Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: UI-2022-002202
[HU/50236/2020]; IA/01759/2020

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3 October 2022	**On 17 November 2022**

Before

DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MD ZAHIDUL ISLAM
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the appellant: Ms S Cunha, Senior Home Office Presenting Officer
For the respondent: Mr M Biggs, Counsel, instructed by Liberty Legal, Solicitors Practice

DECISION AND REASONS

1. The Secretary of State appeals against the decision for the First-tier Tribunal dated 4 January 2022 allowing Mr Islam's appeal against the decision of the Secretary of State dated 9 July 2020 to refuse his application for leave to remain outside the Immigration Rules on the grounds of his human rights.

2. It is more convenient to refer to the parties as they were before the First-tier Tribunal and I shall therefore refer to Mr Islam as “the appellant” and to the Secretary of State as “the respondent”.

3. No anonymity direction was made by the First-tier Tribunal and a direction has not been sought. I see no reason to make one.

4. The appellant’s immigration history is a matter of record. He is a national Bangladesh who first entered the United Kingdom in October 2009 for the purpose of studies. An application for further leave was refused in September 2014 on the basis the respondent believed the appellant had fraudulently obtained a TOEIC certificate which he had submitted in support of his application. These proceedings came about as a result of an application for leave which the appellant made on 21 February 2020. In his application the appellant relied on his private life and he expressly denied having obtained his TOE IC certificate by means of fraud.

5. The First-tier Tribunal judge heard evidence from the appellant and his cousin, Mr Ahmed. Applying the approach to similar cases explained in the case of SM and Qadir (ETS – Evidence – Burden of Proof) [2016] UKUT 229 (IAC), the judge accepted that the respondent had discharged the initial evidential burden of demonstrating the appellant’s dishonesty as a result of the generic evidence submitted. However, after considering the whole of the evidence with care, he was also satisfied that the appellant had discharged the evidential burden upon him of raising an innocent explanation that he had not been dishonest.

6. The factors the judge took into account in reaching that conclusion included the following. The appellant had sat his TOEIC test more than a year before his leave was due to expire so he had had time to take it again if he failed. The appellant had a considerable amount to lose from being dishonest and was of good character. The appellant struck the judge as a credible and consistent witness. He had explained why he chose to take his test at the PLTC testing centre. He had obtained high-level qualifications in Bangladesh and the United Kingdom and all the courses he had taken had been taught in English. There was evidence he had been working as a staff trainer for McDonald’s prior to taking the test. He had taken and passed IELTS tests. The appellant had queried his test result with PLTC and ETS, although he had not received a reply. The judge also considered Mr Ahmed a credible witness. The judge took account of the guidance in MA (ETS – TOEIC testing) [2016] UKUT 00450 (IAC) that there may well be a number of reasons why a candidate well-versed in the English language might still cheat.

7. The judge concluded that the respondent had failed to establish on the balance of probabilities that the appellant’s prima facie innocent explanation should be rejected and therefore concluded the appellant met the suitability requirements of the Immigration Rules. Coming to that conclusion, the judge took account of a summary of the key findings of the All Party Parliamentary Group report into TOEIC fraud (“the APPG

report"), a House of Commons Public Accounts Committee report and a National Audit Office report.

8. Having concluded the suitability requirements of the rules were satisfied, he went on to reject the claim that there were very significant obstacles to the appellant's integration in Bangladesh. However, as a result of his finding that the appellant had not cheated, he concluded that the decision was disproportionate. In arriving at his conclusion, he noted the judgment of the Court of Appeal in Ahsan v SSHD [2017] EWCA Civ 2009.

9. In seeking permission to appeal, the respondent highlighted the decision of the Upper Tribunal in DK and RK (Parliamentary privilege; evidence) [2021] UKUT 00061 (IAC) ("DK & RK (No 1)") and paragraph [21] of that decision in particular. In essence, the judge had erred by taking into account inadmissible evidence in the form of the APPG report. This error infected the judge's assessment of article 8.

10. Permission to appeal was refused by the First-tier Tribunal, the judge suggesting that the subsequent decision of the Upper Tribunal in DK & RK (ETS: SSHD evidence; proof) India [2022] UKUT 00112 (IAC) ("DK & RK (No 2)"), had confirmed that the APPG report was not inadmissible and what was said to the APPG by those who gave evidence was admissible and may be relevant.

11. The respondent amended her grounds seeking permission to appeal and relied on additional passages from DK & RK (No 2). Permission to appeal was granted by Upper Tribunal Judge Gill on the renewed application. She noted that the judge's reasons for finding the appellant had provided an innocent explanation were not subject to any challenge. However, the judge's reasons for finding the respondent had not established the appellant cheated took account of *the findings* of the APPG report and the other reports, which was arguably contrary to guidance in DK & RK (No 2).

