



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-000519
First-tier Tribunal No:
HU/06844/2019

THE IMMIGRATION ACTS

Decision & Reasons Promulgated
On the 12 June 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SAYEED KHAN MOHAMMED
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr Nicholas Wain, Senior Home Office Presenting Officer
For the Respondent: Mr Jay Gajjar, Counsel

Heard at Field House on 1 June 2023

DECISION AND REASONS

1. Although this is an appeal by the Secretary of State, for convenience I shall hereafter refer to the parties as they were before the First-tier Tribunal.
2. The Secretary of State appeals from the decision of First-tier Tribunal Judge Apted promulgated on 12 December 2012 ("the Decision"). By the Decision, the Judge allowed the appellant's appeal against the decision of the respondent made on 26 March 2019 to refuse the appellant's application for leave to remain on private life grounds. The first ground of refusal was that he did not meet the suitability requirements in section LTR

1.6 of Appendix FM, and the second ground of refusal was that he did not meet the requirements of paragraph 276ADE(1)(vi) of the Immigration Rules, as he would not face very significant obstacles to his re-integration in India, and that there were no exceptional circumstances rendering a refusal a breach of Article 8 ECHR.

Relevant Background

3. The appellant is a national of India, whose date of birth is 9 April 1982. The appellant entered the UK on 2 March 2011 with valid leave to enter as a Tier 4 (General) student migrant. His leave was valid from 10 February 2011 to 13 December 2012. He was subsequently granted leave to remain as a Tier 4 (General) student migrant from 24 February 2013 to 4 April 2015. However, this leave was curtailed to end on 16 August 2013. On 2 April 2015 the appellant applied for leave to remain in the UK on private life grounds.
4. In the reasons for refusal dated 26 March 2019, the respondent said that in his application dated 13 December 2012, the appellant had submitted a TOEIC certificate from ETS. ETS had a record of his speaking test. Using Voice Verification software, ETS was able to detect when a single person was undertaking multiple tests. ETS had undertaken a check of his test, and they had confirmed to the Secretary of State that there was significant evidence to conclude that his certificate was fraudulently obtained by the use of a proxy test-taker. His scores from the test taken on 28 November 2012 at Queensway College had now been cancelled by ETS.
5. The appellant's attention was directed to an attached printout entitled ETS Lookup Tool which linked his case to the use of an invalid certificate. Additionally, the Home Office had access to a revised Lookup Tool, specifically developed in the Home Office using the same information provided by ETS, which could identify a number of other tests taken at any given date/time-slot and college by entering the college name, date and time-slot. The appellant's attention was directed to a printout entitled Revised Lookup Tool. The results from the printout showed that on 28 November 2012 at Queensway College, a total number of 90 Speaking and Writing tests (including his) were taken. Data showed that 55 (61%) of those tests were deemed "*invalid*", i.e. obtained by the use of a proxy, and 35 (39%) of those results were deemed "*questionable*", i.e. that the score could not be relied upon due to the general practice of fraud. None of the results were "*released*", meaning that ETS considered them to have been illegitimately obtained and therefore unreliable.
6. The data provided also showed that a total of 2,793 tests were taken at Queensway College. The data showed that 71% of those results were deemed invalid, and 29% of those results were deemed questionable, meaning that the score could not be relied upon due to the general practice of fraud. None of the results were deemed reliable. The evidence, taken in the round, demonstrated that Queensway College was not operating under genuine test conditions at the date of his own test.

7. The respondent went on to give a detailed explanation as to the relevance of the other material that was being enclosed with the refusal decision, including the well-known expert report of Professor French, and the less well-known expert report of Richard Heighway, who concluded that it was very unlikely that the TOEIC system would attribute a genuine test-taker's recording to a different candidate, or that a genuine test-taker's recording would be re-used by multiple candidates.
8. In view of the fact that he had undertaken his TOEIC test at Queensway College, it was evidenced that his test could not be relied upon, as none of the tests taken were found to have any evidence of validity, and all of the test scores had been withdrawn. If he wished to obtain a copy of the voice-recording linked to his speaking test, he could contact ETS's solicitors, Jones Day. For the above reasons, the respondent was satisfied that he had used deception in his application. While the certificate was genuine and not forged, it was fraudulently obtained.

