Neutral Citation Number: [2022] EWCA Civ 741

CA/2022/000297

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)
UPPER TRIBUNAL JUDGE MCWILLIAMS
Appeal Number: HU/03743/2019

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday 27 May 2022

Before :

LADY JUSTICE MACUR
LORD JUSTICE PETER JACKSON
and
LADY JUSTICE ANDREWS

- -

Between :

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Appellant**
- and -	
HALIMA AKTER AND OTHERS	**Respondent**

Zane Malik QC (instructed by **Government Legal Department**) for the **Appellant**
Russell Wilcox (instructed by **Thompson and Co Solicitors**) for the **Respondent**

Hearing date : Thursday 12 May 2022

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Approved Judgment

This Judgment was handed down remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10.30 in the morning, on Friday 27 May 2022.

Lady Justice Macur:

Introduction.

1. This is an appeal by the Secretary of State for the Home Department ("SSHD") against the decisions of Upper Tribunal Judge McWilliams ("UTJ") on 3rd February 2020 setting aside the First Tier Tribunal ("FTT") decision which had dismissed Halima Akter's ("HA") appeal against the decision to refuse her Article 8 ECHR claim for leave to remain, and subsequently, on 27th April 2020, substituting a fresh decision allowing HA's underlying appeal.

2. The issue before the FTT had been focused upon a dispute as to the validity of a Test of English for International Communication ('TOEIC') certificate obtained from Educational Testing Service ('ETS') and submitted in support of HA's application to extend her student visa. The background to the many authorities dealing with the production of alleged fraudulent TOEIC certificates is helpfully contained in paragraphs [5] to [14], [61] to [68] and [79] to [80] in *DK and RK (ETS: SSHD evidence, proof*) *India* [2022] UKUT 112 (IAC) (referred to subsequently as "*DK and RK (2)"*) and is not repeated herein.

3. HA relied upon an All-Party Parliamentary Group report on TOEIC ('the APPG report') dated 18th July 2019 to undermine the SSHD's so called 'generic' evidence, including the expert report of Professor French, the 'look up tool' which identified her test result as 'invalid' and the Project Façade criminal investigation into Queensway College, which was relied upon by the SSHD to satisfy the evidential burden of establishing fraud. The FTT Judge, Judge Watson, considered the opinions and recommendations of the APPG report to bear "little evidential weight" but said he bore "carefully" in mind the report's comments regarding the expert evidence. Notwithstanding, the FTT found that the SSHD had satisfied the evidential burden and, in all the circumstances he described, proceeded to determine the TOEIC certificate to be fraudulent.

4. The only ground of appeal considered by the UTJ was that asserting the FTT's inadequate regard for the findings of the APPG Report. The UTJ's decision was predicated on the basis that, albeit it had not been subject to judicial scrutiny, the evidential weight of the APPG report "is significant". Consequently, the SSHD had "not discharged the evidential burden of proving that the TOEIC certificate was procured by dishonesty…It follows that there was no need for the judge to consider whether [HA] had raised an innocent explanation."

5. At the conclusion of the hearing, we announced that we allowed the appeal with reasons to follow. These are my reasons to join with my Lord and my Lady in that decision.

Background Facts

6. HA is a citizen of Bangladesh. She arrived in the UK on 10 October 2010 with entry clearance as a Tier 4 (Student) visa valid until 30 June 2013. On 2 December 2010, her husband, Ashiquer Rahman was granted entry clearance as her dependent. Their daughter was born in the UK on 27 April 2016.

7. HA was granted a further Tier 4 (General) student visa with leave to remain until 29 December 2014 following an application submitted on 12 June 2013. Her application included a pass certificate in the TOEIC from ETS. Her leave to remain was renewed.

8. However, on 24 July 2014, SSHD served HA with an IS.151A notice of administrative removal on the basis that her leave to remain had been obtained by deception. That is, SSHD was satisfied on information provided by ETS that the TOEIC test had been sat by a proxy and the test was invalidated.

9. HA was refused permission judicially to review the SSHD decision on 16 February 2016. On 24 June 2016, a further removal notice was served.

