

1. The appellant appeals from the decision of First-tier Tribunal Judge Jarvis promulgated on 3 May 2022 (“the Decision”). By the Decision, Judge Jarvis dismissed the appellant’s appeal against the decision of the respondent to refuse his application for indefinite leave to remain on the ground that the appellant had been knowingly involved in false representations as part of the making of an application on 17 January 2013 for further leave to remain as a Tier 1 Entrepreneur; and that requiring him to go back to Bangladesh after residing in the UK for 13 years would not constitute a disproportionate interference with the private life which he had established in the UK.

Relevant Background

2. The appellant is a national of Bangladesh, whose date of birth is 1 January 1977. On 17 January 2013 he applied for further leave to remain as a Tier 1 Entrepreneur. He later varied this application on 21 December 2018 on the basis of his claim to have accrued 10 years' lawful residence by reference to the indefinite leave to remain provisions in paragraph 276B of the Immigration Rules. On 28 May 2021 the respondent refused the application as varied. In a refusal letter which Judge Jarvis characterised as being particularly detailed, the respondent laid out the reasons why she asserted that the appellant had used deception in the making of an application for leave to remain under the Tier 1 Entrepreneur Scheme, on 17 January 2013. As a consequence, the respondent refused the varied application by reference to paragraphs 322(1A), 322(5), 276B(ii)(c), and S-LTR1.6 or S-LTR2.2 of the Immigration Rules.

The Hearing Before, and the Decision of, the First-tier Tribunal

3. The appellant's appeal came before Judge Jarvis sitting at Taylor House on 19 April 2022. The appellant was represented by Mr Canter of Counsel, and Ms Deborah, Home Office Presenting Officer, appeared on behalf of the respondent. The appeal hearing was conducted in a hybrid format. The appellant, the Bengali Interpreter and Mr Canter joined Judge Jarvis in the Hearing Room, whereas Ms Deborah joined the hearing by Video link. Initially, Mr Canter requested that the appellant be allowed to attempt to give his evidence in English with the Tribunal Interpreter in reserve in case he was needed.
4. During cross-examination, the Judge noted that the appellant had asked for a number of relatively clear but long questions to be repeated or re-phrased, and so he suggested to Mr Canter that the appellant should give the rest of his evidence exclusively in the Bengali language using the Tribunal Interpreter. He was happy with this suggestion, and thereafter the appellant gave his evidence in the Bengali language.
5. The Judge records in the Decision that there was no suggestion during the hearing that the appellant had any difficulties with understanding the Interpreter and *vice versa*.
6. In closing submissions, Mr Canter accepted that if the Tribunal concluded that the appellant had used deception in his Tier 1 application, then the Article 8 ECHR appeal would have to be dismissed. Ms Deborah confirmed that if the appellant established that he had not deliberately deployed deception, then the Secretary of State accepted that he otherwise met the requirements of paragraph 276B of the Rules.
7. The Judge's findings and reasons were set out in the Decision at paragraphs [33] onwards. At paragraphs [41] to [46], the Judge gave his reasons for rejecting Mr Canter's submission that the Secretary of State had failed to make out the burden in the first instance of showing that the appellant had practised deception. Beginning at paragraph [47], the Judge

addressed the appellant's response to the allegation of dishonesty in the making of his application. At paragraph [78], the Judge made a number of findings of fact in respect of the circumstances appertaining at the time the application was made on 17 January 2013. His findings included that no actual business had been carried out by the appellant or his partner, even though they both became Directors of the Company in at least November 2012; the appellant was still receiving bank statements which recorded a large number of transactions which did not relate to any business activity carried out by him or his partner - there was no actual business activity other than the untruthful paying off of former liabilities; neither the appellant nor his partner had a business plan at any time in this material period; by the appellant's own evidence, he and his partner did not engage in any genuine, self-generated business activity until July 2013 (some 6 months after the application was made); and the appellant would have known that it was extremely suspicious to take on a client (Fotik Khan) without any due diligence and without having met him:

"While I appreciate that the appellant claims he was advised to do this by 14U and states at page 152 that he was under pressure on the day that he was signing the paperwork for the Tier 1 application, I nonetheless conclude that a man with the appellant's experience and education would have known that this was highly unusual and would reasonably have known that this was an indication of something untoward going on. The appellant himself says that he did not want to sign the document taking on the client but nonetheless did."

