Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: UI-2022-004352
HU/56889/2021[IA/16011/2021]
UI-2022-004355
HU/56888/2021[IA/16015/2021]

THE IMMIGRATION ACTS

Heard at Field House IAC
On the 26 January 2023

Decision & Reasons Promulgated
On the 13 February 2023

Before

JUDGE OF THE FIRST-TIER TRIBUNAL MONSON

Between

(1) FARZANA NASIR
(2) MUHAMMAD NASIR KHAN SIRGAROH
(ANOYMITY DIRECTION NOT MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr Jay Gajjar, Counsel instructed by Law Lane Solicitors
For the Respondent: Ms Alex Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

© CROWN COPYRIGHT 2023

1. The appellants appeal against the decision of First-tier Tribunal Judge Hanbury promulgated on 17 June 2022 (“the Decision”). By the Decision, the Judge dismissed the appellant’s appeal against the decision of the respondent dated 21 October 2021 to refuse their human rights claims *inter alia* on the ground that the first appellant had used deception in a previous application for leave to remain by relying on a TOEIC certificate from Educational Testing Service (“ETS”) that she had fraudulently obtained by using a proxy test-taker to take her Speaking test, and so her human rights claim fell for refusal on grounds of suitability under paragraph S-LTR.4.2 of Appendix FM.

Relevant Background

2. The appellants are both nationals of India. The second appellant is the husband of the first appellant, and joined in her appeal to the First-tier Tribunal as her dependant. In the circumstances and for ease of reference, I shall hereafter refer to the first appellant as “the appellant.”

3. The appellant entered the United Kingdom on 29 November 2010 with valid entry clearance as a student until 15 July 2012. She made an in-time application for leave to remain as a student on 4 April 2012. The application was refused on 9 July 2012. On 14 July 2012 the appellant made a second application for leave to remain as a student. The application was refused on 6 November 2012, but on 11 March 2013 the appellants’ appeal was allowed by the First-tier Tribunal. The application was then returned to the Home Office for reconsideration, and on 21 July 2015 the application was refused upon reconsideration.

4. The appellant did not appeal against this refusal, and remained in the UK without leave, as did her husband. On 6 July 2021 the couple applied for leave to remain on family and private life grounds, and also upon medical grounds.

5. In the refusal decision directed to the appellant, the respondent said that she did not qualify for leave to remain under the 10-year private life route because she was satisfied that the appellant made false representations for the purposes of obtaining leave to remain. In an application dated 14 July 2012 she had used an ETS certificate dated 22 February 2012 which, upon checking, ETS confirmed was invalid. On the basis of the information provided to her by ETS, the respondent was satisfied that her certificate was fraudulently obtained and that she had used deception in her application of 14 July 2012. Accordingly, the respondent was satisfied that she had made false representations in a previous application for leave to remain.

6. She also did not meet the requirements of Rule 276ADE(1)(vi), as she had resided in her country of origin, India, for the majority of her life, including her formative years. Furthermore, she was expected to relocate along with her partner and they would be able to assist each other in relocation.

The Hearing Before, and the Decision of, the First-tier Tribunal

7. The appellants' appeal came before Judge Hanbury sitting at Taylor House on 6 January 2022. Mr Shrestha of Law Lane Solicitors appeared on behalf of the appellants. There was no representation on behalf of the respondent.

8. The appellant's bundle for the hearing contained a witness statement from the appellant in which she insisted that she was the genuine test-taker. She accepted that her test may have been identified as one which was fraudulently obtained. However, this was surely a mistake and the respondent must accept that their investigations were not 100% accurate.

9. The appellant then went on to give what she said was her best recollection of what had happened when she had sat the test, and what the test involved. After she had given her account of what was involved in each of the four components of the test, and the time of day when she said she taken each component, she said that she believed the College may have committed "*this fraud*" by exploiting many genuine test-takers. But she had no idea that this was going on at the time.

10. The hearing took place on the Cloud Video Platform. Both appellants gave oral evidence. The appellant, who gave her evidence in English, confirmed that her evidence was true. Her husband gave his evidence in Urdu through the Interpreter. He also adopted his statement as being true.