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

9. The appellant's appeal came before Judge Apted, sitting at Hatton Cross on 8 December 2022. This was a hybrid hearing, using the Cloud Video Platform. It was also a re-hearing, as an earlier decision by the First-tier Tribunal dismissing the appellant's appeal had been set aside by the Upper Tribunal on procedural fairness grounds. Both parties were legally represented before Judge Apted. The appellant adopted his amended witness statement as his evidence in chief and he was cross-examined.
10. In his amended witness statement, the appellant said that he had booked a test at Queensway College because he was not getting earlier dates from IELTS and his leave was about to expire on 13 December 2012. He said that when he arrived at the Test Centre, someone came and took their names and passport for verification. He said that the TOEIC test was split into two components - one of which was Listening and Reading, and the other was Speaking and Writing. Before they left, they were told that they would find out their results in three weeks by post. He said it was important to mention that in the ETS SELT Source Data his nationality was mentioned as 'United Kingdom'. He said that this cast serious doubt as to what procedure the Home Office had followed to verify his records with ETS.
11. At paragraph [5] of the Decision, the Judge noted that when originally granting leave to appeal against the previous decision of the First-tier Tribunal, Upper Tribunal Judge Grubb had said:

"Ground 2 also raises an arguable error in giving effect to the evidence in the Lookup Tool, which referred to the result of a British citizen which the appellant is not. This, at least, raises an arguable issue that it could not relate to the appellant and the Judge (at 10) offers minimal explanation why despite this, he accepted the respondent had established dishonesty."

12. The Judge's discussion and findings began at [19]. At [22], he said that in support of the accusation that the appellant had used a proxy, the respondent relied upon a Lookup Tool which purported to relate to the appellant, and that this document was appended to the witness statement of Sanjay Vaghela, a senior case worker, that was served the day before the hearing.
13. At [23], the Judge said that the respondent also relied upon the generic expert statement of Professor French, and the generic statements of Rebecca Collings and Peter Millington.
14. At [24], the Judge said that this generic evidence and the methodology used was subsequently examined by an All-Party Parliamentary Group, who published their report on 18 July 2019, and that relevant extracts from the report were at pages 31-41 of the appellant's bundle. The Judge said that the report criticised the basis upon which applicants were identified as having potentially cheated, and criticised some of the methodology that was used to determine whether an applicant had used a proxy.
15. At [25], the Judge said that the generic evidence and the APPG report were considered by the Court of Appeal in *SSHD -v- Aktar & Others* [2022] EWCA Civ 741, applying *DK & RK -v- SSHD* [2022] UKUT 112 (IAC), UT. The Judge went on to set out the head note to the judgment in *Aktar & Others*, which he took from the Weekly Law Reports.
16. At [26]-[28], the Judge summarised the evidence that the appellant had given about attending and taking the test on 28 November 2012, and he said that his account was not challenged by the respondent, and the respondent did not put to him that he had used a proxy.
17. At [29], the Judge referred to the printout of the Lookup Tool that had been produced by Mr Vaghela. The Judge said:

“... There are two material errors on the face of this document. Firstly, the appellant's name is incorrectly spelt. On the face of the document, the appellant's first name is spelled with a single “e” in “Sayed” (Khan Mohammed), whereas the appellant states that his name is Sayeed Khan Mohammed (with two ‘e’s). This is the spelling (Sayeed Khan Mohammed) that appears on the face of all the documents before me and is how the appellant spelt his name in his original application for leave to remain.
18. At [30], the Judge said that the second material error was that the printout stated that the appellant's nationality was “*United Kingdom*”. The appellant was obviously not a British citizen. He was a national of India. He had provided that information in his original application to remain. In evidence to the Tribunal, he stated that when he sat the English Language test, he provided his passport to the Invigilator to establish his identity.