10. On 20 July 2016, HA made an application for leave to remain relying upon her private and family life under Article 8 of the ECHR, which SSHD refused and certified as clearly unfounded on 18 October 2016. On 12 December 2016, that decision to certify was challenged by way of judicial review and was compromised on 1 November 2018 by SSHD's agreement to withdraw and reconsider the 20 July 2016 application. Upon doing so, in a decision dated 29 January 2019 pursuant to paragraph 276ADE(1)(i) and S-LTR4.2 (Appendix FM) of the Immigration Rules, the SSHD maintained her refusal based on HA's deception in relation to the TOEIC certificate.

11. HA sought permission to appeal to the UT. A different FTT judge considered that FTTJ Watson was entitled to find that the SSHD had discharged the initial evidential burden, and his reasoning in rejecting HA's "innocent explanation" was "cogent and open to him on the evidence." However:

> "…the Judge did appear to make a factual error in respect of the First Appellant' degree certificate from Bangladesh… He referred to this as a "significant discrepancy" and went on to find that "I cannot rely upon the documents that the appellant has produced to establish that she is a well-qualified person with no reason to cheat" (at [11]). … It was clear that the Judge placed significant material weight on this apparent inconsistency, and it led him to dismiss a number of documents in evidence. Notwithstanding the other findings which informed the Judge's conclusion that the TOEIC had been obtained fraudulently, this apparent error was a sufficient importance to the outcome that it constituted an arguable error of law.
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> As such, the grounds disclosed an arguable error of law and permission to appeal is granted. Despite my reservations about the other grounds, all may be argued."

12. The UT heard the appeal on 20 January 2020 and set aside the FTT's decision on 3 February 2020. UT Judge McWilliam's sole reason for setting aside the FTT decision was that the FTT Judge had failed adequately, or at all, to engage with the APPG report. Specifically, she held that:

> "17. …The APPG report is capable of undermining the strength of the Respondent's case against the Appellant or at least assists

> the Appellant to raise an innocent explanation. The judge did not properly engage with the report and did not adequately reason why the opinions and recommendations expressed in it were of "little evidential weight."
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> 18. The error is so significant that I set aside the decision of the judge to dismiss the appeal. Whilst, the report has not been subject to judicial scrutiny, its evidential weight, in my view is significant. The Respondent relies on the evidence of Professor French (item 6 of the supplementary bundle) to support his case. However, that evidence is wholly undermined by what the same witness said to the APPG (see the APPG report under the heading "Misuse of advice") namely that his estimate of false positives relied on by the Respondent was qualified and only valid "if the results that ETS had given the Home Office were correct". The APPG concluded that; "But, as we have seen, the reliability of those "results" (the evidence provided by HTS) was questioned by every expert to give evidence, including the three technical experts, making the reliability of the voice recognition software almost irrelevant and casting significant doubt on the usefulness of that statistic so heavily relied upon by the Home Office."

13. The UTJ required further submissions on the consequences of her finding for the overall appeal under Article 8 and set the hearing for 18 March 2020.

14. The SSHD filed an application pursuant to Rule 43 of the Tribunal Procedure (Upper Tribunal) Rules 2008 inviting the UT to set aside its earlier decision on the basis that it was contrary to decided authority, namely, *Secretary of State for the Home Department v Shehzad* [2016] EWCA Civ 615 and *Majumder v Secretary of State for the Home Department* [2016] EWCA Civ 1167, which held that the generic evidence relied on by the SSHD is sufficient to discharge the initial evidential burden of proof. The UT had not taken into account that the APPG had not received evidence from the SSHD, and its report was not akin to judicial scrutiny of evidence.

15. The UTJ dismissed the application on the basis that she had directed herself with reference to *SM and Qadir v SSHD (ETS – Evidence – Burden of Proof)* [2016] UKUT 00229. Consequently, the SSHD conceded that, per *Ahsan v Secretary of State for the Home Department* [2017] EWCA Civ 2009 [2018] HRLR 5, HA's removal from the UK would be incompatible with Article 8. HA's appeal was therefore allowed in a decision promulgated on 27 April 2020.

16. The SSHD sought permission to appeal which was stayed by the UT until after the final determination in *DK and RK (Parliamentary privilege: evidence)* [2021] UKUT 00061 ("*DK and RK (1)*"). On 6 October 2021, the UTJ granted the SSHD permission to appeal to the Court of Appeal.

17. The perfected grounds of appeal asserted that (a) there was no error of law in the FTT's decision, and it was not open to the UT to interfere with it; and (b) the UT's conclusion that the APPG report undermined the SSJD's case as to the fraud to the

extent that it no longer discharged the evidential or legal burden of proof is perverse, inadequately reasoned and wrong in law.

