



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-000589
First-tier Tribunal No:
HU/52087/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 04 December 2023

Before

UPPER TRIBUNAL JUDGE PERKINS
DEPUTY UPPER TRIBUNAL JUDGE LEWIS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MUHAMMAD IMRAN
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Ms A Everett, Senior Home Office Presenting Officer
For the Respondent: Mr E Fripp of Counsel, instructed by Duncan Lewis Solicitors

Heard at Field House on 17 November 2023

DECISION AND REASONS

Introduction

1. This is an appeal against a decision of First Tier Tribunal Judge Webb promulgated on 13 February 2023 allowing the appeal of Mr Muhammad Imran on human rights grounds against a decision of the Secretary of State for the Home Department dated 7 May 2021 refusing leave to remain in the UK.
2. Although before us the appellant is the Secretary of State and the respondent is Mr Imran, for the sake of consistency with the proceedings before the First-tier Tribunal we shall hereafter refer to the Secretary of State as the Respondent and Mr Imran as the Appellant.

3. We are grateful for the pre-hearing industry of Mr Fripp – in particular in preparing a detailed rule 24 response dated 21 March 2023 - and the helpful and realistic approach of Ms Everett at the hearing before us.
4. In the event we are able to resolve the challenge to the decision of the First-tier Tribunal relatively briefly. In such circumstances we do not propose to set out the full history of this case, which in any event is adequately clear from the documents on file and the Decision and Reasons of the First-tier Tribunal. Suffice at this stage to note the following features:
 - (i) The Appellant, a citizen of Pakistan born on 24 April 1984 was, by the date of the hearing before the First-tier Tribunal, accepted to be in a genuine and subsisting marital relationship with Ms Juliet Grimes, a British citizen.
 - (ii) The live issues before the First-tier Tribunal were, in substance:
 - (a) whether the Appellant had cheated in a TOEIC English language test on 20 March 2012 by using a proxy, and had thereafter exercised deception in presenting the test result in support of an application for variation of leave to remain;
 - (b) related to (a), whether the Appellant met the ‘suitability’ requirements of Appendix FM of the Immigration Rules;
 - (c) the applicability of paragraph EX.1(b) of Appendix FM;
 - (d) further or alternatively whether in all the circumstances the Respondent’s decision represented a disproportionate interference with the Article 8 rights of either or both the Appellant and Ms Grimes.
5. The Judge found in favour of the Appellant in all respects:
 - (i) It was concluded that the Respondent had not proven that the Appellant had cheated in his English language test and had thereby not demonstrated that he had engaged in deception by submitting such test results in support of an application for variation of leave to remain (paragraphs 30-40).
 - (ii) In the alternative, even if the Appellant had employed deception it was considered that none of either the mandatory (S-LTR.1.2.-1.8.) or the discretionary (S-LTR.2.2.-2.5.) grounds for refusal on the basis of ‘suitability’ should be applied to his case (paragraphs 41-42).
 - (iii) Paragraph EX.1.(b) was met because relocating to Pakistan would entail very serious hardship for Ms Grimes - with reference to a combination of factors including her health and her Roman Catholic faith - such that there would be insurmountable obstacles to family life continuing outside the UK (paragraphs 43-46).

(iv) Further or alternatively, in any event there would be a disproportionate interference in the respective Article 8 rights of the Appellant and Ms Grimes with regard to their mutual family life were the Appellant required to leave the UK in consequence of the Respondent's decision (paragraphs 47-56).

Challenge

6. The Respondent's Grounds of Appeal to the Upper Tribunal sought to raise two bases of challenge:

(i) The First-tier Tribunal had erred on the issue of 'chain of custody' in respect of the purported audio recording of the Appellant's TOEIC test, in particular by departing from the decision in **DK & RK (ETS: SSHD evidence; proof) India [2022] UKUT 00112 IAC ('DK & RK (No.2)'**) without adequate reason (paragraphs 1 and 2 of the Grounds).

(ii) The First-tier Tribunal had erred in considering the 'suitability' requirements of Appendix FM (paragraphs 3 and 4).

