



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006453

First-tier Tribunal No: HU/50660/2022

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On 11 August 2023**

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

**NARENDRASINH VELUBHA RAULAJI AKA RAVAL
(NO ANONYMITY ORDER MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant:

Mr A Badar, instructed by Connaught Law Ltd

For the Respondent:

Mr E Tufan, Senior Home Office Presenting Officer

Heard at Field House on 28 July 2023

DECISION AND REASONS

1. The appellant is a citizen of India born on 8 September 1989. He appeals against the decision of First-tier Tribunal Judge Wylie dated 12 July 2022 dismissing his appeal against the refusal of leave to remain on human rights grounds.
2. The appellant came to the UK as a student in 2009 and was granted leave to enter until 17 October 2011. He applied for leave to remain as a student on 2 July 2011 which was granted until 30 March 2015. His leave to remain was

curtailed to expire on 14 March 2014. On 12 March 2014, the appellant applied for further leave to remain as a student which was granted until 25 January 2016.

3. On 9 February 2015, the appellant was served with notice of liability to removal on the grounds he had used deception in a previous application. An appeal and application for judicial review were unsuccessful. The appellant made a human rights claim in March 2018 which was refused on 18 January 2022. This decision is the subject of this appeal. It is the respondent's case that the appellant submitted a false English language test certificate in his application of 2 July 2011.

Grounds of appeal

4. The submissions in the grounds are lengthy. In summary, the appellant appealed on five grounds:
- (i) The judge misapplied DK and RK (ETS: SSHD evidence, proof) India [2022] UKUT 112;
 - (ii) The judge failed to properly assess the appellant's evidence and consider whether it met the minimum level of plausibility: Shen (Paper appeals; proving dishonesty) [2014] UKUT 236;
 - (iii) The judge's finding that the appellant gave little information about the test was irrational given he had some recollection of the test he had taken over 10 years ago and his level of English;
 - (iv) In assessing proportionality the judge wrongly combined the tests of exceptional circumstances and the unduly harsh test applicable in deportation appeals;
 - (v) The appellant was interrupted when giving oral evidence about his journey to the test centre and was not given an opportunity to deal with the allegation that he was not an honest witness.
5. Permission to appeal was granted by Upper Tribunal Judge Owens on the following grounds:
1. It is at least arguable that the judge failed to take into account the appellant's evidence of his English language studies and qualifications in 2009 and 2015 when assessing his proficiency in English at [43]. It is also arguable that the judge failed to correctly record the appellant's evidence in respect of his friend's test results and his evidence about attending the test centre at page 19 of the transcript and that the appellant was interrupted when attempting to give evidence about his attendance at the test centres orally.
 2. The grounds in relation to DK & RK (ETS: SSHD evidence; proof) India [2022] UKUT 00112 IAC are weaker but nevertheless I do not limit the grant of permission.
 3. If the remainder of the grounds are not made out, any error in the wider proportionality assessment by the judge (Ground 4) would not be material because it is conceded by Counsel for the appellant that the Article 8 ECHR claim can only succeed if the Tribunal finds that the appellant did not fraudulently obtain his ETS certificate.

Submissions

6. Mr Badar relied on the written grounds and addressed ground 5 first. He referred me to the transcript of the hearing before the First-tier Tribunal and submitted the appellant was giving oral evidence of his journey to the test centre when he was stopped from doing so by the Home Office Presenting Officer

('HOPO'). The appellant had given detailed evidence of his journey in his witness statement dated 2 March 2018 contrary to the questions put by the HOPO in cross-examination.

7. Although the witness statement of 2 March 2018 was not formally adopted as evidence in chief, it was still part of the case and the judge mentioned it at [42]. However, the judge failed to take the appellant's oral evidence and statement into account in concluding the appellant had little recollection of the test at [45]. The appellant was giving details and was not allowed to finish his sentence. The judge failed to give the appellant an opportunity to deal with the allegation of deception and provide an innocent explanation.
8. In relation to ground 3, Mr Badar submitted the appellant's written and oral evidence was sufficient to establish an innocent explanation and the judge's decision was irrational. In respect of grounds 1 and 2, the judge applied only the legal burden at [33] and found it was discharged by the respondent's generic evidence which was inconsistent with the approach in DK and RK.
9. Mr Tufan relied on the rule 24 response and submitted the judge considered the appellant's evidence and his statements at [42] and [45] and her findings were open to her. The appellant was not re-examined and it was no fault of the judge that evidence of the appellant's journey to the test centre was not put before her.
10. The judge properly applied DK and RK which could not be distinguished on its facts. Every test taken at Alexander College was invalid and therefore it was similar to the 'fraud factories' in DK and RK. The appellant had an opportunity to provide an explanation and after detailed analysis the judge found the respondent had proved deception. The judge's reasoning at [45] adequately explained why the respondent had discharged the legal burden.
11. Mr Badar accepted the appellant's Article 8 claim could not succeed unless he could show an error of law in the judge's finding on deception. There were no criminal convictions in this case and Alexander College did not have the same profile as the colleges in DK and RK. There was sufficient evidence of an innocent explanation before the judge and the respondent had failed to discharge the legal burden.

Conclusions and reasons

Ground 1

12. In DK and RK the Upper Tribunal held:
 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.
13. At [25] the judge noted that counsel on behalf of the appellant accepted the generic evidence provided by the respondent met the initial evidential threshold and it was for the appellant to provide an innocent explanation. At [33]

the judge quoted DK and RK and at [34] onwards she considered the appellant's evidence. At [46] she concluded the appellant's evidence had not made any impact on the respondent's evidence and at [47] she found the respondent had discharged the burden of proof that the appellant had used deception in providing a false English language test certificate.