Discussion

18. In *DK and RK (1)* a Presidential panel of the UT (Lane J (P) and UTJ Ockelton (VP)) considered the admissibility of the 'Report of the APPG on TOEIC" dated 18 July 2019. The APPG, which comprised 18 MPs, had heard evidence, including from Professor French, Dr Philip Harrison, and Professor Peter Sommer, who had previously given evidence before the Tribunals upon the reliability of statistical evidence of data supplied by ETS.

19. The UT were clearly of the view that, although the APPG report is not within the scope of Article 9 of the Bill of Rights, the Tribunal would be drawn into the forbidden area of violating Parliamentary privilege. Further, at [22] the opinions of the APPG are "clearly and forcefully expressed" in the report but were opinions to which the UT could have no material regard. Conversely, the transcript of the experts' evidence did not offend those principles.

20. Subsequently, this Court, in *Alam v Secretary of State for the Home Department* [2021] EWCA 1538, considered the reliance placed upon the APPG report on behalf of an aggrieved claimant accused of cheating to achieve his TOEIC certificate by Dove J sitting in the UT.

21. In *Alam*, the APPG Report was first referred to in closing submissions before the UT. Dove J was not provided with the transcripts of evidence and was reliant upon the summary contained within the APPG report. This recorded the three experts to believe the data supplied by ETS to be "questionable" and that Professor French had accepted that the evidence of the low incidence of false positive tests (1%) was only as reliable as the ETS data upon which it was based and had cautioned against using that figure to argue that any particular student had cheated.

22. At [23] of his judgment Dove J said:

> "[A]lthough the subject of dispute and contention after the hearing, the findings of the All-Party Parliamentary Group and the record of the evidence which they received from, for instance, Prof French, questioning the reliability of the generic evidence cannot be overlooked. The evaluation of the generic material and the Group's report is not straightforward, but doing the best that I can it appears that the evidence which the Group received potentially diminishes the weight to be attached to the generic material on the basis that it appears to raise issues which have yet to be forensically explored and definitively concluded upon. Thus, all of these factors have to be placed into the balance in assessing whether or not the respondent has discharged the burden upon her."

23. The transcripts of evidence were made available during the appeal to this Court and were read "without prejudice" as evidence that had not been before the UT. Ultimately, Underhill VP giving the leading judgment of the Court, with whom

Elisabeth Laing LJ and Sir Nigel Davies agreed, considered that the "passages that we saw went no further than the summary given by the APPG and accordingly did not advance the argument."

24. Dove J had proceeded on the basis that it was common ground that the SSHD had satisfied the "first stage" evidential burden upon her and the appellant did not challenge the UT conclusion that she had done so. However, the Appellant's counsel criticised Dove J for understating the effect of the APPG report which, it was said, should have been treated as positively undermining the effect of the generic material which depended on the reliability of ETS data.

25. Underhill LJ concluded that Dove J was entitled to "attach weight to" the submissions on behalf of the SSHD to the effect that there had been no cross-examination of the witnesses, and no evidence from the Home Office or ETS, before the APPG, whereas the so-called 'generic' evidence, including that of Professor French, had been considered and evaluated in a number of decisions of the Court of Appeal and the UT. The appeal was dismissed with the caveat that the Court would not wish its "very case specific reasoning to inhibit any wider analysis that the UT may undertake in the pending appeal of *DK* and *RK*."

26. In *DK and RK (2),* the same presidential panel of the UT as had decided *DK and RK (1)* considered the transcripts of evidence referred to in [23] above, and the oral evidence from an Intelligence Analyst in the Immigration Intelligence Directorate of the Home Office, the person who had devised the 'look up tool' and Professor Sommer. The UT regarded the APPG transcripts of the experts' evidence unfavourably. "The difference between the caution employed by Professor Sommer, in particular, in expert opinions for court use and in what he said at the APPG session is striking"; see [89]. The APPG transcript shows "that those involved were not entirely well informed on the materials already available"; see [90]. The conversation often seemed "to lose its structure and mission"; see [91]. The APPG was not "operating judicially".

27. The UT went on in [92]:

> "Even without all those considerations, however, we cannot find anything in the way of facts in the transcript substantially to undermine the existing evidence adduced by the Secretary of State. The conversation really only expands on the possibility that the evidence could have been different. Professor French and Dr Harrison adhere to their previous assessments. Professor Sommer strengthens his opposition to the Home Office, but without adducing any factual or evidential basis justifying what appears to be a change of opinion about the general reliability of the evidence: and even if it is not a change of opinion, it would be clearly wrong for us to regard what he said there as in any way contradicting or superseding his evidence before us."

