



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001405
UI-2023-001406
First-tier Tribunal No: HU/57326/2021
HU/57327/2021

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On 15 August 2023**

Before

**UPPER TRIBUNAL JUDGE KAMARA
DEPUTY UPPER TRIBUNAL JUDGE WELSH**

Between

**MRS MANPREET
MR SUNIL SUNNY
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Mavrantonis of Counsel, instructed by Farani Taylor Solicitors
For the Respondent: Mr Basra, Senior Home Office Presenting Officer

Heard at Field House on 19 June 2023

DECISION AND REASONS

Introduction

1. The Appellants have been granted permission to appeal the decision of First-tier Tribunal Judge Easterman (“Judge Easterman”), promulgated on 6 March 2023.
2. No anonymity order was made previously and there is no need for one now.

Factual background

3. The Appellants are nationals of India. They are in a relationship, having met in April 2015 whilst in the UK. The First Appellant (date of birth 20 November 1988) entered the UK as a student in 2011, with leave valid until 31 December 2013. The Second Appellant (date of birth 19 April 1986) entered the UK as a student in December 2009, with leave valid until 30 March 2014.

4. The First Appellant, on 2 September 2020, and the Second Appellant, on 3 September 2020, made applications for leave to remain on the basis of their private lives in the United Kingdom (“UK”).
5. On 16 November 2021, the Respondent refused both applications and it is these decisions that were the subject matter of the appeal before Judge Easterman. In respect of both Appellants, the Respondent concluded that neither had demonstrated that they met the requirements of paragraph 276ADE(1)(vi) of the Immigration Rules and that there were no exceptional circumstances warranting a grant of leave to remain outside of the Immigration Rules. Additionally, in respect of the Second Appellant, the Respondent concluded that he did not meet the suitability requirements of the Immigration Rules (paragraph S-LTR.4.2) on the ground that he had used deception in an earlier application, made on 4 July 2013, for leave to remain.
6. That earlier application had been refused, inter alia, on the basis that he had relied upon a Test of English Language for International Communication (“TOEIC”) certificate that he had obtained fraudulently. His appeal against that refusal had been dismissed, by First-tier Tribunal Judge Coaster, on 17 April 2015, for reasons which included that the Respondent had demonstrated that he had used deception as alleged. One aspect of the evidence before Judge Coaster was that, approximately 10 days before the Appellant sat the TOEIC test he had sat the International English language Testing System (“IELTS”) test. Judge Coaster described the scores in the TOEIC test as being “remarkably higher” [32] than those obtained in the IELTS test and found the Second Appellant’s explanation for taking two tests to be “somewhat confused” [14]. The Second Appellant sought permission to appeal the decision of Judge Coaster, which was refused by both the First-tier Tribunal and the Upper Tribunal.

Decision of the Judge

7. In respect of the First Appellant, Judge Easterman found that she had not demonstrated that there are very significant obstacles to integration into India and, in reaching this conclusion, he took into account that she would be returning to India with her partner [60].
8. In respect of the Second Appellant, Judge Easterman concluded that the Respondent had demonstrated on a balance of probabilities that he had used a proxy taker in the TOEIC test and therefore the Respondent was entitled to conclude that the suitability requirements of the Immigration Rules had not been met.
9. In respect of both Appellants, in reaching his conclusion that the Respondent maintaining her decision was not a disproportionate interference with their Article 8 rights, Judge Easterman took into account, inter alia, his finding that they did not meet the requirements of the Immigration Rules and applied 117B(4) and (5) of the Nationality, Immigration and Asylum Act 2002 (“the 2002 Act”).

Grounds of appeal and grant of permission

10. The grounds of appeal pleaded that:
 - (1) Ground 1 - “The Judge has wrongly applied Devaseelan principles in light of the relevant test in SM & Qadir pursuant to DK and RK”. The particulars of this ground of appeal are:

- (i) the legal position at the time Judge Coaster made his decision did not require an assessment of any innocent explanation put forward by the Appellant;
 - (ii) the legal position at the time Judge Coaster made a decision did not require successful Appellants to be put back into the position they would have been if there had been no finding of deception;
 - (iii) Judge Easterman failed to give any, or any proper, consideration to the innocent explanation put forward by the Second Appellant.
- (2) Ground 2 – Judge Easterman erred in failing to apply fully section 117B of the 2002 Act.

11. The Respondent did not file a rule 24 response.
12. Permission was granted by First-tier Tribunal Judge Grant-Hutchinson on 25 April 2023. The grounds upon which permission was granted were not restricted.

Upper Tribunal hearing

13. We heard oral submissions from Mr Mavrantonis and Mr Basra. During the course of this decision, we address the points they made.

Discussion and conclusion

Ground 1

14. In DK & RK (ETS: SSHD evidence; proof) India [2022] UKUT 00112 (IAC) at [60], the Upper Tribunal, after having considered numerous authorities relating to the burden of proof in the context of allegations of dishonesty, described the task in hand in straightforward terms:

“We ... ask first whether the Secretary of State’s evidence would enable a properly-instructed trier of fact to determine that the burden of proof had been discharged on the balance of probabilities. If the evidence at this point would not support a finding that the matter was proved on the balance of probabilities, the Appellants would be entitled to succeed in their appeals. If, however, it would support such a finding, the evidence as a whole falls for consideration in order to decide whether the appeals succeed or fail.”

15. The Upper Tribunal carried out a thorough analysis of the evidence relied upon by the Secretary of State in this type of appeal, which included the evidence that linked the test candidate to the test result, and concluded that:

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 contradicted by credible evidence, unexplained, and not the subject of any material undermining its effect on the individual case, it is in our judgment amply sufficient to prove that fact on the balance of probabilities [127].