11. In submissions, Mr Shrestha relied on a skeleton argument that had been drafted by Mr Gajjar on 22 February 2022. In this document, Mr Gajjar submitted that the decision on suitability was unlawful because the appellant had advanced an innocent explanation which met the minimum/basic level of plausibility. Mr Gajjar relied on the fact that the appellant's witness statement contained a detailed account of the test, and that, in his witness statement, her husband confirmed that he had accompanied her to the test, and waited outside, and he also confirmed that his wife had studied for the test. Reliance was also placed on the fact that the appellant had sat an English test before coming to the UK which she had passed, and in respect of which there was no allegation of deception.

12. In his oral submissions, Mr Shrestha addressed the Judge on the implications of DK and RK (ETS evidence, proof) India [2022] UKUT 00112 (IAC), which had not been reported at the time when Mr Gajjar drafted his skeleton argument.

13. The Judge's discussion of the cheating allegation began at paragraph [26]. He said that the first appellant's leave was revoked because the English Language Test Centre where she claimed to have attended was alleged to have allowed her test to be taken by a proxy.

14. At paragraph [27], the Judge said that it had been clarified in the case of DK and RK that the burden rests on the respondent to raise a case to answer. The burden then rests with the appellant to show an innocent explanation. Provided the appellant does that, the respondent has the legal burden of proving that the appellant cheated.

15. At paragraph [29], the Judge said that in DK and RK it was held that mere assertions of ignorance or honesty by those whose results were identified as obtained by proxy were very unlikely to prevent the Secretary of State from showing that, on the balance of probabilities, the stories shown by the documents was the true one, i.e. that the certificates were obtained fraudulently. It remained not merely a probable fact, but a highly probable fact. The Judge then made a reference to the chain of custody and to submissions made by Mr Shrestha. It was open to the appellant to produce credible and sufficiently comprehensive evidence that, on the balance of probabilities, in his case he had established a lack of dishonesty. However, it was noteworthy that, in DK and RK, there were good reasons to disbelieve the appellants' evidence. RK's position was described as "*wholly incredible".*

16. At paragraph [32], the Judge said that the appellant's contention was that, although the events took place a long time ago, both appellants were able to confirm their attendance at the test, they recalled the day in question, having travelled there, and so forth. They completely contradicted the suggestion of fraud, therefore. They relied on what they called a "*chain of custody."* The Judge continued in paragraph [33]:

> "Neither of the above two reported appeal cases appears fundamentally to undermine the respondent's conclusion in this case that, where appropriate evidence has been adduced of the appellant's fraud, it will only be undermined by cogent evidence which contradicts that evidence. Here, no sufficient evidence was adduced to undermine the evidence of fraud. The respondent therefore validly objected to the evidence of a valid test. This justified the revocation of leave in Mrs Nasir's case, and the refusal of leave to remain."

17. The Judge went on to give reasons as to why the human rights claim did not succeed under Rule 276ADE or, in the alternative, outside the Rules under Article 8 ECHR. The Judge went on to dismiss the appeal on all grounds raised.

The Grounds of Appeal to the Upper Tribunal

18. The appellant's grounds of appeal were settled by Mr Gajjar. Ground 1 was that the Judge's finding at paragraph [33] lacked reasoning which enabled the appellants to understand why the First-tier Tribunal had found that their evidence was insufficient to undermine the respondent's allegation that the first appellant had engaged in deception.

19. Ground 2 was that the Judge had fallen into error by looking to the first appellant to provide cogent evidence to contradict the respondent's

evidence of deception. The Tribunal had failed to direct itself on the minimum/basic level of plausibility threshold.

20. Ground 3 was that the Judge's finding at paragraphs [43] and [45] that the appellants had exaggerated their relationships with their grandchildren was not adequately reasoned.

The Reasons for the Eventual Grant for Permission to Appeal

21. Permission to appeal was initially refused by the First-tier Tribunal. It appeared to Judge Seelhoff that the reasoning at paragraph [33] was manifestly inadequate, but it did not follow that an individual who did not perpetrate TOEIC fraud should be granted leave to remain:

> "Absent a cogent or positive argument as to why leave ought to have been granted but for the mistake, the error cannot be material."

22. Following a renewed application for permission to appeal to the Upper Tribunal, Upper Tribunal Judge Grubb granted permission on Grounds 1 and 3, but refused permission on Ground 2. His reasoning with regard to Ground 1 was as follows:

> "It is arguable that the Judge's reasoning at 33 is inadequate in assessing the appellant's evidence of an innocent explanation and whether the respondent has established the appellant's fraud in taking an English Language test. It is arguable that if that error, if established, is material (see the Judge's comment at 31). An arguable error in making a finding of fraud may, in any event, be a proper basis to grant permission. The materiality of any error will, however, need to be established before the UT."