28. After analysing the evidence in [103] to [125] the UT concluded that:

> "127. 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 uncontradicted by credible evidence, unexplained, and not the subject of any material undermining its effect in the individual case, it is in our judgment amply sufficient to prove that fact on the balance of probabilities.
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> 128. 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.
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> 129. 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 the dishonesty on the balance of probabilities."

29. I do not accept Mr Wilcox's initial submission that *DK and RK (2)* has no precedential authority in establishing that the 'generic' evidence relied upon by SSHD in the 'fraud factory' cases is sufficient to satisfy the evidential burden, because it is neither a 'starred' nor a Countries Guidance case. The cases arise from the same factual matrix, "such as the same relationship or the same event or series of events." (See *AA (Somalia) and SSHD* [2007] EWCA Civ 1040, [69]). The judgment in *DK and RK (2)* includes a comprehensive account of the evidence which the UT heard and its analysis of the same and upon which it based its decision. That is, the UT in *DK and RK (2)* demonstrably undertook the forensic examination and reached the definitive conclusions that were not open to Dove J upon the evidence before him in *Alam*. There would need to be good reason, which would inevitably mean substantial fresh evidence, for another UT to revisit and overturn the determination. This is not a situation, as Mr Wilcox suggested on behalf of HA, in which different Tribunals could reasonably reach different conclusions upon the same factual matrix.

30. I do not regard *DK and RK (2)* to be inconsistent with *Alam* on the issue of admissibility. Counsel for the appellant in *Alam* did not appeal Dove J's determination that the evidential burden upon the SSHD was satisfied. He relied upon points derived from the summary of the evidence of the experts upon which to base his submissions, and not the opinions of the APPG upon the evidence. No objection was taken by the SSHD to that course, and it did not appear to this Court that his arguments offended against the principle of parliamentary privilege identified by the UT in *DK and RK (1)*; see [19] above.

31. The UT decision in this case simply cannot withstand the criticism levelled against it in the grounds of appeal. The UTJ describes the Report as having "significant evidential weight", and specifically relies upon the conclusions of the APPG regarding

the reliability of expert evidence; see [11] above. She does not otherwise engage directly with the evidence of the experts and would be under the same disadvantage as Dove J in *Alam* in doing so.

32. In any event, I consider that *DK and RK (2)* is authoritative in this regard. The evidence relied upon by SSHD in HA's case was sufficient to discharge the evidential burden, and there is a case for HA to answer.

33. At the outset of the hearing, Mr Zane Malik QC, on behalf of the SSHD, conceded that, if this Court allowed the appeal and set aside the decision of the UTJ, then the case should be remitted to the UT to hear the other arguable grounds of appeal based on alleged errors of law arising from the FTT's decision. Mr Wilcox initially suggested that the UT decision could be 'upheld' on alternative grounds, and that this Court should remake the decision accordingly, but I regard that would be an unsatisfactory exercise in the circumstances of this case. The FTT itself granted permission to appeal on the basis of an apparent misapprehension by the FTTJ concerning HA's qualifications: see paragraph 11 above. Whether that matter was of sufficient significance to amount an error of law requiring the UT to intervene has never been determined, because the UTJ dealt only with the issue of the APPG report. HA is now entitled to that determination, which is properly a matter for the specialist Tribunal.

Conclusion:

34. The decision of the UT should be set aside, and the case remitted for rehearing before another UT Judge. The grounds of appeal that are to be remitted were recast by Mr Wilcox after we announced that the outcome of the appeal. Namely, in summary, that it is arguable that the FTT fell into error of law: (i) by requiring HA to prove that her TOEIC test was not invalidated by the use of a proxy and thereby effectively reversed the burden of proof and/or applied the wrong test: and (ii) made an inadequate assessment and analysis of HA's evidence, which undermined the SSHD's case. The argument that appeared at paragraph 11 of the original grounds of appeal, namely that the FTJ had erred in giving little evidential weight to the opinions and recommendations of the APPG report, is no longer available to HA in the light of our decision.

Lord Justice Peter Jackson:

35. I agree.

Lady Justice Andrews:

36. I also agree.