



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-004980
First-tier Tribunal No: HU/56069/2021

THE IMMIGRATION ACTS

Decision and Reasons Issued:
On 31st of October 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE MALIK KC

Between

**SECRETARY OF STATE
FOR THE HOME DEPARTMENT**

Appellant

and

**ABDUL WAHID
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation

For the Appellant: Ms Sandra McKenzie, Senior Presenting Officer

For the Respondent: Mr James Collins, Counsel, instructed by Lawmatic Solicitors

Heard at Field House on 13 September 2023

DECISION AND REASONS

Introduction

1. This is an appeal by the Secretary of State from the decision of First-tier Tribunal Judge Webb (“the Judge”) promulgated on 23 May 2022. By that decision, the Judge allowed Mr Abdul Wahid’s appeal from the Secretary of State’s decision to refuse his human right claim.

Factual background

2. Mr Wahid is a citizen of Bangladesh and was born on 8 December 1988.
3. Mr Wahid arrived in the United Kingdom on 31 January 2010 with entry clearance as a Tier 4 (General) Student valid from 12 January 2010 until 30 October 2012. He was granted further leave to remain as a Tier 4 (General) Student on 13 June 2012 until 11 April 2014. He made an application for further leave to remain as a Tier 4 (General) Student on 4 February 2014. He made a human rights claim while that application was pending on the basis of his relationship with Mrs Rukhsana Begum who is a British citizen present and settled in the United Kingdom. The Secretary of State refused his application and the human rights claim on 24 September 2021. The Secretary of State, among other things, held that Mr Wahid relied on a fraudulently obtained Test of English for International Communication ("TOEIC") certificate in support of his earlier application. The Secretary of State took the view that Mr Wahid used a proxy in order to obtain the TOEIC certificate. The Secretary of State held that his removal from the United Kingdom would not be incompatible with Article 8 of the European Convention on Human Rights.
4. The Judge heard Mr Wahid's appeal from the Secretary of State's decision on 29 April 2022. The Judge found that Mr Wahid had not relied on a fraudulently obtained TOEIC certificate. The Judge found that Mr Wahid did not use a proxy as alleged by the Secretary of State and he met all the requirements for leave to remain as spouse of Mrs Begum. The Judge also made an alternative finding that his removal from the United Kingdom would be incompatible with Article 8 even if he had previously relied on a fraudulently obtained TOEIC certificate. The Judge, accordingly, allowed the appeal in a decision promulgated on 23 May 2022.
5. The Secretary of State was granted permission to appeal from the Judge's decision on 1 December 2022.

Grounds of appeal

6. The pleaded grounds of appeal are in these terms (quoted as written):

"1. The Tribunal found "As mentioned earlier in this Decision & Reasons, the Upper Tribunal in DK & RK believe that previous judicial decisions may have been incorrect in finding that the 'standard' evidence provided by the Respondent (such as the Lockup Tool and supporting statements) only discharged the evidential burden on the Respondent by a narrow margin. In DK & RK it was found that such evidence was "amply sufficient" to demonstrate that the Respondent has proved an individual engaged in dishonesty on the balance of probabilities. Nevertheless, this will only be the case where the Respondent's position is not contradicted by credible evidence. As the Upper Tribunal also said in DK & RK, "each

case falls to be determined on its own individual facts and evidence". When looking at the evidence as a whole, and accepting the Appellant as a credible and honest witness, I find that the Respondent has failed to prove dishonesty on the part of the Appellant (43)".

2. The respondent asserts that paragraph 43 overturns the UT findings in DK & RK. The respondent produced evidence to show the A did not pass his test. Furthermore the A acknowledges it was not his voice on the tape. This evidence in addition to the case of DK & RK shows that our evidence is reliable. The fact that the judge preferred a separate set of evidence does not discount the evidence of dishonesty. In making that finding the Tribunal has erred in law."

Submissions

7. I am grateful to Ms McKenzie, who appeared for the Secretary of State, and Mr Collins, who appeared for Mr Wahid, for their assistance and able submissions. Ms McKenzie relied on the pleaded grounds of appeal in her oral submissions. She invited me to allow the appeal and set aside the Judge's decision. Mr Collins resisted the appeal and submitted that the Judge's findings of fact were open to him and disclosed no error of law. He further submitted that the alleged error of law was not material to the outcome in any event. He invited me to dismiss the appeal and uphold the Judge's decision.

Discussion

8. I have set out the Secretary of State's pleaded grounds of appeal in full so that it is immediately clear that they take issue only with the Judge's conclusion, at [43], that Mr Wahid did not use a proxy to obtain his TOEIC certificate. There is no challenge to the Judge's alternative finding that Mr Wahid's removal from the United Kingdom would be incompatible with Article 8 even if he had previously relied on a fraudulently obtained TOEIC certificate. The Judge, at [48]-[60], conducted an assessment of the Article 8 claim on the assumption that he was wrong in his earlier conclusion that Mr Wahid was not dishonest. I asked Ms McKenzie to explain how, in the circumstances, the error alleged in the pleaded grounds of appeal is material. I gave her an opportunity to reflect on the position and take instructions. She, on return, made no application for permission to amend the grounds of appeal so to challenge the Judge's alternative conclusion and findings at [48]-[60]. In the circumstances, that alternative conclusion and those findings stand unchallenged. It is tolerably clear that the error alleged by the Secretary of State is not material to the outcome. The Judge would have allowed the appeal even if he had found, as the Secretary of State argued, that Mr Wahid was dishonest and obtain his TOEIC certificate using a proxy. In my judgement, this is enough to dismiss the Secretary of State's appeal and uphold that Judge's decision.