12. I heard submissions as to whether the decision First-tier Tribunal judge contains material errors of law.

13. Ms Cunha began by applying to amend the respondent's grounds of appeal so as to include: (1) an argument that the judge misdirected himself in law by failing to make his assessment by reference to the guidance that there may be a variety of reasons why an individual might choose to cheat despite speaking English, and (2) an argument that the judge's conclusion on proportionality failed to take account of guidance to the effect that little weight attaches to private life formed during precarious residence. Mr Biggs opposed the application.

14. I considered the overriding objective of the Tribunal Procedure (Upper Tribunal) Rules 2008 and refused Ms Cunha's application. No reason had been put forward why the application had not been made earlier in the process and had only been raised at the error of law

hearing. Mr Biggs had not been on notice of the new points and it would not be fair to the appellant to allow him to be taken by surprise. In any event, the new grounds would not make a material difference because they lacked merit. It was clear the judge had directed himself as to the guidance in MA (ETS – TOEIC testing) at [78] and to section 117B of the Nationality, Immigration and Asylum Act 2002 beginning at [108].

15. Ms Cunha proceeded to rely on the written grounds seeking permission to appeal but she also sought to argue that the judge had erred by failing to make a finding that the respondent's evidence was sufficient to raise an issue requiring a response from the appellant. Her next point was that the judge had failed to recognise the evidence of widespread fraud as highlighted by the panel in DK & RK (No 2) at [67]. Finally, she argued the judge had erred by relying on the APPG report and by placing significant weight on it.

16. Mr Biggs responded to Ms Cunha's submissions. He said the judge had made a finding on the initial evidential burden on the respondent. The judge could not have erred by failing to have regard to the decision in DK & RK (No 2) which had not been promulgated at the time of the hearing and which was not a factual precedent in any event. As to Ms Cunha's point about reliance on the APPG report, Mr Biggs relied on the judgment of the Court of Appeal in Alam v SSHD [2021] EWCA Civ 1538, which had been cited to the judge. He argued this was authority for the APPG report being admissible. The court had had regard to DK & RK (No 1). In any event, the issue about Parliamentary privilege did not apply to the other reports relied on by the judge. Mr Biggs reiterated the point noted by Upper Tribunal Judge Gill that the respondent had not challenged the judge's reasoning and findings at [64] to [79] that the appellant had provided an innocent explanation. Therefore, even if the judge had erred by wrongly relying on the APPG, his error could not be material.

17. In reply to Mr Biggs's arguments in reliance on Alam, Ms Cunha pointed out that the Upper Tribunal had examined the evidence before the APPG in DK & RK (No 2) and explained its frailties. The judge's reliance on the evidence was tainted. She agreed that the case was not a factual precedent.

18. I now consider those submissions.

19. In general, it is important to reiterate the need to exercise restraint before interfering with a decision of the First-tier Tribunal. In this regard, I have borne in mind what has been repeatedly stated by the Court of Appeal in recent times: see, for example, KB (Jamaica) v SSHD [2020] EWCA Civ 1385, at [16], UT (Sri Lanka) v SSHD [2019] EWCA Civ 1095, at [19], Herrera v SSHD [2018] EWCA Civ 412, at [18], and MI (Pakistan) v SSHD [2021] EWCA Civ 1711, at [47] and [51]. When analysing a decision of the First-tier Tribunal, it is important to read it sensibly and holistically and to guard against the danger of simply substituting one view for the

legitimate view of another. Perfection is not being sought and there is no obligation to provide the best possible reasons (or indeed reasons for reasons).

20. There is no rationality challenge raised by the respondent in this case.

21. In my respectful opinion, Ms Cunha's first argument does not begin to stand up to scrutiny. The only sensible reading of paragraph [63] of the judge's decision is that he made a clear finding that the respondent had discharged the initial burden of furnishing proof of deception (see Beatson LJ in paragraph [3] of his judgment in the case of SSHD v Shehzad & Anor [2016] EWCA Civ 615). That the judge is reaching a conclusion on this point is abundantly clear from his self-direction at [48], the heading preceding paragraph [50] and the fact, bearing in mind what he says at [49], the judge goes on to consider the appellant's response, beginning at [64].

22. Ms Cunha's point that the judge failed to consider the evidence of widespread fraud in ETS cases is also without merit. Obviously, the judge did not have the benefit of the analysis contained in DK & RK (No 2). He could only decide the appeal on the basis of the evidence before him. He approached that task with care and he considered the so-called generic evidence submitted by the respondent, consisting of the statements of Ms Collings and Mr Millington. He also considered the report of Professor French and a statement by Mr Wardle, a Home Office official. He saw data of tests taken at PTLC on 3 July 2013, the date the appellant is alleged to have cheated in his test.

23. Turning to the issue on which permission was specifically granted, namely whether the judge erred in having regard to the findings of the APPG report, I note that the judge refers to the report's summary findings at [83] and [84] in supporting his conclusion that the respondent had not discharged the legal burden of showing fraud on the part of the appellant. The Upper Tribunal in DK & RK (No 1) found that the only part of the APPG report which was admissible was the verified record of what was said by Professors Sommer and French and Dr Harrison. The judge clearly took account of the summary of the APPG report's findings, which would not be admissible for the reasons explained by the Upper Tribunal and reiterated in DK & RK (No 2) at [25]. The judge accepted the submission made on behalf of the appellant that the Court of Appeal had ruled in Alam that the whole report was admissible. Alam does not appear to have been referred to in DK & RK (No 2).