8. The Judge concluded as follows, at paragraph [79]:

"Overall then, I find that by 16 January 2013 the appellant did know that the application being made contained false representations, or in the alternative, and despite signing the declaration to the Tier 1 application form, he had certainly not seen the relevant supporting documents which in itself was a direct false representation. In my judgment it is more likely than not that he decided to ignore what was going on in the hope that he would receive his leave extension and that any potential difficulties in the future would be seen as the fault of I4U and not directed at him."

The Grounds of Appeal to the Upper Tribunal

9. After permission to appeal had been refused by the First-tier Tribunal, Mr Malik was instructed to settle grounds of appeal for a renewed application for permission to the Upper Tribunal.
10. In the grounds of appeal dated 17 June 2020, Mr Malik identified, and went on to develop, six grounds of appeal. Ground 1 was that the FTT's decision was vitiated by a procedural error arising from the Secretary of State's breach of the duty of candour and disclosure. Ground 2 was that the FTT had erred in law in failing to recognise that the appellant was a vulnerable witness and in failing to have regard to his mental health issues when assessing the credibility of his evidence. Ground 3 was that the FTT had erred in relation to the burden and standard of proof. Ground 4 was

that the FTT had misapplied the Court of Appeal's judgment in *TK (Barundi) -v- SSHD* [2009] EWCA Civ 40 with respect to the absence of corroboration from the appellant's business partner, Mr Siddique. Ground 5 was that the FTT had misconstrued paragraph 322(1A) of the Immigration Rules, and Ground 6 was that the FTT had erred in law in failing to conduct the two-stage balancing exercise required by paragraph 322(5) of the Immigration Rules.

The Reasons for the Grant of Permission to Appeal

11. On 31 August 2022 Upper Tribunal Jonathan Perkins granted permission to appeal on all grounds raised. He was doubtful that the Secretary of State's duty of candour extended as far as ground 1 asserted but, in the absence of authority, he said it may be argued. He was also doubtful that there was any merit in the contention in Ground 2 that the Tribunal ought to have treated the appellant as vulnerable when it was not suggested that the appellant by his Counsel requested such treatment and when the decision of Judge Jarvis appeared to show appropriate sensitivity to the appellant's needs - for example, with regard to translation. But he acknowledged that there was a medical report and it might be that the Tribunal should have been more pro-active. The Upper Tribunal would obviously need to be satisfied that any error was material. Whether the phrases identified in Ground 3 summarised the Judge's approach was a matter for argument, but he agreed that it was arguable that the Judge lost his way when considering shifting burdens. Ground 4 required a careful consideration of what the Judge actually did. Noting the absence of evidence was not necessarily indicative of the burden of proof being placed on the wrong party.

The Hearing in the Upper Tribunal

12. At the hearing before me to determine whether an error of law was made out, Mr Malik developed his case in respect of each of the 6 Grounds, by reference to his extensive skeleton argument that he had served in advance of the hearing. In response, Mr Wain addressed each of the Grounds, and submitted that no error of law was made out which rendered the Decision unsafe. Mr Malik replied briefly, and I informed the parties that I was reserving my decision.

Discussion and Conclusions

13. Ground 1 relates to the missing third page of a witness statement provided by a Chief Immigration Officer that was the last document in a bundle filed by the respondent, which ran to nearly 500 pages. The witness statement was made regarding applications made to the Home Office by the appellant. It was made on 12 October 2020 in the context of the CIO being attached to the West London Criminal & Financial Investigation Team. He said that he was referring to Home Office records within his statement, and these were records kept by the Home Office in both paper and computer format. He went on to detail the information

which the appellant confirmed in his application of 17 January 2013. On page 2, he stated that in support of the application the appellant submitted HSBC Bank statements for AH Palak Ltd, which featured a number of transactions between people and companies involved in the fraud, which he went on to list individually.