9. In any event, I am satisfied that the Judge, at [43], made no error of law as contended in the pleaded grounds of appeal.
10. The Judge, at [8], expressly considered the evidence adduced by the Secretary of State in support of her allegation, including, Lookup Tool, Revised Lookup Tool, witness statements of Rebecca Collings, Peter Millington and Adam Sewell, expert reports of Peter French and Richard Heighway and Project Façade report on Synergy Business College. The Judge, at [13]-[20], summarised the oral evidence given by Mr Wahid and Mrs Begum. The Judge, at [32], correctly acknowledged that the burden of proof was on the Secretary of State and the standard of proof was the balance of probabilities. The Judge, at [34], acknowledged that the guidance given in *DK and RK (ETS: SSHD evidence, proof) India* [2022] UKUT 112 (IAC) was the last word on the subject. The Judge, at [39], followed the guidance in *DK and RK* by acknowledging the strength of the Secretary of State's evidence and observing that:

“... The Respondent has therefore put forward an allegation of dishonesty that is not frivolous but is rather a serious allegation that requires not merely a mere assertion of honesty but a detailed response from the Appellant. It is the Appellant's response that I shall now consider.”

11. The Judge then, as he stated, carefully considered Mr Wahid's response in the evidence. The Judge, at [40], found Mr Wahid's evidence as to his proficiency of English in 2011 as credible. The Judge correctly acknowledged, by reference to the case-law, that there may well be other reasons why a person who could pass may nevertheless decide to cheat. The Judge kept an open mind and observed that he should continue to examine the evidence. The Judge, at [41], found that Mr Wahid's explanation for taking the TOEIC test at Synergy Business College was “plausible and persuasive”. The Judge accepted the “very detailed and plausible account” provided by Mr Wahid in his evidence. The Judge accepted Mr Wahid's evidence.
12. The Judge, at [43], correctly noted that it was found in *DK and RK* that the Secretary of State's evidence was “amply sufficient”. The evidence, however, was not determinative. The Judge acknowledged, as was noted in *DK and RK*, at [4], that “each case falls to be determined on its own individual facts and evidence”. The Judge looked at the evidence as a whole and found that Mr Wahid was a “credible and honest witness”. There were thousands of fraudsters who cheated in their TOEIC tests and Appellant has been identified as one of them by a process not shown to have been generally inaccurate. I am satisfied, looking at the Judge's decision as a whole, that he made his assessment in this context.
13. The Judge, at [36]-[37], expressed reservations as to the reasoning in *DK and RK* in relation to a discrete issue about the test centres. It was not necessary for the Judge to have expressed those reservations and they played no material part in his ultimate decision. The Judge, at [39], accepted the Secretary of State's

submission that “Mr Wahid did obtain a TOEIC Certificate from a Test Centre that was clearly involved in organised crime by receiving large sums of money” and also noted that Mr Wahid’s voice was not on the audio clips. This reinforces the view that the Judge was fully aware of the context and the strength of the Secretary of State’s evidence. It was open to him to find that Mr Wahid, despite the strength of evidence against him, was an honest individual. In any event, the Secretary of State’s pleaded grounds of appeal do not contend that the Judge’s observations, at [36]-[37], gave rise to an error of law. Mr McKenzie, as I note above, made no application for permission to amend the grounds so to challenge anything other than the Judge’s finding at [43].

14. The Judge was entitled to find that Mr Wahid was not dishonest and the Secretary of State failed to discharge the ultimate burden of proof. It was for the Judge to balance and weigh different considerations and items of evidence. The Judge’s conclusions are neither perverse or inadequately reasoned. There is no misdirection in the Judge’s decision. I do not accept that the Judge, as pleaded in the grounds of appeal, “overturned” the findings in *DK and RK*. The Judge did so such thing in allowing Mr Wahid’s appeal. It is well-settled that where a particular point is not expressly mentioned by the First-tier Tribunal, the Upper Tribunal should be slow to infer that it has not been taken into account: see *MA (Somalia) v Secretary of State for the Home Department* [2010] UKSC 49 [2011] 2 All ER 65, at [45]. When it comes to the reasons given by the First-tier Tribunal, the Upper Tribunal should exercise judicial restraint and should not assume that the First-tier Tribunal misdirected itself just because not every step in its reasoning is fully set out: see *Jones v First Tier Tribunal and Criminal Injuries Compensation Authority* [2013] UKSC 19 [2013] 2 All ER 625, at [25]. An appeal to the Upper Tribunal is available only on a point of law and the Upper Tribunal should not rush to find an error of law simply because it might have reached a different conclusion on the facts or expressed themselves differently: see *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49 [2008] 1 AC 678, at [30]. It is the nature of the fact-finding exercise that different tribunals, without illegality or irrationality, may reach different conclusions on the same case and the mere fact that one tribunal has reached what may seem an unusually generous view of the facts of a particular case does not mean that it has made an error of law: see *MM (Lebanon) v Secretary of State for the Home Department* [2017] UKSC 10 [2017] WLR 1260, at [107].
15. In my judgement, on these principles, there is no proper basis to interfere with the Judge’s findings of fact on the issue concerning the TOEIC certificate and his ultimate decision to allow Mr Wahid’s appeal.

Conclusion

16. For all these reasons, I find that the Judge made no error on a point of law in allowing Mr Wahid’s appeal. I uphold that the Judge’s decision and dismiss the Secretary of State’s appeal.

Decision

17. The First-tier Tribunal's decision did not involve the making of an error on point of law and it shall stand.

Anonymity

18. In my judgement, having regard to the Presidential Guidance Note No 2 of 2022, *Anonymity Orders and Hearing in Private*, and the overriding objective, an anonymity order is not justified in the circumstances of this case. I make no order under Rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Zane Malik KC
Deputy Judge of Upper Tribunal
Immigration and Asylum Chamber
Date: 18 October 2023