IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-003956

First-tier Tribunal No:
HU/52841/2022
IA/04465/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 25th November 2024

Before

UPPER TRIBUNAL JUDGE GREY

Between

SUKHWINDER SINGH BHAM

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr P. Turner, Counsel
For the Respondent: Ms A. Ahmed, Senior Home Office Presenting Officer

Heard at Field House on 14 November 2024

DECISION AND REASONS

1. This is an appeal brought by the appellant against the decision of First-tier Tribunal Judge Gibbs ('the Judge') dated 25 June 2024, in which she dismissed the appellant's appeal in respect of the respondent's decision to refuse his human rights claim.

Factual Background

2. The appellant is a national of India who is 35 years old. He entered the UK on 6 October 2009 as a Tier 4 general student. An extension of leave

was refused on 19 April 2013 and his subsequent appeal of that refusal was unsuccessful.

3. On 27 July 2021 the appellant submitted a further application for leave to remain based on his Article 8 ECHR rights. That application was refused on the grounds of suitability because the respondent found that the appellant had previously relied on a TOEIC certificate from Educational Testing Service (ETS) which the respondent found was obtained fraudulently. Further, the respondent was not satisfied that the appellant would face very significant obstacles on return to India or that there were exceptional or compassionate circumstances that arose in his case.

4. The appellant's appeal was heard at Hatton Cross on 5 June 2024 and was dismissed in the decision promulgated on 25 June 2024.

The decision under appeal

5. The Judge started by reminding herself in accordance with the recent decision of this Tribunal of Varkey & Joseph (ETS - Hidden rooms) [2024] UKUT 00142 (IAC) that the question before her was whether the respondent had discharged the burden of establishing whether it is more probable than not that the appellant had acted dishonestly. The Judge recorded that the appellant's representative at the hearing conceded that the initial burden had been discharged by the respondent and consequently she proceeded to consider whether the appellant had provided a credible explanation to address the evidence pointing to dishonesty.

6. The Judge stated that the appellant's explanation was that he had no need to use a proxy because he had a good level of English already because he was educated in English in India, and he had passed the English language requirement to enable him to enter the UK. The Judge balanced against this the fact the appellant failed the reading module of an International English Testing System (IELTS) test in May 2012 and knew he had limited time to provide evidence of a pass for his application. In light of these circumstances, the Judge found the appellant had made the decision to use a proxy for his test and concluded that the detailed evidence adduced by the appellant regarding his attendance at the TOEIC test was insufficient to dissuade her from this conclusion.

7. The Judge found the appellant did not meet the requirements of the Immigration Rules having sought to rely on fraudulent evidence to obtain leave to remain, that he would not face very significant obstacles to integration on return to India and that the public interest clearly outweighed any factors in his favour in the Article 8 balancing exercise.

The grounds of appeal

8. The appellant sought permission to appeal on the following three, distinct but related grounds:

a. The Judge gave insufficient reasons for her decision;

b. The Judge failed to take into account relevant evidence; and

c. The Judge failed to correctly apply relevant case law.

9. Permission to appeal was granted by Upper Tribunal Judge Kamara in the following terms:

> "The main issue in this human rights appeal was whether the appellant had cheated in a TOEIC test. At first glance the judge's reasons for rejecting the appellant's innocent explanation appear just about adequate but given what is said in ground two regarding matters which went in the appellant's favour which were not considered, it is arguable that the findings were unsafe for the reasons set out in the three grounds."

Analysis and decision

10. The Judge's decision was concise and for ease of reference I set out in full the sections of the decision which represent the Judge's assessment of the appellant's case in response to the respondent's evidence of cheating. The decision states:

> "9. In this appeal the appellant's evidence is that he has no need to use a proxy to take the test because he had a good level of English already. The appellant relies on the fact that he had been educated in English in India. He has also passed English language requirements to enable him to enter the UK.
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> 10. Balanced against this however is the appellant's evidence that on 19 May 2012 he sat an International English Language Testing System (IELTS) test but did not score sufficiently in his reading module and therefore had to take another test. This is what led him to take the TOIEC test on 19 July 2012. I find that, having failed (even if by only 0.5) the IELTS test, and knowing that he was limited in time to provide evidence of a pass that the appellant made the decision to use a proxy.
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> 11. Although the appellant has provided detailed evidence regarding his attendance at the TOIEC test I am not persuaded that this is sufficient in itself to dissuade me from the conclusion that he used a proxy test taker, particularly given my findings above. "

11. The Judge then proceeds to recite Headnote [4] of Varkey & Joseph (ETS - Hidden rooms) [2024] UKUT 00142 (IAC) which sets out a number of ways by which a TOEIC fraud may have been perpetrated, before the Judge concluded that she was satisfied the respondent had satisfied the burden of proof to persuade her that the appellant submitted a fraudulently obtained test certificate.