14. It is reasonable to infer that the witness statement from the CIO formed part of the factual substratum on which the extremely detailed reasons for refusal letter was based. What was set out in the refusal letter was supported by extensive disclosure of documents relating to the impugned Tier 1 application, including business accounts, bank statements and material emanating from Immigration4U.
15. As is apparent from the skeleton argument filed by appellant's Counsel for the hearing in the First-tier Tribunal, and also the Judge's summary of the issues and of the line taken by the appellant, there was no dispute about the details of the fraudulent operation in which the appellant and his business partner were said to have been embroiled. The dispute was solely over whether the appellant had been complicit in the fraud, or whether he was an innocent victim of it.
16. Notwithstanding this, Mr Canter applied at the hearing for a ruling that the respondent had not discharged the initial burden of raising a *prima facie* case of dishonesty on the part of the appellant because of the failure to produce the missing page from the witness statement.
17. At [43] of the Decision, the Judge said that while it would obviously be preferable if the third page of the witness statement had been provided, he did not accept- looking at the evidence overall, and the nature of the appellant's case in rebuttal - that this omission materially undermined the Secretary of State's *prima facie* case. At [44], he held that there was a huge amount of uncontested evidence which had been provided by the Secretary of State which was extensively detailed in the refusal letter, which corroborated the detail of the two pages of the statement which had been disclosed. As he had already recorded, the appellant did not dispute the core aspect of the Secretary of State's case that a number of individuals involved with I4U (and who had been directly involved in the appellant's application of January 2013) had been involved in a highly sophisticated fraud which included that directed through the appellant's company AH Palak Ltd. The Judge said that he appreciated that the appellant could not contest or query evidence which had not been disclosed, but he could see nothing in the refusal letter to suggest that the Secretary of State was relying upon specific evidence provided by the CIO in that missing page in order to in any way justify the decision under challenge. Therefore, he concluded at [46] that the nature of the evidence in the case was sufficient to justify the initial assertion that the appellant was involved in the making of a dishonest application.
18. In Ground 1, it is not asserted that the Judge erred in law in the findings which he made at [43] to [46]. Instead, the line taken in Ground 1 is that

the proceedings in the First-tier Tribunal were vitiated by procedural unfairness, as the duty of candour and disclosure required the disclosure of the missing page. Without knowing what was on the missing page, it was impossible for anyone to exercise judgment and decide whether it should be disclosed to the appellant. If the Presenting Officer was not even aware of the contents of the missing page, they could not have identified whether what was on that page was of significance or relevance. They could not have been sure that the First-tier Tribunal was not inadvertently misled. It is not submitted that the Secretary of State misled the FTT, or that there was a deliberate breach of the duty of candour or disclosure. It is submitted that the appellant was entitled to know what was on the missing page, given that the witness statement was admitted by the FTT into evidence.

19. The difficulty with Mr Malik's submission is that the appellant was represented by Counsel, and his Counsel did not apply for the witness statement to be excluded on the ground that one page was missing. In the alternative, he did not apply for an adjournment on the ground that there could not be a fair hearing of the appellant's appeal without the missing page being produced.
20. I do not consider that the two authorities relied upon by Mr Malik advance the argument. In *Citizens UK -v- SSHD* [2018] EWCA Civ 1812, the Court held at [106] that "*a duty of candour is a duty to disclose all material facts known to a party in judicial review proceedings*". Singh LJ explained that, "*the duty not to mislead the Court can occur by omission, for example by the non-disclosure of a material document or fact or by failing to identify the significance of a document or fact*".
21. On analysis, neither of these considerations was in play at the hearing in the First-tier Tribunal. The non-disclosure of the third page of the witness statement did not constitute a failure to disclose all material facts known to the respondent. Although it is true that no one at the hearing knew what was on the missing page, there was - and is - no reason to suppose that the third page of the witness statement may well have contained something that could have assisted the appellant, as Mr Malik submits.
22. The mere fact that the witness statement was included in the respondent's bundle did not by itself mean that it was a material document in the appeal in circumstances where, as the Judge explained, there was no dispute between the parties as to the underlying facts.
23. Mr Malik submits that a separate duty of disclosure from the Secretary of State was identified in *Nimo (Appeals: Duty of disclosure)* [2020] UKUT 88 (IAC), where the Presidential Panel held that, "*in an Immigration appeal, the Secretary of State's duty of disclosure is not knowingly to mislead ...*". But there is simply no evidential foundation for the proposition that in failing to provide the missing page, the respondent was knowingly misleading the First-tier Tribunal.