24. The Alam case was an appeal against the dismissal of a judicial review application in respect of a decision to remove an individual accused of taking his TOEIC test by means of a proxy. The appeal was dismissed. The court rejected the argument that the judge at first instance erred by failing to treat the APPG report as definitively undermining the generic material. The court commented that tribunals

and practitioners might welcome some general guidance on the proper approach to ETS data in the light of the evidence which the three experts witnesses gave to the APPG, anticipating the Upper Tribunal would do so in the pending appeal in DK & RK.

25. The court did not formally consider the point about Parliamentary privilege in Alam because the respondent raised no positive objection to the admissibility of the APPG report. At [85] of his decision, the Judge of the First-tier Tribunal said that the Court of Appeal noted that the APPG report was admissible in proceedings involving allegations of fraudulently obtained TOEIC certificates and the report's admission did not breach Parliamentary privilege. He was referring to the following passage:

> "14. … We might nevertheless have felt obliged to decline to consider ground 1 if it appeared to us that doing so would involve a breach of Parliamentary privilege. But, as already noted, the report of an APPG does not in itself constitute Parliamentary proceedings, and none of the particular submissions in Mr Karim's skeleton argument appeared to us to raise problems of the kind referred to by the Upper Tribunal in *DK and RK*. …"

26. This is at best an indication that admission of the report would not breach Parliamentary privilege. However, I do not need to decide whether in fact the judge did err by considering the APPG report for the following reasons.

27. It is plain from a reading of the decision as a whole that any error on the part of the judge in having regard to inadmissible evidence was not material to the outcome of the appeal. I have reached that conclusion for two main reasons.

28. Firstly, the APPG report was only part of the evidence taken into account by the judge in this section of his decision. If anything, greater weight was placed on the reports of the House of Commons Public Accounts Committee (see [86] and [87]), the National Audit Office report (see [88]) and the Home Affairs Select Committee's Inquiry (see [89]-[91]). These were not privileged. Whilst the expert evidence given to the APPG was subjected to some serious analysis in DK & RK (No 2), it is not possible to say that the judge's own analysis of the evidence which he considered was inadequate. It is probably right that the experts were not questioned by counsel, which was one reason given in DK & RK (No 2) as undermining the evidential value of what the experts had said to the APPG (see [88]). It is also true that the evidence given to the other committees regarding concerns that the test results were correctly attributed to the right people appears to be similar to that given to the APPG which the Upper Tribunal was critical of. However, that is not sufficient to render the judge's whole assessment unsustainable.

29. Secondly, and more significantly, the judge made a clear finding, supported by cogent reasons, that he accepted the oral evidence of the appellant as to the circumstances in which he had (genuinely) taken the

TOEIC test. As said, the respondent did not challenge those findings and the judge was entitled to regard those findings as outweighing any concerns raised by the respondent's generic evidence. Given the strength of his findings about the appellant's "innocent explanation" it is difficult to see how he could have come to any other conclusion than that the respondent had not established fraud.

30. Perhaps the key passage on this point in DK & RK (No 2) is at paragraph [67] which reads as follows:

> "The evidence showing fraudulent activity in a number of ETS centres (including UTC and NLC) is overwhelming. It is clear beyond a doubt that these were institutions for the manufacture of fraudulent qualifications. This conclusion does not show that any individual certificate was obtained fraudulently. But it has an important part in the evaluation of the evidence as a whole, in that it provides the context."

31. It is clear that the Upper Tribunal did not intend to be understood as saying that an appellant could never succeed in an ETS fraud case. Again, at [131] it said,

> "The appellants' cases are that there must have been a "chain of custody" error. They rely on their own assertions about the tests. If credible, and sufficiently comprehensive, such assertions might perhaps, in an individual case, suffice to prevent the Secretary of State establishing dishonesty on the balance of probabilities. In the present cases, however, there are good reasons to disbelieve the appellants' evidence."

32. I find this is a case in which the judge was entitled to find the respondent had not established dishonesty. The respondent's appeal is therefore dismissed and the decision of the judge shall stand.

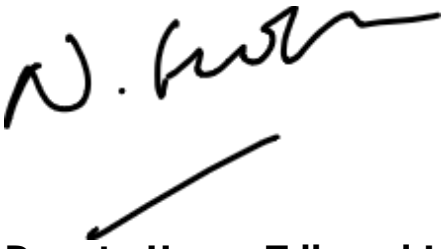
Notice of Decision

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. The appeal to the Upper Tribunal is dismissed and the decision of the First-tier Tribunal shall stand.

3. No anonymity direction.

Signed: Date: 5 October 2022



Deputy Upper Tribunal Judge Froom