12. Although drafted as three distinct grounds, the main aspect of the appellant's challenge to the Judge's decision is that there is inadequate reasoning provided for him to understand why he lost his appeal and what the Judge made of the evidence he adduced in support of his appeal. It was submitted that the inadequacy of the reasoning gave rise to concerns

about whether certain pieces of evidence had even been considered in the decision making process.

13. It is well established that a Judge's reasons provided in a decision may be short and still adequate. Providing concise reasons which are focused on the key issues in dispute is to be encouraged. As set out in the Practice Direction from the Senior President of Tribunals: 'Reasons for decisions' (4 June 2024) ('the Practice Direction'):

> "5. ….To be adequate, the reasons for a judicial decision must explain to the parties why they have won and lost. The reasons must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the main issues in dispute. They must always enable an appellate body to understand why the decision was reached, so that it is able to assess whether the decision involved the making of an error on a point of law.
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> 6. Providing adequate reasons does not usually require the First-tier Tribunal to identify all of the evidence relied upon in reaching its findings of fact, to elaborate at length its conclusions on any issue of law, or to express every step of its reasoning. The reasons provided for any decision should be proportionate, not only to the resources of the Tribunal, but to the significance and complexity of the issues that have to be decided. Reasons need refer only to the main issues and evidence in dispute, and explain how those issues essential to the Tribunal's conclusion have been resolved."

14. I find that the Judge has produced a concise decision which adopts the current approach of the First-tier Tribunal to decision writing, in compliance with the Practice Direction, to focus on the principal issues in dispute.

15. I reject the appellant's assertion that it is *"completely unclear what findings are being referred to"* when the Judge refers to *"my findings above"* at [11] of the decision. In the context of this decision, and in the absence of a reference to a specific paragraph number, I find the Judge must be referring to the findings made in the paragraph immediately preceding; where she states that she finds the appellant decided to use a proxy having recently failed the IELTS test and having limited time to provide evidence of a pass. In reality, the matters set out at [10] are the only true findings the Judge had made by this point in the decision and at [11] she must have been referring to this when she refers to *"my findings above"*.

16. I also reject Mr Turner's submission made at the hearing that it was apparent the Judge was *"overwhelmed"* by Varkey. In no sense can it be inferred from the decision that the Judge was unaware of the recent decision of Varkey, what it said and what it meant for the appellant's appeal. The Judge's approach to the decision-making in the appellant's appeal was in line with Varkey whereby her starting point was to consider whether the respondent had discharged the burden establishing whether it is more probable than not that the individual acted dishonestly. Having recorded that the appellant accepted a prima facie case had been presented by the respondent, the Judge then proceeded to assess the

appellant's answer to the respondent's case. The decision suggests that the Judge's assessment of the appellant's case was that it amounted to little more than a denial that he cheated and that he had no motive to cheat having been educated in English in India.

17. Where I find the appellant's challenge has more merit is in relation to the adequacy of the Judge's reasoning, in particular in relation to the expert evidence adduced by the appellant.

18. At [114] of Varkey it states:

> "The parties agree that a Tribunal must consider the evidence before it as a whole and the decision will be fact sensitive. In reaching its decision, **the Tribunal must survey the wide canvas of evidence before it**. The factual determination must be reached on the basis of all available materials, and **the Tribunal must consider each piece of evidence in the context of all the other evidence**."

19. Whilst the Upper Tribunal emphasised the need for a fact sensitive analysis to be undertaken and for each piece of evidence to be considered, this of course does not equate to having to identify and make findings on each piece of evidence. Although in doing so, the parties would be left in no doubt that each piece of evidence had been considered by the Judge, in many cases such an approach would be neither practical nor proportionate, and as directly stated in the Practice Direction at [6], is not required. However, I find that there may be some pieces of evidence which logically call for direct comment given the potential relevance and significance of that evidence to the key disputed issues.

20. In support of his appeal before the First-tier Tribunal the appellant adduced a initial bundle of 43 pages; a supplemental bundle of 11 pages which included email correspondence requesting the appellant's voice recording; and a report of Christopher Stanbury dated 11 March 2023 commissioned by the appellant on the instructions of his legal representatives.

21. Mr Stanbury's report is 63 pages in length, although a number of pages relate to Mr Stanbury's experience and qualifications and generic matters which do not directly relate to the disputed issues.

