IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: UI-2021-001752
On appeal from PA/50510/2020
[IA/00245/2020]

THE IMMIGRATION ACTS

Heard at Field House
On 9 August 2022
Extempore decision

Decision & Reasons Promulgated
On the 25 October 2022

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRK (BANGLADESH)
(ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer
For the Respondent: Mr R Spurling, Counsel instructed by Hunter Stone Law

DECISION AND REASONS

1. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Cameron ("the judge") promulgated on 12 July 2021. The judge allowed an appeal by the appellant before the First-tier Tribunal against the refusal of his asylum and humanitarian protection claim dated 22 June 2020.

2. In this judgment I will refer to the appellant before the First-tier Tribunal, who is the respondent to these proceedings, as "the claimant".

Factual background

3. The claimant is a citizen of Bangladesh born in January 1982. He arrived in the United Kingdom with leave as a student in 2011, which was renewed in the that capacity until 10 January 2014. In an application for an extension of his leave during that period, the claimant relied on a Test of English for International Communication ("TOEIC") certificate in respect of an English speaking and writing test he claimed to have attended and completed at the London College of Media and Technology on 22 August 2012.

4. At the expiry of his leave in January 2014, the claimant did not leave the United Kingdom, and was encountered by enforcement officials on 1 November 2019. On 11 December 2019, he claimed asylum. That claim was refused on 22 June 2020, and it was that refusal decision that was under appeal before the judge.

5. In light of the issues that are relevant in this appeal, the details of the claimant's asylum claim are of marginal relevance. It will be sufficient simply to state the following. The claimant's case was that he was a member of the Bangladesh Nationalist Party ("the BNP"), and, as such, was at risk of being persecuted by the Awami League upon his return to Bangladesh.

6. As part of the decision refusing the claim for asylum, the Secretary of State alleged that the TOEIC certificate previously relied upon by the claimant had been obtained by deception through the use of a proxy test-taker. The Secretary of State concluded that the claimant's use of a proxy in the TOEIC test was a factor adversely affecting his credibility for the purposes of section 8(2)(a) and (b) of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 ("the 2004 Act"). Those provisions provide that actions that were likely to have misled or concealed information were factors that should be taken into account by a decision-maker as adversely affecting the credibility of a claimant.

7. The claimant appealed to the First-tier Tribunal under section 82 of the Nationality, Immigration and Asylum Act 2002. The hearing before the judge took place on 20 April 2021, but unfortunately it was unable to complete that day. The judge made provision for post-hearing written submissions to be exchanged by the parties, which took place very shortly afterwards. By a decision dated 12 July 2021, the judge allowed the appeal. In his decision, the judge summarised the claimant's case and the evidence that he relied upon to establish it at some length.

8. At [50] of the decision, the judge addressed the TOEIC issue. He set out the evidence relied upon by the Secretary of State. As is common in TOEIC cases, that evidence falls into two categories. First, there was the so-called 'generic' evidence which is relied upon in all cases of this nature by the Secretary of State. Secondly, there was evidence specific to this claimant which was said to link the allegations concerning the TOEIC certificate to the conduct of the claimant individually.

9. Having set out the evidential foundation of the Secretary of State's TOEIC-based allegations, the judge summarised what were then the leading authorities on the issue from [54] to [58]. The judge outlined the appellant's evidence at [59] and following. In his evidence, the claimant had given a description of attending the

test on the day in question and described what took place during the process. His evidence as recorded by the judge at [61] was that he had not used a proxy test taker and that he believed to have been a victim of poor practices on the part of the college and on the part of the Home Office.

10. The judge had been referred to a report by the All-Party Parliamentary Group Report on TOEIC. That is a cross-party group assembled by Members of Parliament to address what have been described as significant concerns with the manner in which the Secretary of State has advanced TOEIC-based allegations against those said to have cheated in English language tests. The judge said this at [66]:

> "66. The Parliamentary report concludes that there were fundamental flaws in the evidence provided by the respondent and appears to indicate that some expert evidence was ignored.
>
> 67. Within the recommendations they state that those accused of cheating should be allowed to sit a further English test and that if they pass this their previous immigration status should be restored."

11. The judge said that he had taken note of the decision in *DK and RK (Parliamentary privilege; evidence)* [2021] UKUT 00061 (IAC). Although the judge did not quote any extracts from that decision, which I shall call *DK and RK (No 1)*, it will be convenient at this point to set out some of the operative conclusions of that Presidential panel insofar as they related to this issue:

> "15. Although the Upper Tribunal is not bound by formal rules of evidence, it cannot act in such a way as to violate Parliamentary privilege, whether that be to interfere with free speech in Parliament or by reference to the separation of powers doctrine. The Tribunal cannot interfere with or criticise proceedings of the legislature.
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> 16. Were the APPG report to be admitted, we are in no doubt that the Tribunal would be drawn into this forbidden area. The views of the APPG about the accuracy or otherwise of what was said to the Home Affairs Select Committee and the Public Accounts Committee is an integral aspect of the APPG report. They serve to inform the overall conclusions of the Group."