7. Permission to appeal was granted on 8 March 2023 in material part in these terms:

*"4. It is arguable by reference to the Grounds of Appeal that there may have been error of law in the Decision as identified in the application because arguably the Upper Tribunal Decision [in **DK & RK (No.2)**] binds the FTTJ to conclude otherwise. I grant permission to appeal.*

5. GOA also contend that the FTTJ erred in concluding [at paragraph 42] that he "would have exercised discretion in favour of the appellant" [in respect of 'suitability']. Arguably there is no issue of discretion to be applied by a FTTJ but only a decision on whether, in the circumstances found to apply, the requirements of the rule are met or not.

6. It is arguable that as contended, the FTTJ has adopted a "blinkered approach" by considering an exercise of discretion."

8. Before us Ms Everett was candid in acknowledging that the difficulty that the Respondent's challenge faced was that the Grounds did not in terms impugn the alternative finding in respect of Article 8 (paragraphs 47-56). In this context it is to be noted that the Judge was explicit in indicating the outcome of the appeal even if the Appellant had been dishonest in respect of presenting his TOEIC test results, and even if EX.1.(b) was not engaged: see paragraph 47 -

“Should I be incorrect in my view that the Respondent has failed to prove dishonesty on the part of the Appellant, and/or incorrect in my view that the Appellant has successfully demonstrated that he satisfies the exception found at EX.1.(b) - EX.2, I have also considered this case within a wider proportionality assessment.”

9. Ms Everett suggested that the highest she could put the Respondent’s case was to submit that any error in the approach to ‘suitability’ under the Rules would impact on the ‘public interest’ aspect of the balancing exercise when considering proportionality. We consider that Ms Everett exhibited customary realism in not seeking to develop such a submission at any length or with any vigour.
10. In our judgement it is adequately clear that the Article 8 evaluation from paragraph 47 onwards was a freestanding evaluation premised on a theoretical acceptance of the Respondent’s position in respect of the TOEIC test. It is apparent that in conducting such an exercise the Judge had regard to the nature of such dishonesty, and explored the adverse weight to be accorded to it – see in particular paragraphs 50 and 51. It is manifest that the Judge struck a balance between the public interest and the private interests (which he characterised as “*substantial*”) – see paragraph 56.
11. We conclude that the Respondent has not challenged this aspect of the First-tier Tribunal’s decision. It follows, irrespective of any merit that there might be in the grounds of challenge, insufficient argument has been advanced to overturn the outcome decision.
12. We conclude that the Secretary of State’s challenge fails accordingly and Mr Imran’s appeal must remain allowed.

Some observations

13. In the circumstances, it is not necessary for us to reach any fixed conclusions on the grounds of challenge and the basis of the grant of permission to appeal.
14. Were it necessary we would likely have found there to be no merit in the second basis of challenge.
15. At paragraphs 41 and 42 the Judge gave independent consideration to the ‘suitability’ requirements under Appendix FM on the premise that the Appellant had cheated in his TOEIC test and had acted dishonestly in presenting the result to the Respondent in support of an application for variation of leave to remain. It seems to us that it was open to the Judge to conclude that such conduct did not engage the mandatory grounds for refusal. Whilst we accept that there may be some scope for ambiguity arising from the phrase “*I would have exercised discretion in favour of the Appellant*”, we would have been unlikely to conclude that this amounted to

a material error. It seems to us adequately clear that the Judge either: meant that in his evaluation he would have concluded that none of either the mandatory or the discretionary grounds for refusal were met; or he meant, having ruled out the mandatory grounds, if one of the discretionary grounds were met he would have exercised a discretion not to rely upon it. The overall conclusion – that the Appellant did not fail on grounds of ‘suitability’ – seems, without more, clear enough and adequately reasoned.