22. It is noted that Mr Stanbury's instructions summarised at [2.1] of his report requested that he comment on whether certain matters were possible. In this regard I remind myself of observations of this Tribunal in Varkey at [108] where it states:

> "….The general conclusions reached by the Tribunal in *DK and RK* are not in our judgment in any way undermined by the evidence of Mr Shury and Mr Stanbury. We are left in no doubt that in general, there was widespread cheating and test centres adopted the less sophisticated methods available of manipulating test results, working in collusion with candidates. It is possible that another method was adopted by a test centre but **an appeal is not determined on what is possible**. **That something is possible is not to say it is probable**. The question for a

> Tribunal is whether it is more likely than not, that the particular appellant they are considering in the case before them cheated."

23. At [131] of Varkey it states:

> "….Although we accept the opinions expressed by Mr Stanbury regarding matters that are within his expertise, the difficulty with much of the evidence of Mr Stanbury is that he is prone to speculation. His opinion is based upon **what he considers to be possible**. He accepts however that he did not know what was actually happening at test centres in 2012. Any opinion expressed by him as to what the LCSS did strays beyond his knowledge or expertise. It is not for him to speculate as to what may have happened to any recording made."

24. It is entirely possible that, having regard to these and other observations of the Upper Tribunal in Varkey regarding the evidence of Mr Stanbury, the Judge considered the expert's evidence and determined that it took the appellant's case no further. The difficulty I have is that, apart from recording that the report was before the Judge at [4] of the decision, there is no further reference to this evidence in the decision at any point.

25. A useful summary of the settled law in respect of the error of law jurisdiction is provided at [26] of Ullah v Secretary of State for the Home Department [2024] EWCA Civ 201 which includes guidance that, inter alia, where a relevant point was not expressly mentioned by the First-tier Tribunal, the Upper Tribunal should be slow to infer it had not been taken into account; and, that the issues for determination and the basis upon which the First-tier Tribunal reaches its decision on those issues may be set out directly or by inference.

26. The Judge states at [11] that *"Although, the appellant has provided detailed evidence regading his attendance at the TOEIC test I am not persuaded that this is sufficient in itself to dissuade me from the conclusion he used a proxy tester".* This statement arguably addresses what the Judge made of the appellant's oral evidence; and that she regarded it as insufficient to address the respondent's case. However, I am unable to infer from this statement that it also addresses the Judge's assessment of the expert evidence. It is reasonable to characterise the expert evidence as going beyond *"evidence regarding his attendance".*

27. It was Mr Turner's submission at the hearing that it had to be questioned whether the Judge had even read the expert's report.

28. I have regard to the length of and detail in the expert's report and that, unlike the report before the Upper Tribunal in Varkey, it was focussed on the circumstances of this appellant's English test. I also take into account the importance of this matter for the appellant and the implications of a finding of dishonesty for the appellant, in particular in relation to future immigration applications. If the Judge determined that the expert's report did not advance the appellant's case, he was entitled to know why. I find that I am unable to infer from the decision that the Judge had given the evidence of Mr Stanbury proper consideration.

29. In addition to the expert's report the appellant also challenges the failure by the Judge to assess the appellant's account provided in various witness statement, his oral evidence at the hearing, his *"proactive attitude in requesting his voice recordings from ETS"*, and his character reference letters.

30. I find that it is reasonable to infer from the decision that the Judge had considered the appellant's account from the various witness statements by reference to the Judge's summary of the appellant's lack of motive for cheating referred to at [9], and by reference to his *"detailed evidence regarding his attendance at the TOEIC test"* at [11]. I find that no error is made by the Judge in this regard.

31. Further, it is difficult to see how the character references provided could advance the appellant's case. Those providing the character references may well believe the appellant to be the sort of person who was unlikely to cheat, but they do not have any direct knowledge of what actually happened. However, the failure to make specific reference to these matters again gives rise to concerns about whether this evidence had been considered and I accept that it may have been helpful for the Judge to refer to this evidence briefly. In addition, in the context of a matter where his honesty has been put into question and his appeal dismissed, it may have been helpful for the Judge to make a specific finding on the appellant's oral evidence and his proactive approach to obtaining the voice recordings. However, I am not persuaded the failure of the Judge to make specific reference to these matters would in themselves amount to a material error of law.

32. Where I find the decision required further reasoning was in respect of the expert evidence and what the Judge made of. It was an important part of the 'wide canvas of evidence' before the Judge. I find that the failure to refer to the expert evidence of Mr Stanbury in the decision is a material error of law.

33. In view of the limited specific findings made by the Judge, the decision should be set aside and remitted to the First-tier Tribunal to be re-heard.

34. I retain the finding at [7] of the decision, based on the appellant's concession in the First-tier Tribunal, that the respondent's evidence established a prima facie case for the appellant to answer.

Notice of Decision

The appellant's appeal is allowed. The decision of Judge Gibbs involved the making of an error of law and is set aside. The appeal is to be remitted to be heard by a Judge other than Judge Gibbs.

Sarah Grey

Judge of the Upper Tribunal
Immigration and Asylum Chamber

21 November 2024