12. The judge recorded submissions that had been advanced on behalf of the claimant that the evidence relied upon by the Secretary of State was not sufficient to discharge what was then regarded to be the initial evidential burden faced by the Secretary of State when seeking to make allegations of this nature, in light of the APPG Report. The judge also recorded that the claimant had submitted that the TOEIC analysis in the refusal decision had been included as something of an afterthought.

13. The judge then reached findings of fact that the claimant had not cheated in the English language test on 12 August 2012. The operative findings reached by the judge were expressed by reference to the contents of the APPG Report and other Parliamentary materials:

> "77. After taking into account the most recent reports from National Audit Office Investigation Report dated 24 May 2019, the All-Party Parliamentary Report issued on 18 July 2019 and the House of Commons Committee of Public Accounts Report dated 9 September 2019 I am not satisfied that the respondent has, given those concerns been able to discharge their burden and I am not satisfied that the respondent has been able to show on a balance of probabilities that the appellant utilised deception when submitting the TOEIC certificate.
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> 78. The respondent has raised the issue of deception within the protection claim however for the avoidance of doubt I am not satisfied that the respondent has even on a balance of probabilities, if that were the test rather than the lower burden in relation to protection claims, is shown that the appellant did undertake the English language test by way of a proxy taker."

14. At [85] the judge went on to say:

> "85. The weight of that adverse credibility finding must be viewed in light of all the other evidence. It is clear that the respondent accepts that the appellant was a member of the BNP in Bangladesh and also that he has taken part in activities in this country. The respondent states that in their view this was not sufficient to bring him to the adverse attention of the authorities in Bangladesh."

For present purposes it is not necessary to outline the remaining analysis conducted by the judge. The judge allowed the appeal on asylum and human rights grounds.

Grounds of appeal

15. There is a single ground of appeal before the Upper Tribunal, namely that the judge erred in law by taking into account the APPG Report and the National Audit Office Report to find against the Secretary of State. Permission to appeal was granted by First-tier Tribunal Judge Povey on the basis that:

> "It is arguable that the Judge mis-applied *DK and RK (No 1)*, wherein the Upper Tribunal found that the reports of the APPG, the NAO and Parliamentary Committees were not admissible and not entitled to be given weight in Tribunal proceedings (by reason of a combination of factors including Parliamentary privilege, the separation of powers and the principles of evidence, at [7] to [21])."

Submissions

16. I should preface this part of my discussion of the submissions by recording that Mr Spurling, who also appeared below, realistically accepts that it was an error for the judge to ascribe significance to the APPG report on TOEIC in the way that he did. The sole issue is whether that was a material error.

17. Mr Melvin submits that the judge reached his credibility findings, at least in part, on his erroneous rejection of the Secretary of State's TOEIC-based allegations. Not only had the decision letter expressly relied upon the TOEIC allegations

pursuant to section 8 of the 2004 Act. The judge also recorded at [85] that his credibility findings were reached by reference to the evidence in the ground. That being so, submitted Mr Melvin, this Tribunal cannot be confident that the clear error of law which infected the judge's analysis in relation to the TOEIC issue did not bleed across in some way to those broader credibility findings.

18. On behalf of the claimant, Mr Spurling submits that the error was immaterial. He began by drawing attention to the minimal emphasis placed by the Secretary of State on the overall TOEIC issue at the hearing before the First-tier Tribunal. He submitted that the respondent's review did not refer to the TOEIC issue at all, and it was not until 23 March 2021 that the Secretary of State even provided the evidence upon which she was later to rely concerning the TOEIC allegations. Further, the presenting officer's submissions and cross-examination of the claimant were, in Mr Spurling's submission, limited. According to Mr Spurling's note of the hearing before the judge, the presenting officer before the First-tier Tribunal simply asked the appellant as to how he paid for the TOEIC test but did not challenge him in relation to any aspects of his account.

19. That being so, there was no engagement with the broader case advanced by the claimant concerning the TOEIC-based allegations, and it is against that background that one must approach the judge's remaining findings of fact. This was a judge, submits Mr Spurling, who did precisely what any first instance judge is supposed to do, namely consider all the evidence in the case, reflect on the submissions that had been advanced, as this judge did pursuant to the detailed written submissions that were provided after the hearing, and reach findings of fact based upon those submissions and the evidence heard. That being so, this Tribunal should approach the first instance findings of fact with the restraint with which appellate courts and tribunals should approach such findings.

20. Moreover, Mr Spurling highlighted the successor case to *DK and RK (No 1)*, namely *DK & RK (ETS: SSHD evidence; proof) India* [2022] UKUT 00112 (IAC). I shall call that case *DK and RK (No 2)*. In Mr Spurling's submission, the import of *DK and RK (No 2)* is not such as to conclude that no individual would ever be able successfully to challenge an allegation brought by the Secretary of State. It would be possible, on his submission, for an individual, consistently with *DK and RK (No 2)*, to submit that they took the test genuinely without the use of a proxy and to provide credible evidence in that regard.