24. If Mr Malik is right that the appellant was entitled to know what was on the missing page as a pre-requisite for a fair hearing, it follows that the appellant's Counsel should have applied for an adjournment, rather than acquiescing in the hearing going ahead. When I put this point to Mr Malik in oral argument, he responded by relying on *MM (Unfairness); E&R (Sudan)* [2014] UKUT 105 (IAC). I accept that in *MM*, a Presidential Panel of the Upper Tribunal held that a successful appeal is not dependent upon the demonstration of some failing on the part of the FTT. However, what is in play here, on Mr Malik's hypothesis, is not an absence of some failing on the part of the Judge, but a postulated mistake by appellant's Counsel to take a point which is now relied upon by the appellant as vitiating the fairness of the proceedings.
25. The hearing in the First-tier Tribunal was not a dress-rehearsal. Instead of taking the point now advocated by Mr Malik, Counsel for the appellant at the hearing before Judge Jarvis took a different point in relation to the same material, which was that the absence of the missing page meant that the initial burden of proof was not discharged. The Judge gave adequate reasons for rejecting this argument, and there was no procedural unfairness in the hearing going ahead on the evidence as it stood.
26. Ground 2 arises from the fact that there was a report from the appellant's GP in the appellant's bundle, which diagnosed him as suffering from a generalised anxiety disorder, for which he was prescribed medication. Mr Malik submits that the Judge erred in law in not treating the appellant as a vulnerable witness and asking himself whether this vulnerability had impacted upon his credibility.
27. However, the mere fact that the appellant had mental health problems did not necessarily entail that he should have been identified as a vulnerable witness. Paragraph 2 of the Joint Presidential Guidance Note No.2 of 2010, states that although some individuals are by definition vulnerable, others are less easily identifiable. Footnote 2 states that the phrase "*vulnerable adult*" has the same meaning as in the Safeguarding Vulnerable Groups Act 2006. It is not suggested that the appellant is a vulnerable adult. I accept that he could have potentially been identified as vulnerable on account of his diagnosed mental health condition. But neither in the GP report, nor in the appellant's own witness statement, was it suggested that his condition had affected his memory or concentration, or that there was any risk of his condition impacting adversely upon his ability to give evidence effectively under cross-examination. There was no suggestion that the appellant was suffering from any kind of cognitive impairment.
28. As was submitted by Mr Wain in oral argument, paragraph 5 of the Guidance stipulates that the primary responsibility for identifying vulnerable individuals lies with the party calling them. It is not in dispute that Counsel for the appellant did not identify the appellant as a vulnerable individual. Indeed, he made no mention whatsoever of the appellant's mental health condition in his written submissions. I do not consider that

there is anything in the GP report or in the appellant's witness statement that should have caused the Judge to treat the appellant as vulnerable of his own motion.