19. At [31], the Judge reiterated that there were therefore two material errors on the face of the Lookup Tool printout. There was therefore, in his view, a question mark over whether the Lookup Tool related to the appellant. The appellant gave evidence to the Tribunal about what occurred when he took the test. He gave that evidence to the Tribunal in English and was cross-examined upon it. His English was clear, he did not use an Interpreter, and he was able to articulate himself and was able to respond to questions in cross-examination to questions from the Tribunal. The Judge also noted that the appellant had a number of qualifications obtained from various institutions whilst in the UK.
20. The Judge reached the following conclusion at [32]:

“I therefore find that on the facts of this particular case, there is material which undermines the respondent’s case, (namely the Lookup Tool), which on its face could relate to someone else rather than the appellant. I therefore find on the facts of this case, the respondent has not discharged their burden on a balance of probabilities that the appellant used a proxy to take his English Language test. I therefore find that he did not attempt to deceive the respondent when he subsequently applied for leave to remain relying upon his test result. I therefore find that the appellant does meet the suitability requirements within paragraph S-LTR1.6 of Appendix FM to the Immigration Rules and find that he does therefore meet the requirements of paragraph 276ADE(1)(i) [sic] of the Rules and should have been granted leave to remain.”

The Grounds of Appeal to the Upper Tribunal

21. A member of the Specialist Appeals Team settled the Secretary of State’s grounds of appeal to the Upper Tribunal. He submitted that the First-tier Judge had misdirected himself in law. The fact that the appellant was said to be British was indicative of proxy fraud, as a British citizen person would not have needed to take the test. The information could not have come from the appellant, as he would know his nationality. In addition, the misspelling of the appellant’s name further supported that point. The Tribunal had failed to address that 61% of the tests were “*flawed*” on that day. The case law confirmed that the respondent’s evidence was so reliable that it should win the argument. In failing to find for the respondent in line with the case law of *DK & RK*, that the First-tier Tribunal had erred in law. The First-tier Tribunal Judge had applied too low a burden of proof.

The Reasons for the Eventual Grant of Permission to Appeal

22. Permission to appeal was initially refused by a First-tier Tribunal Judge on the basis that the grounds amounted to no more than an expression of disagreement with the findings of Judge Apted, and they identified no arguable error of law
23. On 19 April 2023 Upper Tribunal Judge Canavan granted permission to appeal for the following reasons:

2. It is arguable that the Judge erred in finding that evidence was unchallenged when it was clear from the decision letter and the respondent's review before the hearing that the allegation of fraud in relation to a TOEIC certificate (CERT number: 0044202435004003), said to have been produced in support of an earlier application for leave to remain made on 13 December 2012, was maintained. The appellant had asserted that he had taken the test at Queensway College on 28 November 2012. It is arguable that the Judge failed to give adequate consideration to the fact that, regardless of the spelling of the name on the individual "*Lookup Tool*", the Lookup Tool for Queensway College for that day suggested that all tests at that centre were cancelled as invalid or questionable, which must have included the appellant's test result. The grounds raised sufficiently arguable points to justify granting permission to appeal.
3. Although it is not raised in the grounds, it is not possible to ignore the obvious fact that the Judge only made findings in relation to the ETS issue, and failed to give any reasons in relation to the central question of the appeal, which was whether the decision was unlawful under section 6 of the Human Rights Act. At the date of the hearing, the appellant had remained in the UK without leave since 16 August 2013. Even if the Judge found that the respondent could not rely on the suitability requirement, the decision letter refused the application with reference to the private life requirement under paragraph 276ADE(1)(vi) and concluded that the refusal would not give rise to unjustifiably harsh consequences amounting to a breach of Article 8.
4. Having made that observation, it was a matter for the respondent to consider whether it was appropriate to make an application to amend the Grounds. In the alternative, the parties might want to discuss the possibility of agreeing a consent order in relation to the error of Law. Subject to any further applications, the appeal would be listed for hearing in the Upper Tribunal.

The Rule 24 Response

24. In a Rule 24 response dated 31 May 2023, Mr Gajjar (who did not appear below) submitted that the Judge had properly directed himself. *DK & RK* did not conclude that the respondent's reliance on the Lookup Tool/generic evidence could not be challenged, especially if it contained errors of fact. The flaws in the Lookup Tool identified by the Judge could not be protected by the statistic that no test results were released on that day. The point was a circular one: the erroneous Lookup Tool fed into the statistics.
25. With respect to the additional error of law raised by Judge Canavan as being arguable, Mr Gajjar said that he was not aware of the respondent applying to amend her grounds of appeal to the UT. In any event, he submitted, there was no material error on the part of the Judge. The appellant's evidence was that he had not received the curtailment notice and, as such, he had made an application on 2 April 2015 which was two days before his leave was originally due to expire. The Secretary of State's published guidance called for leave to remain to be granted where an appellant secured a finding by the Tribunal that the appellant did not

obtain their TOEIC certificate by deception. Under the guidance, the respondent was required to give effect to that finding by granting 6 months' leave to remain outside the Rules, so as to enable the appellant to make any application they wanted to make or to leave the UK.