16. As regards the first ground of challenge, we do not consider it appropriate to offer any tentative conclusion one way or the other on the grounds as pleaded. It is an issue in respect of which we would have required further and detailed submissions from the representatives before reaching a determination.
17. However, irrespective of whether the Judge fell into error of law, and irrespective of whether any such error is adequately identified in the Respondent’s grounds, we do consider it appropriate to offer the following observations with regard to the First-tier Tribunal’s approach to the TOEIC issue – and perhaps hereby identify some of the areas that we might have invited submissions on had this issue been ‘live’.
18. In substance the Judge based his conclusion in this regard on two reasons:
 - (i) The Judge found that the Appellant did not have a need to cheat: “*I find it difficult to accept why this particular Appellant would have any need or desire to have a proxy sit a TOEIC examination on his behalf*” (paragraph 38). (We pause to note that it would appear that such an observation informed the Judge’s subsequent conclusion that he found the Appellant to be a “*credible and honest witness*” (paragraph 40).)
 - (ii) Concern over the quality of evidence in respect of the ‘chain of custody’, with particular reference to the response of the solicitors for ETS to an enquiry made by the Appellant’s representatives: “... *ETS has refused to provide material that would allow external checking of their allegation...*” (paragraph 39).
19. In respect of any ‘need to cheat’, we acknowledge that the Judge, at paragraphs 36 and 38, expressly recognised the caution sounded in **DK & RK (No. 2)** at paragraph 108 echoing **MA (ETS - TOEIC testing) [2016] UKUT 450 (IAC)** - “*there are numerous reasons why a person who could pass a test might nevertheless decide to cheat*”. However, the Judge did not heed this caution. Instead, at paragraph 38, the Judge rehearsed the Appellant’s various qualifications and experience of the English language, and relied on such matters – and seemingly such matters alone – to inform his conclusion that it was “*difficult to accept*” any need or desire to cheat.
20. Although, as Mr Fripp acknowledged before us, it is common in cases of this sort for such a submission to be made – that the appellant was

sufficiently competent in English not to need to employ a proxy - it is be noted that no such submission was seemingly made in this case.

21. The Judge noted that he had been provided with a 26 page Skeleton Argument settled by Mr Fripp (paragraph 10). That document is available to us. It is, as might be expected, carefully drafted and sets out submissions in respect of the different aspects of the case in considerable detail. However, it makes no submission to the effect that the Appellant had no need to cheat. Nor is there to be found in the Judge's summary of the submissions made on behalf of the Appellant at the hearing (paragraphs 14-18) any suggestion that such a submission was made at the hearing.
22. There was, as Mr Fripp acknowledged before us, good reason beyond the caution of the Upper Tribunal for not making such a submission. That good reason is to be found in the decision of First-tier Tribunal Judge Rose promulgated on 16 February 2014, which was before the Judge in the Appellant's bundle (pages 14-17). (The Judge identified this document at paragraph 8.)
23. In appeal reference IA/19855/2013 Judge Rose allowed the Appellant's appeal against a decision to refuse him leave to remain as a Tier 4 (General) Student Migrant further to a hearing held at Birmingham on 7 February 2014. Paragraphs 8 and 9 of the Decision of Judge Rose indicate that the Appellant failed to attain a sufficient score for 'speaking' in a TOEIC test on 22 February 2012, submitting a further test result dated 20 March 2012 - the exact test result that is the subject of the Respondent's allegation of using a proxy tester. See:

"8. The documents submitted by the Appellant in support of his application included official score reports issued by ETS relating to test undertaken by the Appellant in speaking, writing, listening and reading. One report, dated 22 February 2012, shows that the Appellant had achieved scores of 160 for writing and 140 for speaking. A further report, dated 20 March 2012, records a score of 180 for speaking.

9. The Appellant did not dispute that a score of 140 for speaking was not sufficient. According to his witness statement, because of his low score, he took that particular paper again and scored 180 points, which was above the required score of 150; that score was accepted by his college before it issued a CAS letter."
24. To be clear: the evidence before the First-tier Tribunal herein demonstrated that the Appellant had failed a TOEIC speaking test approximately one month prior to the test in which he was accused of cheating.
25. Two observations may be made: an ability to provide paper evidence of past education in the English medium, both abroad and in the UK, is not inevitably an indicator of an ability to pass a TOEIC test - else the

Appellant would not have failed in February 2012; the caution of the Upper Tribunal in both **MA** and **RK & DK (No. 2)** – that there is a range of reasons why a person proficient in English may nonetheless cheat – is sound.