29. The Guidance provides as follows in respect of witnesses who have been identified as vulnerable: *"Where there were clear discrepancies in the oral evidence, consider the extent to which the age, vulnerability or sensitivity of the witness was an element of that discrepancy or lack of clarity."*
30. The Judge did not purport to resolve the issue of whether the appellant was credible on the basis of clear discrepancies in his oral evidence. On the contrary, it is apparent from the Decision that the reason why the Judge found the appellant to be dishonest was not because there were inconsistencies in his oral evidence, but because he did not accept his considered explanation for how he behaved at the time, or his assertion that he was not aware at the time that he was embroiled in a fraudulent operation. The appellant had given detailed written answers to an extensive Questionnaire, and he had made a detailed witness statement. The assessment of credibility was thus made primarily on the basis of the appellant's written response to the allegations made against him, and it did not turn on his performance in cross-examination.
31. For the above reasons, I find that the Judge did not err in law in not treating the appellant as a vulnerable witness, and I am wholly unpersuaded that the failure by the Judge to treat the appellant as a vulnerable witness rendered the proceedings procedurally unfair.
32. Ground 3 is that the Judge placed too high a burden on the appellant, and thereby erred in law. This is because the Judge is said to have wrongly elevated *"plausibility"* to *"reliability"* or *"reasonableness"*. Mr Malik singles out two passages from the Decision. The first is at [53] where the Judge concluded that the appellant had not provided a reliable or reasonable rebuttal of the Secretary of State's significant evidential case against him. The second is at [57], where the Judge said that *"overall the appellant does not reliably establish why he agreed to go into business with a complete stranger, Mr Siddique."*
33. Mr Malik submits that there was no legal burden on the appellant to provide a reliable or reasonable explanation as to the allegation of fraud, following *DK & RK (ETS: SSHD evidence, proof) India* [2022] UKUT 112 (IAC), where a Presidential Panel held that the burden of proving a fraud or dishonesty is on the Secretary of State and the standard of proof is on the balance of probabilities, and that *"the burdens of proof do not switch between parties but are those assigned by Law."*
34. Mr Malik adds that the Judge's approach is not even justified on the earlier case law, as in *SSHD -v- Shezad* [2016] EWCA Civ 615, where the Court of Appeal observed that the Secretary of State bears the initial burden of furnishing proof of deception, and that this burden is an evidential burden; which means that: *"if the Secretary of State provides*

prima facie evidence of deception, the burden shifts onto the individual to provide a plausible innocent explanation, and that if that individual does so the burden shifts back to the Secretary of State.”

35. On analysis, the Judge did not misdirect himself for the reasons given below.
36. Firstly, earlier in the Decision, the Judge set out both the guidance given in *Shehzad* and in *DK & RK (2)*. Thus, the Judge was fully aware of the two approaches which potentially fell to be applied, while at the same time recognising that the legal burden of proving dishonesty always rests with the respondent. Mr Malik submits that the Judge should not have followed the Court of Appeal authority, because it has been superseded by the ruling of the Upper Tribunal in *DK & RK (2)*. But that cannot be right. Clearly, the decision of the Court of Appeal, being a decision of a higher authority, remains good law. In addition, it was the guidance in *Shehzad* that Counsel for the appellant invited the Judge to apply. The reformulation of the guidance in *DK and RK (2)* reflects the fact that a Presidential panel has decided that in general the respondent’s evidence in ETS cases amply discharges the burden of proof, and so the evidential boomerang approach is no longer appropriate for ETS cases. It does not follow that it has become inappropriate for other types of case whether the respondent has to prove dishonesty.
37. Secondly, the other matter to which the Judge had express regard was the Secretary of State’s Guidance cited at paragraph [39] on the topic of deception by a third party. It is this guidance which introduces into the Judge’s discussion the concept of reasonableness. The Judge records at paragraph [40] that this very same guidance was relied upon by the appellant in his current solicitor’s letter dated 18 March 2021, which was at page 133 onwards of the Home Office bundle.
38. As indicated by the Judge, it was part of the case advanced in the letter of 18 March 2021 that the appellant had acted reasonably in his dealings with Immigration4U, and the appellant relied on this fact as negating the inference of complicity. The guidance relied upon by the appellant expressly requires caseworkers to consider, in the context of a fraud that has been perpetrated by a third party, whether the applicant’s behaviour has been reasonable.
39. So, in addressing the question of reasonableness, the Judge was rightly engaging with the case put forward by the appellant. As to the Judge’s deployment of the concept of reliability, it is tolerably clear that he was treating reliability as being synonymous with plausibility. In finding that the appellant had not reliably established why he went into business with a complete stranger, the Judge was saying no more than that his explanation for doing so was not plausible or credible. At the same time, the Judge did not lose sight of the fact that the ultimate question was whether the respondent had proved that the appellant was dishonest. At [54] the Judge said as follows:

“I fully appreciate the appellant’s claim is that he made mistakes and, as he said during the Tribunal hearing, acted stupidly by not doing background checks on AH Palak or on Fotik Khan, and in allegedly not demanding to see the documents which I4U intended to submit for the January 2013 application - however, overall, I find, applying the balance of probabilities, that the appellant did know that I4U had carried out fraud through AH Palak Ltd and/or that the application made on 17 January 2013 was a deceptive one.”