The Hearing in the Upper Tribunal

23. At the hearing before me to determine whether an error of law was made out, Mr Gajjar briefly developed Ground 1 of the appeal. In reply, Ms Everett said that she had to concede that there was an error of law, and that she found it difficult to argue that it was not material. Although the position taken by Ms Everett was not determinative of the question whether a material error of law was made out such that the Decision should be set aside, I was persuaded on balance that the appeal should be allowed. I gave brief oral reasons for so finding, with a fuller exposition of my reasons to follow in writing. The representatives were in agreement that the appropriate course was that the appeal should be remitted to the First-tier Tribunal for a fresh hearing.

The Reasons for Finding a Material Error of Law

24. In light of the guidance given by the Upper Tribunal in DK and RK, it was clearly open to the Judge to find that the evidence adduced from the appellants about the taking of the test was not sufficient to rebut the

respondent's evidence, even though the evidence of the appellants had not been challenged by way of cross-examination. However, the Judge did not adequately lay out the ground in order to explain why this evidence was insufficient.

25. The problematic passage in the Judge's line of reasoning occurs in paragraph [29] which I have cited earlier in this decision. The reference to the chain of custody appears in the middle of a sentence without any obvious link to what has appeared before or what appears immediately afterwards. This phrase is immediately followed by the sentence: "*Mr Shrestha stressed this in his submissions.*" It is not at all clear what "*this*" refers to. It is also not at all clear how much of the remainder of the paragraph is a submission by Mr Shrestha as distinct from an observation by the Judge. In either case, the remainder of the paragraph contains two propositions with which the Judge does not adequately engage for the purposes of addressing the innocent explanation offered by the appellants.

26. The first proposition is that it is open to an appellant to produce credible and "*sufficiently comprehensive*" evidence that shows he has established a lack of dishonesty. The Judge does not purport to apply this test to the explanation given by the appellants. The Judge does not overtly ask himself whether the appellants' explanation is credible and sufficiently comprehensive as to be capable of establishing a lack of dishonesty. It may be that the Judge is of the view that the explanation offered by the appellants amounts to no more than a mere assertion of ignorance or honesty, but he does not say so in terms.

27. The second proposition which emerges from the final two sentences is that DK and RK is potentially distinguishable on the facts because there were good reasons to disbelieve the evidence of the appellants, in particular that of RK, whose position was described as wholly incredible. It is not clear whether the Judge accepts this attempt to distinguish DK and RK, or, if he does, what the implications are for the first appellant in respect of whom the Judge does not identify any specific reasons to disbelieve her evidence over and above the reasons inherent in the cogent evidence deployed by the Secretary of State to prove fraud.

28. An error of law is made out because the Decision does not perform the vital function of adequately explaining to the appellant why she is found to have been dishonest. The error is material because it has a bearing on the proportionality assessment for the appellant's Article 8 claim outside the Rules. It could also be material for another reason, which was the subject of discussion at the hearing before me. Whereas the implication of the reasons for refusal is that the suitability issue was only raised for the first time in the refusal decision of 2021, the Judge found that the appellant's student visa had been revoked because of the same allegation of cheating. If this is true, then an ultimately successful repudiation of the cheating allegation might enable the appellant to argue that, but for the false allegation of cheating, she would have been granted further leave to

remain, and that she should be put back in the same position she would have been if her student visa had not been revoked or refused.

29. I do not consider that Ground 3 is made out, but this is immaterial as the making out of Ground 1 is sufficient to justify the Decision being set aside in its entirety and being remitted to the First-tier Tribunal for a fresh hearing.

Anonymity

30. The First-tier Tribunal did not make an anonymity direction, and nor do 1.

Notice of Decision

The Decision of the First-tier Tribunal involved the making of a material error of law, and so the Appellants' appeal is allowed. The Decision of the First-tier Tribunal is set aside in its entirety, with none of the findings of fact being preserved.

Directions

The appeal shall be remitted to the First-tier Tribunal at Taylor House for a de novo hearing before any Judge apart from Judge Hanbury.

Signed Andrew Monson Date 4 February 2023

Deputy Upper Tribunal Judge Monson