26. We note that the Appellant’s witness statement before the First-tier Tribunal did not mention his failure in February 2012. We have already noted that Mr Fripp’s Skeleton Argument did not make a submission to the effect that the Appellant did not need to cheat. Mr Fripp confirmed to us that he was alert to the content and meaning of paragraphs 8 and 9 of Judge Rose’s decision.
27. It is unfortunate that the First-tier Tribunal Judge was seemingly not alert to paragraphs 8 and 9 of Judge Rose’s decision. (Of course, had he been so, it would have been incumbent upon him to address the failure in February 2012 in both his reasoning and his written reasons before reaching a conclusion to the effect that the Appellant did not need to cheat.)
28. As indicated above, we do not propose to reach any fixed finding in respect of this aspect of the case, whether in fact, or by reference to any possible error of law, or by consideration of whether such a matter is encompassed by the Respondent’s grounds of challenge. We merely identify that there is a significant basis for concern in respect of the First-tier Tribunal Judge’s fact-finding, and the very real possibility that a material finding was based on a misconception of the facts, as well as a seemingly unreasoned disregard for the guidance offered by the Upper Tribunal.
29. As regards the issue of the ‘chain of custody’ we make the following observations in respect of the general evidence, the approach of the Upper Tribunal hitherto, and the approach of the First-tier Tribunal herein. Thereafter we make some observations about the particular evidence in this case.

(i) In **DK & RK (No. 2)** the Tribunal, comprising the President and Vice President, embarked on a detailed analysis of the up-to-date evidence in respect of TOEIC tests, including ETS’s ‘chain of custody’. This analysis encompassed earlier jurisprudence of the higher courts in respect of the applicable legal tests, and consideration of earlier decisions’ factual assessments, together with the consideration of expert evidence called on both sides of the argument. As the First-tier Tribunal Judge observed, at paragraph 36, the approach and findings were accepted by the Court of Appeal in **Halima Akter & others [2022] EWCA Civ 741**.

(ii) The ‘chain of custody’, and ‘linking’, was scrutinised in detail at paragraph 76 *et seq.* under the heading ‘Individual Evidence: Linking tests to candidates’: see in particular paragraphs 85 and 86 on ‘chain of custody’ and the generation of a unique ID test number which should appear on the audio files, test certificates and all other documentation relating to the test.

Consideration of the evidence before the Upper Tribunal was taken forward into its 'Analysis' at paragraph 103 *et seq.*: the possibility of a 'mix-up' was considered in the context of ETS's analytical process and the importance of being able to attribute test results to particular candidates given its role as an examining authority with a global reputation (paragraph 106, and see similarly paragraph 120); it was recognised that whilst some of the expert evidence identified 'room for error', there was no evidence from any quarter of actual error - leading the Tribunal to observe "*What is clear here is that there is every reason to suppose that the evidence is likely to be accurate*" (paragraph 107). See similarly: "*the "chain of custody" argument, remains only a theoretical possibility not supported by any detailed evidence, and rendered less likely by some of the general evidence*" (paragraph 114 - in which it is also stated "*it is important to appreciate that although these possibilities prevent the data conclusively proving fraud in a scientific sense, they do not substantially remove the impact of the evidence as capable of establishing facts in issue so that a human trier of fact is satisfied on the matter on the balance of probabilities*"). This analysis in respect of 'chain of custody' reaches its conclusion in paragraphs 120-121, before the succinct statement at paragraph 126 to the effect that there is "*the virtual exclusion of suspicion of relevant error by ETS*".

(iii) Whilst on the one hand the Judge appeared to accept aspects of the analysis, reasoning, and guidance in **DK & RK (No. 2)**, he expressed doubt in respect of other matters - which he characterised as 'obiter: see paragraph 34. In particular the Judge commented:

(a) "*I do not agree that a law-abiding individual attending a Test Centre with which he is unfamiliar and who is focussed on his or her own affairs, would inevitably be aware of wrongdoing at that Test Centre.*";

(b) "*I would further point out that criminals may do things (without the knowledge or consent of a person affected by their actions) because their criminal inclination or 'business model' simply makes it habitual for them to act in certain ways.*"; and

(c) "*More importantly, I am concerned as to the Upper Tribunal's general comment in respect of the 'chain of custody'.*".

(iv) The Judge's comments at (a) and (b) above in substance take issue with paragraph 125 of **DK & RK (No. 2)**. However, beyond expressing an opinion, the Judge does not offer any reasoning - evidence-based or otherwise - for disagreement.

