



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001491
First-tier Tribunal Nos:
HU/52208/2022
LH/00312/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 16 July 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MD MOSTAFIZUR ALAM KHURSHID
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr. T. Melvin, Senior Home Office Presenting Officer
For the Respondent: Mr. A. Stedman, Counsel instructed by Thamina Solicitors

Heard at Field House on 27 June 2023

DECISION AND REASONS

1. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Zahed (the "Judge"), promulgated on 22 February 2023, in which he allowed Mr. Khurshid's appeal against the Secretary of State's decision to refuse his application for indefinite leave to remain. Mr. Khurshid is a national of Bangladesh who applied for indefinite leave to remain on the basis of ten years' lawful residence.
2. For the purposes of this decision I refer to the Secretary of State as the Respondent and to Mr. Khurshid as the Appellant, reflecting their positions as they were before the First-tier Tribunal.
3. Permission to appeal was granted by First-tier Tribunal Judge Sills on 28 April 2023 as follows:

“The grounds are arguable. In particular, it is arguable that the Judge failed to consider and apply the guidance from the UT in the case of DK and RK (ETS: SSHD evidence; proof) India [2022] UKUT 112 (IAC) at para 129”.

The hearing

4. The Appellant attended the hearing. I heard submissions from Mr. Melvin and Mr. Stedman. I reserved my decision.

Error of law

5. I find that the Judge has erred in his failure to consider properly the evidence before him with reference to the relevant caselaw. At [25] the Judge finds, in accordance with the caselaw, that the Respondent has discharged the evidential burden through provision of the generic evidence to require the Appellant to give a plausible explanation. It is in the consideration of this plausible explanation that the Judge falls into error.
6. The Judge states at [25]:

“I find that the Appellant through his evidence and documentary evidence has given a plausible innocent explanation of why he took the test and how he took the test”.
7. His findings in relation to the English language test and ETS are set out from [17] onwards. The documentary evidence to which the judge has referred at [25] is that referred to earlier in the decision, at [18] to [21]. This is evidence of the Appellant’s English language skills as they were around the time that the test was taken in 2012. The Judge makes positive findings about the Appellant’s English language ability as at the time that the test was taken in 2012 and sets out the various certificates which the Appellant had obtained during this time.
8. However it is clear from DK and RK (ETS: SSHD evidence; proof) India [2022] UKUT 112 (IAC) that more is needed than just the evidence of the Appellant’s ability to speak English. It states at [108]:

“A further possible source of corroboration may be incompetence in English (i.e. English at a lower level than that required for the test); but it must not be thought that the converse applies: as the then President pointed out in SSHD v MA [2016] UKUT 450 (IAC) at [57], there are numerous reasons why a person who could pass a test might nevertheless decide to cheat. This is a point that seems to have escaped Professor Sommer in his comments to the APPG”.
9. It is clear from this that an individual’s standard of English being sufficiently good is not enough to show that he did not cheat. The Judge’s finding that the Appellant did not use a proxy test taker refer entirely to “his evidence” and the documentary evidence of his English language skills in 2012. At no point does the Judge consider the specific evidence put forward by the Respondent in relation to the Appellant. The Respondent provided the witness statement of Raana Afzal to which was appended the ETS SELT Source Data. This indicated that the Appellant’s tests had been found to be invalid. The tests were taken on 17 July 2012. At Annex B to this witness statement is the ETS TOEIC Test Centre Lookup Tool for Seven Oaks College for the results from 17 July 2012. This indicates that on 17 July 2012, 70% of the tests taken were found to be “invalid” and 30% were found to be “questionable”. No tests were released.

10. I find that there is no reference to this evidence in the decision. The Judge has found the Appellant to be a credible witness, but he has not taken into account that, on the day the Appellant took his ETS test, all of the tests taken at that centre were either “invalid” or “questionable”. He has ignored the evidence from the Respondent when making a finding that the Appellant was a credible witness.
11. I was referred by Mr. Melvin to paragraph 103 of DK and RK which states:

“We conclude that the voice recognition process is clearly and overwhelmingly reliable in pointing to an individual test entry as the product of a repeated voice. By “overwhelmingly reliable” we do not mean conclusive, but in general there is no good reason to doubt the result of the analysis.”
12. The Appellant did not produce his voice file. The Judge has failed to consider this, and how it might impact on his credibility findings.
13. I find that the Judge has failed to consider the evidence in the round. He has failed to consider the evidence from the Respondent, in particular the evidence of the results from the test centre on 17 July 2012. At [23] the Judge finds: “I find on a balance of probabilities that the appellant would be confident that his English Language ability would be such that he would be able to take the test himself and pass”. However, following DK and RK, a finding that an appellant did not cheat cannot be based solely on his English language ability and on a finding that he was credible, particularly when the evidence of the Respondent has not been taken into account.
14. I find that the Judge has erred by failing to consider the case of DK and RK, and by failing to give full consideration to all of the evidence before him, including that from the Respondent. I find that these are material errors of law.
15. I have carefully considered whether this appeal should be retained in the Upper Tribunal or remitted to the First-tier Tribunal to be remade. I have taken into account the case of Begum [2023] UKUT 46 (IAC). At headnote (1) and (2) it states:

“(1) The effect of Part 3 of the Practice Direction and paragraph 7 of the Practice Statement is that where, following the grant of permission to appeal, the Upper Tribunal concludes that there has been an error of law then the general principle is that the case will be retained within the Upper Tribunal for the remaking of the decision.

(2) The exceptions to this general principle set out in paragraph 7(2)(a) and (b) requires the careful consideration of the nature of the error of law and in particular whether the party has been deprived of a fair hearing or other opportunity for their case to be put, or whether the nature and extent of any necessary fact finding, requires the matter to be remitted to the First-tier Tribunal.”
16. I have carefully considered the exceptions in 7(2)(a) and 7(2)(b). I consider that the extent of the fact-finding necessary means that it is appropriate to remit this appeal to be reheard in the First-tier Tribunal, given that none of the findings in relation to the ETS issue can stand.

Notice of Decision

17. The decision of the First-tier Tribunal involves the making of material errors of law.

18. I set the decision aside except that the finding at [16] that the Appellant had over eleven years' continuous lawful leave as at the date of his in-time application on 30 July 2021 stands, as there was no challenge to this finding.
19. The appeal is remitted to the First-tier Tribunal to be reheard.
20. The appeal is not to be listed before Judge Zahed.

Kate Chamberlain

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
13 July 2023

-