The Hearing in the Upper Tribunal

26. At the hearing before me to determine whether an error of law was made out, Mr Wain made an application at the outset for permission to amend the grounds of appeal to include the additional arguable error of law that had been identified by Judge Canavan. Mr Gajjar opposed this application on the grounds that it came too late, and also that it was not *Robinson* obvious. I refused the application on procedural grounds, as there was no satisfactory explanation as to why the respondent had not made any formal application in writing to amend the grounds well in advance of the appeal hearing.
27. Later on in the hearing, Mr Wain apologised for overlooking the fact that there had in fact been a written application to amend the grounds, that was made on 15 May 2023 by Andy McVeety of the Specialist Appeals Team. Mr Wain emailed a copy of this letter to me and Mr Gajjar. From the contents of letter, it was apparent that the respondent had formally requested permission from the Upper Tribunal to amend her grounds of appeal to add an additional ground, which was that it was clear that the First-tier Tribunal Judge had erred in failing to consider that the respondent's refusal was not limited solely to the ETS issue. Having heard from Mr Gajjar, I granted Mr Wain permission to argue the additional ground set out in the letter of 15 May 2023, as I considered that it was in the interests of justice to grant permission.
28. As to Ground 1, Mr Wain submitted that the Judge had made a material error of fact. He proceeded to take me to the relevant documents in the respondent's bundle and appellant's bundle before the First-tier Tribunal. He showed me that the Judge had based his finding on the Lookup Tool at M4, which was the document provided by Mr Vaghela the day before the hearing. This printout focused exclusively on the scores which had been awarded for the speaking and writing test results attributed to the appellant. However, the respondent's bundle and the appellant's bundle also contained an earlier printout from the Lookup Tool which contained additional information, including information about the reading and listening test results attributed to the appellant. Crucially, in the light of the Judge's adverse findings, the name of the appellant was correctly spelt in the original Lookup Tool printout. Mr Wain submitted that it was not disputed that the appellant had taken all four components of the test on the day in question, and there was no dispute about the passport number given in the original Lookup Tool.
29. On behalf of the appellant, Mr Gajjar developed the Rule 24 response opposing the appeal on both Ground 1 and Ground 2. There was still an error in both versions of the Lookup Tool with reference to the appellant

having British nationality. There was no explanation as to how it was that the respondent's data was changing. The respondent had not produced the appellant's test certificates, so it was not possible to marry-up the certificate number given in the Lookup Tool with the certificate number on the certificate. He acknowledged that *DK & RK* was more generous, but he submitted that this generosity did not extend to the respondent relying on a materially erroneous Lookup Tool that was unexplained.

30. In reply, Mr Wain submitted that, following *DK & RK*, the Judge had to consider all the evidence in the round, and he had failed to do so when applying his mind as to the effect of the misattribution to the appellant of British nationality status.

31. I reserved my decision.

Discussion and Conclusions

32. The Judge's line of reasoning is clear, and were it not for the mistake of fact identified by Mr Wain, I would have been inclined to find that Ground 1 amounted to no more than an expression of disagreement with a finding that was reasonably open to the Judge on the evidence before him, for the clear reasons which he gave.

33. However, the Judge's misdirection on the non-existence of a Lookup Tool printout which contained the appellant's correct name is sufficient to render the Decision unsafe for three reasons.

34. Firstly, the Judge attached equal weight to the asserted material error over the spelling of the appellant's name as he did to the false attribution to the appellant of British nationality. It cannot be said that no reasonable Tribunal properly directed could do otherwise than to find in favour of the appellant solely because of the false attribution to him of British nationality.

35. Secondly, in failing to have regard to the original Lookup Tool, the Judge overlooked the crucial consideration that there was no challenge by the appellant to the passport number attributed to him in that document. The appellant had been provided with the original Lookup Tool printout with the reasons for refusal more than three years prior to the hearing before Judge Apted. The only basis on which he had challenged its reliability was because it had described him as a British national, when he was in fact an Indian national. There was no dispute that the passport number attributed to him in the Lookup Tool was the correct passport number for the Indian passport that he had presented at the Test Centre. There was also no dispute about the other detailed information given in the original Lookup Tool, such as the test certificate numbers for the two certificates that had been issued to him for the tests taken on 28 November 2012.

