IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-004054

First-tier Tribunal No: HU/50789/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 15 June 2023

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MD THAHEDUZZAMAN

Respondent

Representation:
For the Appellant: Susanha Cunha, Senior Presenting Officer
For the Respondent: Peter Jorro, instructed by Londonium Solicitors

Heard at Field House on 30 May 2023

DECISION AND REASONS

1. The Secretary of State appeals, with permission granted by Upper Tribunal Judge Pickup, against the decision of First-tier Tribunal Judge Corrin. By her decision of 5 July 2022, Judge Corrin ("the judge") allowed Mr Thaheduzzaman's appeal against the Secretary of State's refusal of his human rights claim.

2. To avoid confusion, I shall refer to the parties as they were before the FtT: Mr Thaheduzzaman as the appellant and the Secretary of State as the respondent.

Background

3. This is an ETS case. The full background was set out at [2]-[10] of the judge's decision. For present purposes, it suffices to set out the following.

4. The respondent accused the appellant of having relied on a fraudulently obtained document in support of a successful application he made for leave to remain as a student in December 2012. That allegation caused the respondent to issue the appellant with an IS151A document in 2015. In 2020, the appellant made an

application for leave to remain on human rights grounds. The application was refused by letter dated 30 October 2020. In that letter, the respondent once again stated, in reliance on evidence provided to her by ETS, that the appellant was a person who had used a proxy to take his English language test at Synergy Business College in March 2012. The respondent held that the application fell for refusal accordingly.

The Appeal to the First-tier Tribunal

5. The judge heard the appeal at Taylor House on 8 June 2022. Both parties were represented by counsel: Mr Biggs for the appellant, Mr Dingley for the respondent. The judge heard oral evidence from the appellant and submissions from the representatives before reserving her decision.

6. In her reserved decision, the judge found that the respondent had failed to discharge the burden of proving that the appellant had cheated in his test in March 2012: [58]. She went on to allow the appeal on Article 8 ECHR grounds because the 'historical injustice' perpetrated against him by way of the false allegation of cheating tipped the balance of proportionality in his favour: [63].

The Appeal to the Upper Tribunal

7. The respondent's grounds of appeal are poorly expressed. They give no indication of the error of law into which the FtT is said to have fallen. There is no attempt to identify and plead separate grounds of challenge.

8. The grounds span three pages. The first page sets out, verbatim and in full, the findings which the judge reached at [52]-[55] of her decision. The second page, and much of the third page, sets out, in full, various sections of the Upper Tribunal's decision in *DK & RK (ETS: SSHD evidence; proof) India* [2022] UKUT 112 (IAC). There are then two paragraphs which I should reproduce in full:

> [14] It is respectfully submitted that the point for consideration by the Tribunal is not whether the appellant had the skill set to pass, whether he was capable of speaking English, or he knew the route to the test centre or the other reasons given by the Tribunal to accept the appellants account of events. Instead DK and RK lays out why the respondent has correctly asserted why fraud has taken place. On that basis the appeal should have been dismissed.
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> [15] The Tribunal has failed to consider that point in line with the caselaw and in doing so has erred in law.

9. Judge Pickup seemingly granted permission because he considered it arguable that the judge had given undue weight to matters such as the appellant's ability in English, although he noted that 'the respondent may have difficulty in establishing a material error of law'.

10. I heard concise submissions from Ms Cunha in amplification of the grounds. She submitted that the judge had failed to weigh the appellant's evidence against the conclusions reached by the Upper Tribunal in *DK & RK (2).*

11. I heard an equally concise submission from Mr Jorro. He relied on the rule 24 response which had been settled by Mr Biggs and submitted that it was not clear

what error of law was asserted by the respondent. It appeared to be that the respondent submitted that no ETS case could properly be allowed but that was not what was said in *DK & RK (2)*.

12. I indicated at the conclusion of the submissions that the respondent's appeal against the judge's decision would be dismissed and that my reasons for that conclusion would follow in writing. Mr Jorro indicated that he felt unable to pursue the application for wasted costs which had been foreshadowed in Mr Biggs' rule 24 response.

Analysis

13. It is difficult, with respect to the judge, to imagine a more thorough and cogently reasoned decision in a case of this nature. She undertook a detailed analysis of the appellant's evidence and she found him to be a credible witness. She made that finding against the backdrop of the authorities. She was plainly aware of what had been said in *DK & RK (2)* and she reproduced the critical holding in that case at [48] of her decision. She knew, therefore, that the Upper Tribunal had accepted the respondent's case that her evidence in these cases was 'amply sufficient' to discharge the burden of proof unless that evidence was contradicted by credible evidence.

14. The judge gave a host of reasons for finding that the respondent had failed to discharge the burden upon her in this particular case. I need not set them out in full, not least because they are replicated in full in the respondent's grounds of appeal. The judge found the appellant's account of sitting the test to be detailed, clear and credible. She felt that he had no good reason to cheat. She noted that he had taken 'appropriate action' in response to the allegation of deception. She concluded that he had been a bona fide student with good character references. He was able to give his evidence in English, although the judge took into account the fact that there might be many reasons why a person with proficiency in English might nevertheless cheat.

15. As Mr Jorro noted in his robust submissions, *DK & RK (2)* does not suggest that an appellant faced with an allegation such as this is unable to succeed in an appeal. The Upper Tribunal in that decision certainly accepted that the respondent's evidence was persuasive (or "amply sufficient" in the absence of credible contradictory evidence) and it is clear that comparatively few appellants will now be able to succeed. But the door is not closed, and there will be some cases in which a fact-finding Tribunal can conclude legitimately that no cheating occurred. Insofar as the Secretary of State suggests otherwise in the penultimate sentence of [14] of the grounds, the error of approach is her own.

16. It was no doubt in recognition of that difficulty that Ms Cunha preferred to submit that the judge had failed to weigh her impression of the appellant's evidence against what was said about the respondent's evidence in *DK & RK (2).* That submission overlooks the judge's clear references to that authority and to what was held by the Upper Tribunal. I reject that criticism of the judge's decision; she plainly took careful account of what the Upper Tribunal made of the respondent's evidence in *DK & RK (2).*

17. There was some suggestion at the hearing and in the grounds of appeal that the judge had attached undue weight to the fact that the appellant could speak English. It is clear that she did not do so, however. That was a legitimate matter

for her to take into account provided she bore in mind what was said at [57] of *MA (Nigeria)* [2016] UKUT 450 (IAC), which was that 'there is a range of reasons why persons proficient in English may engage in TOEIC fraud'. It is quite clear from [57] of her decision that she took careful account of that decision, since the way in which she expressed her conclusions in that paragraph is expressed in terms very similar to those used by McCloskey J in that decision.

18. Mr Biggs reproduced [2] of Lewison LJ's judgment in *Volpi v Volpi* [2022] 4 WLR 48 in his excellent rule 24 response. I do not consider this to be a case in which there is any need to assume, however, that the trial judge took into account evidence which was not expressly mentioned. Nor is this a case in which there is any need to remind myself that the FtT is an expert Tribunal charged with administering a complex area of law in challenging circumstances and that it should be assumed to know and to apply the law correctly unless the contrary is shown. This is, instead, a case in which an expert judge has demonstrated very clearly, over the course of a detailed and cogently reasoned decision, that she has taken every aspect of the competing cases into account before coming down in favour of the appellant. There is clearly no error of law in her decision and the Secretary of State's appeal is dismissed.

Notice of Decision

The Secretary of State's appeal is dismissed. The decision of the FtT to allow the appeal on Article 8 ECHR grounds shall stand.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

8 June 2023