(v) As regards (c), the Judge offers further consideration of 'chain of custody' at paragraph 35. In this context we observe:

(a) In his Skeleton Argument before the First-tier Tribunal Mr Fripp sought to undermine the reasoning in **DK & RK (No. 2)** by reference to National Audit Office ('NAO') evidence and an All

Party Parliamentary Group ('APPG') report: see Skeleton Argument at paragraphs 25 and 26. The Skeleton Argument recognised the effect of the decision in **DK and RK (Parliamentary privilege; evidence) [2021] UKUT 00061 (IAC)** ('**DK & RK (No. 1)**') in excluding such evidence from consideration in **DK & RK (No. 2)**; however, it was submitted that **DK & RK (No. 1)** was wrongly decided.

(b) Wrongly decided or not, **DK & RK (No. 1)** was binding on the First-tier Tribunal.

(c) The First-tier Tribunal Judge made reference to the submissions in this regard at paragraph 35. However, it is not possible to find any ruling in the Decision on the admissibility of the NAO and APPG evidence.

(d) In the remainder of paragraph 35 the Judge seemingly underplays the strength of the Upper Tribunal's findings on 'chain of custody' by emphasising the expert evidence of Professor Sommer, and referring only to the Tribunal's observation that a civil case did not need to be 'water tight' because of the applicable standard of proof. This does not adequately reflect the conclusions we have highlighted at (ii) above - e.g. "*the virtual exclusion of suspicion of relevant error by ETS*".

(vi) In the circumstances, notwithstanding that the Judge accepted that in principle decisions of the Upper Tribunal are binding on the First-tier Tribunal (paragraph 36), and notwithstanding that the Judge acknowledged that **DK & RK (No. 2)** had been approved in the Court of Appeal (also paragraph 36), in seemingly expressing a number of (incompletely or poorly) reasoned bases for disagreement, it is not readily clear that he applied the full rigour of the findings in **DK & RK (No. 2)** to the facts of the instant case, or otherwise offered any clearly reasoned justification for not doing so. We likely would have required further exploration of this matter with the assistance of the representatives.

30. In addition to the Judge's potentially misconceived finding that the Appellant did not need to cheat (and the attachment of weight to such finding), and the Judge's potentially unclear approach to the weight to be accorded the generic evidence further to the guidance in **DK & RK (No. 2)**, as identified above the Judge also placed weight on the case specific evidence of an exchange of correspondence between the Appellant's representatives and the representatives for ETS (contained in a supplementary Appeal Bundle, identified at paragraph 9 of the Decision). The Judge addressed this issue at paragraph 39.

31. On the face of it, the Judge appears to have put near determinative weight on ETS declining to produce any further evidence in response to the Appellant's representatives' email request to provide a log confirming

the full name of the candidate, his date of birth, the time of test, the time allocation of the test, the student ID number, and the location of the test. The Judge commented:

“... If ETS possess reasonable evidence of the linkage of the recording to the Appellant, there is no reason not to provide such evidence. I therefore find that, in this particular case before me, ETS has refused to provide material that would allow external checking of their allegation which has been accepted by the Respondent.” (paragraph 39)

32. However, the Judge did not go on in terms to articulate what, in his judgement, flowed from such a refusal, or why. In the following paragraph, having reminded himself of **RK & DK (No. 2)**, and that each case required to be determined on its own facts and evidence, the Judge stated that he found the Appellant to be credible and honest, before stating his conclusion that the Respondent had failed to prove dishonesty.
33. It seems to us that there is potentially a missing link in the reasoning here, and we would have been minded to invite submissions from the representatives were this to have still been a live issue before us. In particular we may have required some considerable assistance as to why the declination to provide the requested information undermined the generic evidence relied upon by the Respondent, or otherwise undermined the specific ‘lookup tool’ filed in the appeal which, on the basis of **RK & DK (No. 2)** would appear to provide linkage of audio test and result (see paragraph 84 *et seq.*).
34. However, happily, it was unnecessary for us to trouble the representatives in respect of these matters, it being sufficient for us to dismiss the Respondent’s challenge on the basis that irrespective of any possible error on the TOEIC issue, or on suitability, or on EX.1, the alternative conclusion in respect of Article 8 stood.

Notice of Decision

35. The decision of the First-tier Tribunal contained no material error of law and accordingly stands.
36. The appeal of Mr Mohammad Imran remains allowed on human rights grounds.
37. No anonymity order is sought or made.

Ian Lewis

Deputy Judge of the Upper Tribunal

Case No: UI-2023-000589
First-tier Tribunal No: HU/52087/2021

(Immigration and Asylum Chamber)

25 November 2023