IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004673

First-tier Tribunal Nos: HU/56976/2021
IA/16131/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 23 December 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MOHAMMED REJAUL ISLAM
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr N. Wain, Senior Home Office Presenting Officer
For the Respondent: Mr M.A.M. Khan, Law Dale Solicitors

Heard at Field House on 6 December 2023

DECISION AND REASONS

Introduction

1. I refer to the parties as they were before the First-tier Tribunal where Mr Islam was the appellant. The appellant is a citizen of Bangladesh born on 15 December 1991. The appellant applied to the respondent on 25 February 2021 for leave to remain on the basis of his private and family life. The respondent refused that application on 15 October 2021 primarily on the basis that the respondent concluded that the appellant had obtained a TOEIC certificate, issued by ETS, following a test on 18 October 2011, by deception.

2. The appeal against the decision was allowed by First-tier Tribunal Judge Green ("the judge") on 15 September 2023, after a hearing on 14 September 2023. The respondent before the First-tier Tribunal was not represented before the First-tier Tribunal. The judge considered that no adjournment had been requested and considered it was in the interests of justice to proceed to hear the appeal in the respondent's absence.

3. Permission to appeal was granted by Judge of the First-tier Tribunal Chowdhury on 23 October 2023 on the basis that it was arguable that the First-tier Judge had erred in law in not considering **MA [2016] UKUT 00450 (IAC)** and **DK and RK (India) [2022] UKUT 00112 (IAC)** which provided that unless contradicted by credible evidence, the generic evidence relied on by the respondent was sufficient to discharge the evidential burden. The respondent had asserted that although the respondent was not represented before the First-tier Tribunal, the relevant cases were before the judge including as referenced in the respondent's review.

4. The matter came before me to determine whether the First-tier Tribunal had erred in law and if so, whether any such error was material and thus whether the decision should be set aside.

Submissions – Error of Law

5. In the grounds of appeal and in oral submissions by Mr Wain it is argued in short summary for the respondent before the First-tier Tribunal as follows.

6. The respondent before the First-tier Tribunal argued that when considering the ETS test issue and setting out the legal background at [11] to [18] of the decision and reasons, the judge failed to consider the relevance of **MA** and **DK and RK (India)** which rendered the Tribunal's consideration incomplete. It was argued that although there was no Presenting Officer at the hearing, the relevance of **DK and RK** had been set out at paragraphs 6 to 10 of the respondent's review but the judge made no reference to these arguments.

7. The respondent asserted that **Malaba v SSHD [2006] EWCA Civ 820** (paragraph 20) applies, "it is imperative for the adjudicator to explain how she reached her main conclusion that, having regard to the response statement, the discrepancies did not completely undermine the core of the claim". It was submitted that if the Tribunal had applied the correct approach to the evidence of the ETS test, a different conclusion may well have been reached. It was further submitted that the judge's findings at [20] of the decision were misconceived and if the judge had applied **MA** they would have noted that the Look Up tool and evidence in the respondent's bundle, was cogent evidence and evidence of language skills or qualifications did not mean that there was no deception.

8. It was further argued that the judge failed to consider the appellant's skills at the time of the ETS test over a decade earlier and if the judge had considered the evidence of the appellant's language skills up to 2014, when the ETS issue was identified, a different conclusion may have been reached. It was argued that the judge's decision was incomplete and unsustainable and rendered the judge's proportionality assessment unreliable as it failed to take account of the appellant's apparent deception.

9. Mr Wain submitted that the judge had erred in relying, at [11], on the case of **R (on the application of Gazi) v SSHD (ETS-JR) [2015] UKUT 00327** and the difficulty in relying on **Gazi** was that the judge arguably did not accept that the generic evidence was sufficient to discharge the burden of proof on the respondent. Mr Wain submitted that there was no reference to the generic evidence at all. It would appear considering the decision including the judge's directions at [11] that there was no acceptance of the generic evidence, that an appellant then has to respond to, as provided in **DK and RK**.