36. Thirdly, in his assessment of the probative value of the Lookup Tool printout at M4, the Judge did not follow the guidance given by the Tribunal

in *DK & RK*. I accept that the Judge correctly directed himself as to the head note of *Aktar*, which in turn reproduces one of the conclusions of the Tribunal in *DK & RK*. But the Judge appears not to have recognised that the evidence referred to in this conclusion as amply establishing the burden of proof is the standard generic evidence relied on by the respondent coupled with specific evidence that the Speaking test taken by the applicant has been found by ETS to be invalid, thus indicating the presence of a proxy test-taker. In the discussion and analysis undertaken in *DK & RK*, the Presidential Panel identified respects in which the standard evidence can be corroborated, and hence further strengthened, by additional evidence, such as the Speaking test being taken at a fraud factory, as was clearly the case here.

37. The Judge was not wrong to attach some weight to the observation of Upper Tribunal Grubb when granting permission to appeal against the earlier decision of the First-tier Tribunal. However, as was apparent from the grounds of appeal before Judge Grubb that were settled coincidentally by Mr Gajjar, the error of law challenge was made in the context of a heavy reliance on the APPG report. In considering the matter afresh at the date of the hearing, Judge Apted needed to consider the significance of the false attribution of British nationality to the appellant in the context of the guidance given in *DK & RK* about the inherent reliability of the ETS data relied upon by the respondent, and the extreme unlikelihood of a genuine test-taker having his test being mixed up with someone else's. The Presidential Panel acknowledged that the ETS data might not be free from error, but this did not relieve the Judge of the requirement to weigh up the likelihood of the false attribution of British nationality being an unexplained anomaly as against the likelihood of the appellant's Speaking test result on 28 November 2012 being erroneously attributed to someone else with an identical or nearly identical name who also took a test at Queensway College on the same day, but who was a British national.
38. As to Ground 2, there is a clear error in the Judge's reasoning at [32]. The Judge directed himself that, as the appellant met the suitability requirements within paragraph S-LTR1.6 of Appendix FM, he "*therefore*" met the requirements of paragraph 276ADE(1)(vi) of the Rules, and so should have been granted leave to remain. In making this finding, the Judge overlooked the fact that the refusal under Rule 276ADE had been made on the separate and independent basis that the appellant had not shown that there would be very significant obstacles to his integration into the country of return. Accordingly, it did not follow from the fact that the appellant had met the suitability requirement (as he had found) that he also qualified for leave to remain on private life grounds under Rules 276ADE.
39. As meeting the suitability requirement was the only reason given by the Judge for finding that Rule 276ADE was satisfied, the Judge clearly misdirected himself in law.

40. I do not consider that Mr Gajjar's arguments to the contrary stand up to scrutiny. The Judge did not make a finding of fact that the appellant had not received notice of curtailment, and that therefore he qualified for leave to remain on the grounds of 10 years' continuous lawful residence as there had been no break in the continuity of his lawful residence period leading up to the eventual refusal of his 2015 application, and then his lawful leave had been extended by virtue of the appellant enjoying Section 3C leave under the Immigration Act 1971.
41. While I accept that there may be merit in the case put forward by Mr Gaffar that the appellant automatically qualifies for leave to remain under the Secretary of State's published Guidance simply by virtue of being found by the Tribunal not to have cheated in an English Language test, this was not the case that was put at the hearing before the First-tier Tribunal, and procedural fairness requires that the respondent has a proper opportunity to address a case that was not argued before the First-tier Tribunal.
42. In summary, I find that both grounds of appeal are made out.

Notice of Decision

The decision of the First-tier Tribunal involved the making of a material error of law, and so the Secretary of State's appeal is allowed. The decision of the First-tier Tribunal is set aside in its entirety, with none of the findings of fact being preserved.

Directions

The appeal shall be remitted to the First-tier Tribunal at Hatton Cross for a *de novo* hearing before any Judge apart from Judge Apted.

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

11 June 2023