IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005269
First-tier Tribunal No: HU/56763/2021
IA/15854/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 27 April 2023

Before

UPPER TRIBUNAL JUDGE SHERIDAN
DEPUTY UPPER TRIBUNAL JUDGE SKINNER

Between

Secretary of State for the Home Department

Appellant

and

Hossain Md Bellal
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Ms Everett, Senior Home Office Presenting Officer
For the Respondent: Mr Biggs, Counsel instructed by Londonium Solicitors

Heard at Field House on 3 March 2023

DECISION AND REASONS

1. This is an appeal by the Secretary of State. However, for convenience, we will refer to the parties as they were designated in the First-tier Tribunal.

2. The respondent is appealing against a decision of Judge of the First-tier Tribunal Beach ("the judge") dated 21 September 2022.

Decision of the First-tier Tribunal

3. The central issue in contention before the judge was whether the appellant cheated on an English-language test taken on 19 March 2013 at Queensway College.

4. The judge wrote a detailed decision that included lengthy quotations from several cases, including the recent Upper Tribunal decision *DK & RK (ETS: SSHD evidence; proof) India* [2022] UKUT 00112 IAC.

5. The judge acknowledged that the respondent had adduced evidence indicating that the appellant engaged in fraud (including evidence from ETS showing that of 89 tests taken at Queensway College on 19 March 2013 20 were deemed questionable and 69 were deemed invalid) but was nonetheless not satisfied that the respondent had discharged the burden of establishing that on the balance of probabilities the appellant had cheated. The judge's reasons for this conclusion are summarised in paragraph 50, where she found that the appellant's evidence had been consistent; that the appellant had provided a cogent explanation of why he chose to take the test at Queensway College; and that the appellant was fluent in English.

Grounds of Appeal

6. The respondent's grounds of appeal make a single submission, which is that the judge erred by failing to have regard to *DK and RK.*

Failure to identify an error of law

7. Given that the judge cited, and set out at length extracts from, *DK and RK*, it plainly is not the case that the judge failed to have regard to *DK and RK*. The appeal therefore cannot succeed on the basis of the grounds as drafted.

8. Before us, Ms Everett sought to reformulate the grounds, arguing that (i) the weight attached by the judge to the respondent's evidence was inconsistent with *DK and RK*; and (ii) the judge misapplied *DK and RK*.

9. Mr Biggs submitted that we should not consider Ms Everett's submissions because they are different to the grounds and the respondent has not made an application to amend the grounds. We agree with Mr Biggs. The grounds make a single argument, which is that the judge failed to consider *DK and RK.* The arguments advanced by Ms Everett are entirely distinct from this.

10. That said, we would in any event reject Ms Everett's arguments. Firstly, subject to irrationality (which was not argued), the weight to attach to evidence is a matter for the judge. Disagreeing with weight is not a basis for finding a judge erred. We therefore do not accept Ms Everett's argument that the judge erred by not attaching sufficient weight, in accordance with *DK and RK,* to the respondent's evidence.

11. Secondly, we do not agree with Ms Everett that the judge misapplied *DK and RK.* The Upper Tribunal in *DK and RK* found that documentary evidence derived from ETS is strong evidence of cheating (in paragraph 129 it is characterised as indicating that cheating is a "highly probable fact"). However, as submitted by Mr Biggs, *DK and RK* also recognises that a fact specific assessment is required where evidence in a particular case can be sufficient to counter the documentary evidence. As this was the approach taken by the judge we do not accept that the judge misapplied *DK and RK*.

Costs

12. Mr Biggs argued that as the respondent's case was hopeless it was unreasonable for her to seek permission to appeal – and then to pursue the appeal - against the judge's decision. He submitted that costs should be awarded to the appellant in accordance with rule 10(3)(d) of the Tribunal Procedure (Upper Tribunal) Rules 2008 which provides for costs to be awarded where a party has acted unreasonably in bringing, defending or conducting proceedings.

13. As explained in *Thapa & Ors (costs: general principles; s 9 review)* [2018] UKUT 54 (IAC), the power under rule 10 to award costs must be exercised with significant restraint. In a passage from *Ridehalgh v Horsefield* [1994] Ch 205 cited with approval in *Thapa*, the acid test for unreasonableness was described as "whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgment but it is not unreasonable." In this case, the grounds were poorly drafted and, even as reformulated by Ms Everett, the respondent's case was weak. However, the respondent's case and grounds in this appeal were not, in our judgment, so egregious as to cross the line into unreasonableness for the purposes of rule 10(3)(d).

14. Further and in any event, rule 10(5) requires an application for costs to be made by a written application to include a schedule of the costs claimed sufficient to allow summary assessment of such costs by the Upper Tribunal. The costs application was including in Mr Biggs' rule 24 response dated some 2 months before the hearing. It did not however include a schedule of costs and he did not have one at the hearing. No explanation was given for this. In light of this procedural failing and the time and cost that would be required in order for us to be in a position to assess costs, we would not have exercised our discretion to award costs. To do so would not have been in accordance with the overriding objective.

15. Accordingly, we refuse Mr Biggs' application for a costs order against the respondent.

Notice of Decision

16. The decision of the First-tier Tribunal did not involve the making of an error of law and stands.

D. Sheridan

Judge of the Upper Tribunal
Immigration and Asylum Chamber

Date: 7.3.2023