10. In the Rule 24 response and in oral submissions by Mr Khan for the appellant before the First-tier Tribunal it was argued, in short summary, as follows.

11. The judge recorded the background of the appeal and set out the documentation contained in a 660 page joint bundle which it was argued that the judge took into consideration, including the respondent's review which relied on **DK and RK** and **MA**.

12. Mr Khan argued that the appellant before the First-tier Tribunal had provided sufficient reasons in response to the evidence relied on by the Secretary of State and was not satisfied that the appellant before the First-tier Tribunal had used deception for the five reasons set out at [20] of the decision and reasons.

Conclusions – Error of Law

13. The primary argument in this case is that the judge failed to have regard to the jurisprudence of **DK and RK (India)** and **MA**. The judge noted at paragraph [2] of the decision and reasons, a 660 page joint bundle. The judge then went on to set out the authorities of **R (on the application of Gazi) v SSHD (ETS-JR) [2015] UKUT 00327**, **SM and Qadir (ETS - Evidence - Burden of Proof) [2016] UKUT 229 (IAC)**, **Qadir [2016] EWCA Civ 1167**, and **KS (India) v SSHD [2018] EWCA Civ 836**.

14. I take into account that the judge did not specifically set out the authorities of **MA** or **DK and RK (India)**. The respondent before the First-tier Tribunal had cited these authorities in the respondent's review. The respondent had noted that the appellant's skeleton argument (ASA) had not provided any objective evidence to demonstrate that the TOEIC certificate was obtained by deception. The respondent before the First-tier Tribunal in the respondent's review refuted this in pointing to the ETS Look Up tool and the various witness statements in the respondent's bundle before the First-tier Tribunal. Whilst the appellant before the First-tier Tribunal had initially, in the ASA, had advanced arguments relating to the shortcomings of the evidence provided to demonstrate the appellant's deception, the respondent in the respondent's review again relied on **DK and RK** which stated "The evidence currently being tendered on behalf of the Secretary of State in ETS cases is amply sufficient to discharge the burden of proof". Paragraph 117 of the same case stated: "The evidence the respondent relies on in these cases is not shown to be unreliable in any general sense. On the contrary, the very limited concerns that have been raised tend to show that as a class the evidence is highly reliable".

15. The respondent considered the appellant's evidence in the appellant's witness statement before the First-tier Tribunal that the appellant denied employing any deception including pointing to his strong competence in all areas of English. However the respondent had pointed out, including relying on paragraph 108 of **DK and RK** that "there are numerous reasons why a person who could pass a test might nevertheless decide to cheat".

16. The judge, in allowing the appellant's appeal, did not reach any finding that the respondent before the First-tier Tribunal's evidence in relation to the ETS test was unreliable. Whilst the judge did not set out the more recent authority of **DK and RK**, there was no material error in the judge's approach.

17. Whilst reliance solely on the authority of **Gazi** might have been problematic, the judge also reminded himself at paragraph [12] that the Secretary of State's

generic evidence combined with the particular evidence in relation to an appellant, was sufficient to discharge the evidential burden that the TOEIC certificates had been procured by dishonesty.

18. The judge went on to direct themselves that in accordance with **SM and Qadir (ETS – Evidence – Burden of Proof) [2016] UKUT 229 (IAC)** every case will invariably be fact-sensitive and in **Qadir [2016] EWCA Civ 1167** the judge reminded that the Court of Appeal upheld the Upper Tribunal's consideration of the expert evidence and the Upper Tribunal was entitled to reach its conclusions on the English language abilities of the claimants. The judge further cited the case of **KS (India) v SSHD [2018] EWCA Civ 836** that it was permissible for the Upper Tribunal Judge to have formed their own assessment that the appellant must have committed fraud when they had scored 200 out of 200 but their English at the hearing was so poor that at times it was impossible to understand what they were saying.