In using the phrase “amply sufficient” we differ from the conclusion of this Tribunal on different evidence, explored in a less detailed way, in SM and Qadir v SSHD. We do not consider that the evidential burden on the Respondent in these cases was discharged by only a narrow margin. It is clear beyond a peradventure that the Appellants had a case to answer [128].

In these circumstances the real position is that mere assertions of ignorance or honesty by those whose results are identified as obtained by a proxy are

very unlikely to prevent the Secretary of State from showing that, on the balance of probabilities, the story shown by the documents is the true one. It will be and remain not merely the probable fact, but the highly probable fact. Any determination of an appeal of this sort must take that into account in assessing whether the Respondent has proved dishonesty on the balance of probabilities [129].”

16. Just because the decision of Judge Coaster was made prior to the decisions in SM and Qadir v SSHD [2016] UKUT 229 and DK and RK v SSHD does not mean that the approach taken must have been wrong. It was necessary for Judge Easterman to examine the decision of Judge Coaster and compare it to the approach prescribed in that subsequent case law; and that is precisely what he did. At [62], Judge Easterman stated that he had read the decision of Judge Coaster “with care and it seemed to me to echo almost exactly the remarks subsequently made in DK and RK ...”. Contrary to the submissions of Mr Mavrantonis, we agree with Judge Easterman. Judge Coaster took into account the evidence adduced by the Secretary of State [12, 13] and the explanation put forward by the Appellant [14] before concluding at [34] that the Secretary of State had discharged the burden.
17. Mr Mavrantonis also made submissions about the consequences for an appellant if there were a finding on appeal that he/she had not engaged in deception. However, this matter is not capable of being material unless we conclude that Judge Easterman erred in law in concluding that the Respondent had proved deception.
18. Mr Mavrantonis submitted in the grounds of appeal at [10] that Judge Easterman ought to have considered the Second Appellant’s “innocent explanation” but that from “§67, he appears to have simply adopted FTTJ Coaster’s position without more.” However, Judge Easterman plainly did consider the Second Appellant’s case:
 - (1) he summarised the factual case [24-27];
 - (2) he confirmed that he had taken into account the skeleton argument of Mr Mavrantonis [28];
 - (3) he summarised the oral submissions of Mr Mavrantonis [29-34];
 - (4) he rejected, and gives reasons for rejecting, the argument that the Second Appellant had taken his test at a different college (Edan) to that asserted by the Respondent (UTC);
 - (5) he rejected, and gave reasons for rejecting, the explanation put forward by the Second Appellant, different to that given to Judge Coaster, why the TOEIC and IELTS test results differed markedly.
19. Under the same ground of appeal, Mr Mavrantonis raised the issue of Judge Easterman having drawn an adverse inference about the credibility of the Second Appellant’s assertion that he sat the TOEIC test at Edan College, not UTC, by reason of his failure to raise this issue before Judge Coaster.
20. Judge Easterman stated, “I note that there is no discussion in Judge Coaster’s decision of a dispute about the centre at which [the Second Appellant] took his test” [64]. He went on to state, “I find it highly convenient that he now suggests that the test was taken at the same college, and on the same day, as his partner, who he had not met at the time, so that a discrepancy between her results, which were not pursued [by the Secretary of State], and his could be raised as a further issue” [64].

21. In his oral submissions, expanding on the written grounds of appeal, Mr Mavrantonis stated that it was irrational for Judge Easterman to take this factor into account because the Respondent had not produced the evidence that was before Judge Coaster identifying the relevant test centre and Judge Coaster had not identified the name of the college in question.
22. We disagree with Mr Mavrantonis. In our view, there was strong support for the conclusion that the evidence as to the identity of the college seen by Judge Easterman was the same as that seen by Judge Coaster:
- (1) We remind ourselves of the decision in DK and RK, that the evidence relied upon by the Secretary of State is amply sufficient to discharge the burden of proof. For Mr Mavrantonis' submissions to be valid would require evidence that the look-up tool had produced two different results for the same individual.
 - (2) Whilst Judge Coaster did not name the test centre, such an omission was understandable because the name of the college was not relevant to the matters in issue.
 - (3) The other information recorded by Judge Coaster accords with that before Judge Easterman, namely the name of the person who took the test and the invalid score in the invalid test.
 - (4) It has not been submitted that the Second Appellant gave evidence to Judge Easterman that, in the first appeal, the Respondent had submitted that he had taken his test at Edan College.
23. In these circumstances, we conclude that the inference drawn by Judge Easterman was proper and reasonably open to him.
24. The final matter raised within ground 1 was that "it is at least arguable that the judge's conclusion at §65 that [the First Appellant's] test is not necessarily genuine is unfair and respectfully wrong especially when no such allegation has ever been put to [the First Appellant]" [14]. Taking the point shortly, this relates to the case of the Second Appellant that his partner, the First Appellant, sat a TOEIC test at Edan College, on or about the same date as he did, but that the Secretary of State did not pursue allegations of deception against her. We conclude that this point is not capable of being material, given the case put by the Respondent, and the finding of Judge Easterman, was that the Appellant took the test at UTC.
25. For the reasons set out above, we conclude that ground one discloses no error of law.

Ground 2

26. Judge Easterman did not make findings, or take into account, section 117B(2) or (3) of the 2002 Act and this is an error of law. However, given that, at best, these would be neutral factors in the proportionality assessment, the error is not capable of being material.

Notice of Decision

27. The decision of the First-tier Tribunal did not involve the making of a material error on a point of law and so the decision stands.

C E Welsh

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

27 July 2023