Discussion

21. As I have already noted, it was common ground that the judge fell into error by ascribing any significance to the opinions expressed in the APPG Report and the National Audit Office report to which he referred at [77]. It is important for this Tribunal to endorse that common ground. At [77], the judge did not engage in any of his own analysis with the Secretary of State's so-called generic evidence, but rather anchored his own critical approach to that evidence to the opinions and findings of the Parliamentary materials. The APPG on TOEIC reached findings and expressed opinions that are protected by Parliamentary privilege.

22. As this Tribunal held in *DK and RK (No 1)*, "were the APPG Report to be admitted, we are in no doubt that the Tribunal would be drawn into this forbidden area". It is not clear, in my judgment and with respect to the judge, how he purported to have followed *DK and RK (No 1)* as he did at [65] of his decision, yet simultaneously to ascribe what appears to have been determinative significance

to the inadmissible opinions of the relevant Parliamentary bodies the judge summarised at [77]. That was a clear error of law.

23. I therefore turn to Mr Spurling's submissions that this was an immaterial error. Mr Spurling was right to submit that if, one were to omit [77] and [78] from the judge's decision, there could be no complaint about the judge's findings of fact. That is of course true. However, it is precisely the presence of [77] and [78] which has led to this appeal before the Upper Tribunal. In my judgment, it is clear that the judge rightly approached all matters of credibility by reference to the evidence in the case in the round. So much is clear from [85], as set out above.

24. In my judgment it is nothing to the point that there was minimal testing of the evidence before the First-tier Tribunal. First, there was no suggestion that the presenting officer had not relied on the Secretary of State's refusal letter in which the TOEIC allegations were made.

25. Secondly, it is hardly surprising that there was not a greater challenge to the claimant's narrative concerning his attendance at the test centre. The evidence which the Secretary of State relies upon, and indeed the footage as revealed in the BBC Panorama documentary which catalysed the TOEIC issues being matters of such extensive litigation before this Tribunal, entailed proxy test takers accompanying the test candidates to the test centre, in circumstances in which the candidates were complicit in the fraud. Accordingly, any challenges at the hearing as to whether the claimant attended the test centre would be unlikely to yield any fruit, since complicit participants would have attended the test centres alongside the proxy test takers.

26. Mr Spurling also submits that pursuant to the so-called evidential burden of proof 'pendulum', which at the time of the hearing before the judge was understood to swing from the Secretary of State to the appellant (or in the present proceedings claimant), and back again, the judge performed an analysis that was consistent with the approach he was required to take. In my judgment, that the judge approached part of his analysis in a manner consistent with the then understanding of the law is incapable of remedying the overall error into which the judge fell. First, *DK and RK (No 2)* clarified the law in relation to the so-called burden of proof pendulum. Having set out the authorities from which that doctrine was derived, this Tribunal said the following at *DK and RK (No 2)*,[46]: "We are far from confident that the relevant passage in *Shen*, set out above, fully justifies this excursion into the varied metaphors of pendulum, spotlight, and boomerang."

27. *DK and RK (No 2)* went on at [47] to state that:

> "There is no sense in which procedurally a case passes backwards and forwards between the parties, giving either of them new chances or even tactical obligations to meet the evidence so far adduced by their opponent: on the contrary, each side has one opportunity only to produce all the evidence it considers relevant to the case. Further, the burden of proof does not shift from one side to the other during the course of a trial. The burden of proof is fixed by law according to the issue under examination. If it were not so, parties would not know in advance what evidence would or might be necessary to establish their cases."

Although I accept Mr Spurling's submission that the findings of fact in *DK and RK (No 2)* postdate this judge's factual analysis, the declaratory nature of the doctrine of precedent in this jurisdiction is such that the judge did fall into error, albeit at no fault of his own, by following the pre-*DK and RK (No 2)* authorities. The consequence of that is that the judge's erroneous reliance at [77] on the APPG Report cannot be said to have been cured by the "pendulum" part of his analysis.

28. The overall question which the judge should have addressed was: has the Secretary of State proved to the balance of probability standard that this claimant engaged in the deception as alleged when obtaining the TOEIC certificate? The judge took into account a perverse and irrelevant consideration, namely the opinions set out in the APPG report, breaching Parliamentary privilege in doing so, when concluding that the Secretary of State had not.

29. In my judgment, given the overall view of the claimant's credibility that the judge took at [85] (that is, considering *all* evidence in the round), only one conclusion is merited on the facts of this case, namely that the judge fell into error when determining the credibility of the claimant's asylum claim. That assessment was, for the reasons I have set, out irredeemably tainted. That being so, the only course open to this Tribunal is to set aside the decision of the judge and remit it to the First-tier Tribunal to be reheard by a different judge with no findings of fact preserved.

Anonymity

30. Since these proceedings concern a claim for asylum that is yet to be determined, it is appropriate at this stage to maintain the anonymity order already in force.

Notice of Decision

The appeal is allowed. The decision of Judge Cameron involved the making of an error of law and is set aside with no findings of fact preserved. The case is remitted to the First-tier Tribunal to be heard by a different judge.

Anonymity order made.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Stephen H Smith Date 22 September 2022

Upper Tribunal Judge Stephen Smith