19. The Upper Tribunal in **DK and RK** in their general conclusions commencing at paragraph 126 of that decision considered that the evidential burden of the respondent in these cases, judgment was amply sufficient to prove that fact on the balance of probabilities, if that evidence was uncontradicted by credible evidence. The Tribunal went on to consider that it differed from **SM and Qadir v SSHD** in that the Tribunal did not consider that the evidential burden on the respondent in these cases was discharged by only a narrow margin and that it was "clear beyond a peradventure that the appellants had a case to answer".

20. The Tribunal in **DK and RK** went on to consider that the real position was that mere assertions of ignorance or honesty by those whose results were identified as obtained by a proxy were very unlikely to prevent the Secretary of State from showing 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 the dishonesty on the balance of probabilities.

21. The fact that the judge did not expressly mention **DK and RK** does not in itself merit an inference 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 E.R. 65,** at paragraph 45). The judge had in mind all the evidence before the First-tier Tribunal including that relied on by the respondent and need not have set all such evidence out.

22. It is not the case that the First-tier Tribunal has misdirected itself, simply because the respondent asserts a different conclusion should have been reached on the facts or that the judge could have expressed themselves differently (see including **AH (Sudan) v Secretary of State for the Home Department [2007] UKHL 49; [2008] 1 A.C. 678,** at paragraph 30).

23. In considering the appellant's evidence, the judge was not accepting that mere assertions of ignorance or honesty by this appellant were sufficient. The judge undertook a holistic assessment. Whilst the judge was entitled to take into consideration that the respondent was not represented and not in a position to cross-examine the appellant and his wife, that was not the end of the judge's consideration.

24. The judge was entitled, for the reasons given to find that the evidence given was credible. The judge stated at [19] that "The key findings of fact derived from the statements and supporting documents are as follows".

25. The judge noted that the appellant spoke English and did not require the services of an interpreter. Whilst the judge was considering an appeal over a decade after the alleged ETS test, the judge also considered that the appellant had passed the equivalent of an A level on 26 August 2000 in the appellant's Higher Secondary Certificate Examination in Bangladesh. In addition, the judge took into consideration at [20(c)] that the appellant had sat and passed an IELTS test on 5 May 2007 and on 8 November 2008 in Bangladesh. The judge then went on to consider the appellant's further English qualifications obtained in 2022 in the round.

26. It was not the judge's findings therefore, that the fact that the appellant spoke English now was sufficient; it is clear that the judge considered the appellant's English proficiency prior to 2014 when the ETS issue came to light.

27. Rather, the judge considered in the round the appellant's and his wife's witness statements and oral evidence together with the appellant's longstanding English language proficiency and the judge was entitled to come to the conclusion that the appellant had in effect responded to the Secretary of State's case. Whilst **MA [2016]** notes, as referred to in **DK and RK**, that there are numerous reasons why an individual might nevertheless decide to cheat, it was open to the judge to accept on the balance of probabilities that this appellant had not having considered all of the evidence in the round.

28. **DK and RK** provided that the evidence 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 the appellant whose test entry is attributed to a proxy. The burden of proving the fraud or dishonesty is on the Secretary of State and the standard of proof is the balance of probabilities. The burdens of proof do not switch between parties but are those assigned by law.

29. The judge took into account the evidence relied on by the Secretary of State which the judge was aware of including in noting at [2] the 660 page bundle and making references to the Secretary of State's evidence in the cases the judge referred to. Again, any specific failure to cite the Look Up tool is not material and does not in itself indicate that the judge did not have regard to that evidence or that the judge did not apply the correct legal test.

30. In reaching the findings the First-tier Tribunal did, the judge was satisfied that the response from the appellant to the evidence from the Secretary of State was sufficient to satisfy the judge that this appellant had not practised deception. That was a finding properly open to the judge.

Notice of Decision

(1) The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

(2) I do not set aside the decision.

M M Hutchinson

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

19 December 2023