40. The Judge went on to say at [55] that in his judgement the evidence tended to show on balance that the appellant acquiesced knowingly in the submission of a deceptive application on his behalf. At [56] the Judge said that he did not accept the appellant’s evidence that by the time the application was submitted in January 2013 he was unaware of the broad thrust of the fraud which was ongoing. The Judge said that he had come to this conclusion based on a number of different composite points, *“bearing in mind the appellant’s background in business studies and as a reasonably intelligent man”*.
41. As to Ground 4, in *TK (Barundi)* the Court held at paragraph [21] as follows:

“It follows that where a Judge in assessing credibility relies on the fact that there is no independent supporting evidence where there should be supporting evidence and there is no credible account for its absence [he] commits no error of law when he relies on that fact for rejecting the account of an appellant.”
42. I accept Mr Malik’s submission that the guidance given by the Court of Appeal was in the context of a typical human rights case where the burden of proof is on the applicant. In contrast, the burden of proof in the present case is on the Secretary of State, and the appellant has no burden to disprove dishonesty.
43. Although, as Mr Wain concedes, the Judge thus misdirected himself in relying on *TK (Barundi)*, I do not consider that he erred in law in drawing an adverse credibility inference from the appellant’s failure to call his business partner Mr Siddique as a witness to support his innocent explanation. Also, the Judge did not reject the appellant’s denial of complicity in the fraud because he had not produced Mr Siddique as a supporting witness. The Judge found that the charge of dishonesty was made out for a multiplicity of reasons, and his conclusion was not dependent upon the absence of supporting evidence from Mr Siddique.
44. Ground 5 relates to the Judge’s construction of paragraph 322(1A) of the Immigration Rules. Mr Malik submits that the Judge’s construction of this Rule is inconsistent with its language, and that it is also inconsistent with the Immigration Rules read as a whole.
45. Mr Malik’s case is supported by paragraph 34BB(1) of the Rules, which provides that: *“where an applicant has an outstanding application for*

entry clearance or permission to stay which has not been decided (“the previous application”), any further application for entry clearance or permission to stay will be treated as an application to vary the previous application and only the most recent application will be considered”.

46. However, I do not consider that there was a material error in the Judge treating paragraph 322(1A) as being applicable in circumstances where it was not in dispute that other relevant suitability provisions were engaged, and it was agreed that, if deception was made out, the appellant’s appeal fell to be dismissed. In short, whether or not paragraph 322(1A) was rightly relied upon by the respondent is academic.
47. Ground 6 is that the Judge did not follow the required two-stage process when assessing the applicability of paragraph 322(5) of the Rules. In addition to the concession to which I have referred earlier, whereby the appellant conceded that the appeal should be dismissed even if it was only the discretionary grounds for refusal that applied, the required balancing exercise was in any event performed by the Judge at [90] where he said: *“Whilst there is no dispute that the appellant has associated himself with community groups and good causes in the UK, his knowing acquiescence in the making of false representations is a particular serious matter in my view and does go materially to his character.”*
48. At [91], the Judge said that for the same reasons he concluded that the appellant fell foul of the character, conduct and association/public good requirements in 276B(ii)(c) and S-LTR1.6 of Appendix FM.
49. In conclusion, the Judge gave adequate reasons for the findings which he made, which were reasonably open to him on the evidence, and the Decision was not vitiated by a material error of law.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. The appellant’s appeal to the Upper Tribunal is dismissed.

Andrew Monson
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

10 June 2023