14. Contrary to the written grounds DK and RK cannot be distinguished on its facts and it is consistent with Court of Appeal authority following SM and Qadir (ETS - Evidence - Burden of Proof) [2016] UKUT 229. DK and RK applied in this case and was binding on the First-tier Tribunal.
15. The judge found at [32]: "On the date in question at Alexander College, ninety tests were taken, of which thirty three were 'questionable' and fifty seven 'invalid'. The appellant's test was invalid." The judge found the respondent's evidence was sufficient to require a response from the appellant and she then went on to consider the appellant's evidence.
16. I find the judge properly applied DK and RK and considered the appellant's evidence in concluding the respondent had discharged the burden of proof. The judge adopted the correct approach set out at [127]:

"Where the evidence derived from ETS points to a particular test result having been obtained by the input of a person who had undertaken other tests, and if that evidence is uncontradicted by credible evidence, unexplained, and not the subject of any material undermining its effect in the individual case, it is in our judgment amply sufficient to prove that fact on the balance of probabilities."

Ground 2

17. On reading the decision as a whole the judge clearly found that the appellant had failed to provide credible evidence capable of undermining the respondent's evidence. The judge gave adequate reasons for why the appellant's innocent explanation did not meet the minimum level of plausibility at [42] and [45]:
 - "42. The appellant gave little information about the test. As noted above, the information is from the witness statement dated 2 March 2018, and he was not asked to adopt this statement as his evidence. He did not state the name of the college, despite providing a postcode. Apart from saying that he went by tube he did not describe his journey, from where he travelled or if he needed to change trains. There was no evidence of the environment, the room or building, who else was in the room, how many others were sitting the test, or any detail which would support his claim that he had undertaken the test."
 - "45. I accept that the test was taken over ten years ago. However I consider that the appellant would have had some recollection of attending the test, and indeed he was aware of the allegation in February 2015, just under three years after the test. He had appealed the decision, but he had chosen to have the matter dealt with on the papers, and it appears from the determination of First-tier Tribunal Judge Bradshaw that no evidence in explanation of the allegation of deception had been provided by him. He sought leave to appeal that decision, but it is clear from the decision of the Upper Tribunal Judge that he had not provided any statement dealing with the ETS deception."

Ground 3

18. The judge gave an accurate record of the appellant's account given in his statements and in oral evidence. She took into account the appellant's qualifications, his proficiency in the English language, his explanation for not

having used a proxy test taker and the passage of time since the test was taken. Her conclusion that the appellant could give little information about the test was open to her on the evidence before her.

19. The judge took into account all the evidence before her and properly directed herself in law. She was entitled to attach little weight to the appellant's innocent explanation. Ground 3 disagrees with the judge's findings but fails to establish irrationality.

Ground 4

20. Given my findings on the remaining grounds and the appellant's concession in relation to Article 8, there is no material error of law as submitted in ground 4.

Ground 5

21. It is apparent from the transcript that the questions asked in cross-examination were too long and at times confusing. However, in summary the appellant was asked by the HOPO why he did not provide an innocent explanation in his witness statement relied on as evidence in chief. The appellant responded as follows:

"As for the proof as, as I remember going to the test centre and I don't know what other proof I can gather, it's been long time, it's, so I went to the test centre by tube, it was on Devonan Street, went for two, two different location so one, one was for the.."

22. The HOPO interrupted and put the question again stating: "You haven't, you haven't provided these details in your witness (sic) though did you?" The appellant replied:

"I have provided earlier, I have provided two witness statements. There should be one more witness statement regarding TOEIC."

23. The judge referred to the witness statement dated 2 March 2018 and the HOPO stated the appellant had not adopted that statement. The HOPO put to the appellant that he had used a proxy test taker and had not provided an innocent explanation. The appellant denied this stating that he had given an explanation in both witness statements and explained "about the test centre and everything." There was no re-examination.

24. I am not persuaded that ground 5 discloses an error of law. The judge considered the appellant's evidence in his statement of 28 April 2022 at [35] and set out his oral evidence at [36] to [39] when the appellant referred to his earlier statement. The judge took into account the statement dated 2 March 2018. She summarised his evidence in this statement at [39] and [40].

25. At [42] the judge concluded the appellant gave little information about the test because he did not give the name of the college, he did not describe his journey or where he travelled from and to, other than stating he went by tube. The appellant did not describe the environment, the room or building or how many others were sitting the test.

26. The appellant was represented by counsel at the hearing and it was open to her to re-exam the appellant to enable him to put forward evidence to support his claim if she was of the view he had been unable to do so in cross-examination.

She did not ask any questions in re-examination. The judge was not obliged to put matters or question the appellant. The allegation of using a proxy test taker was put to the appellant and he was given an opportunity to answer. He relied on his witness statements to provide details of his attendance at the test centre. The judge took in account both his witness statements and his oral evidence and her finding that he gave little information about the test was one which was reasonably open to her on the evidence before her.

Summary

27. For the reasons given above, I find there was no error of law in the decision of 12 July 2022 and I dismiss the appellant's appeal.

Notice of Decision

The appeal is dismissed

J Frances

Judge of the Upper Tribunal
Immigration and Asylum Chamber

1 August 2023