IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005076
First-tier Tribunal Nos:
HU/51073/2021
IA/06401/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 23 April 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

MR NASIR AHMED
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Biggs, counsel instructed by Hubers Law
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

Heard at Field House on 20 March 2024

DECISION AND REASONS

1. The Appellant is a national of Bangladesh born on the 1 September 1988. He arrived in the UK on the 3 May 2011 with entry clearance as a Tier 4 Student. He sought an extension of leave, which was refused but succeeded on appeal. The Appellant then sought to further extend his leave but this was refused in a decision dated 25 October 2016 on the basis that he had obtained a TOEIC fraudulently. The Appellant appealed and his appeal was allowed by First-tier Tribunal Judge Oliver in a decision dated 13 December 2017. The Secretary of State sought and obtained permission to appeal and in a decision dated 20 July 2018, Deputy Upper Tribunal Judge Lever set that decision aside and remade the decision on the 11 February 2019 dismissing the Appellant's appeal. An application for permission to appeal was made to the Court of Appeal on 10 April 2019 but in a decision dated 10 February 2020 the Court of Appeal refused permission to appeal.

2. On 6 November 2020 the Appellant made a fresh application for indefinite leave to remain. This application was refused in a decision dated 30 March 2021. The

Respondent issued a review of the decision on 1 April 2022 and the matter went to appeal on the 5 May 2022 before Judge Scott-Baker.

3. In a determination dated the 24 May 2022, the appeal was dismissed. An application for permission to appeal was made on the 17 October 2022, which asserted:

(i) firstly that the judge had made an error of law in departing from the concession made by Respondent that the Appellant met the suitability requirements. It was submitted that the refusal decision did not suggest that the Appellant fell for refusal on suitability grounds on the basis that he had relied on a false TOEIC certificate, see page 253 of the Respondent's bundle and that the judge erred in law in departing from this concession on the basis that the suitability point had been taken in the Respondent's review and that this was an error because no formal application had been made to withdraw the concession, contrary to the decision in Kalidas [2012] UKUT 00327 (IAC). It was submitted that the review was not an opportunity to withdraw a concession without providing necessary details, see AM (Iran) [2018] EWCA Civ 2706 at 44;

(ii) Secondly, it was submitted that the First-tier Tribunal had acted in a manner which was procedurally unfair in rejecting the Appellant's unchallenged evidence given at the hearing and had applied the wrong test in considering that evidence. This is because there was no cross-examination and therefore no challenge to the contents of the Appellant's two witness statements by either the Presenting Officer and there were no questions from the judge either. It was asserted that if there was no cross-examination that the First-tier Tribunal was troubled by a point raised, then it was incumbent upon them to put that point to the witness, see Muhandiramge [2015] UKUT 675 (IAC) at 15 to 22, the principles in Maheshwaran [2002] EWCA Civ 173, Doody [1993] 3 All ER 92, Koca [2005] CSIH 41 at 42 and 43. The question for the Tribunal was whether, in light of the new evidence, it was appropriate and fair to depart from the previous decision of Judge Lever, bearing in mind the findings of the Tribunal at that time were not binding on the FtT, see Mubu [2012] UKUT 00398 (IAC), BK (Afghanistan) [2019] EWCA Civ 1358, Sultana [2021] EWCA Civ 1876 and Patel [2022] EWCA Civ 36.

4. Permission to appeal was granted by UTJ Kamara in a decision dated 24 August 2023.

Hearing

5. In his submissions, Mr Biggs sought to rely on two further authorities that postdated the grounds of appeal, the first being the judgment in the Court of Appeal in Ullah [2024] EWCA Civ 201 and secondly, that of the Supreme Court in TUI v Griffiths [2023] UKSC 48.

6. Mr Biggs relied on both grounds of appeal. In relation to ground 2, he submitted that the short point is that the decision was vitiated by procedural unfairness as the Presenting Officer failed to cross-examine the Appellant, but nevertheless the First-tier Tribunal Judge held that the Appellant had given false evidence and had

utilised deception. Mr Biggs submitted that the recent judgment in *Ullah* considered a similar issue and held that at least normally a Presenting Officer is obliged as a matter of procedural fairness to challenge a material witness in respect of an allegation of dishonesty: see [36] to [44], where the court considered the *TUI* case, which made this clear. Whilst the facts of *Ullah* were different, the principles were the same and it was held that in the absence of cross-examination the Secretary of State in that case had failed to prove dishonesty. The decision of the First tier Tribunal had been set aside by the Upper Tribunal, but had been restored by the Court of Appeal on the basis there did need to be cross-examination in order to satisfy the requirements of procedural fairness based on the *TUI* case at [60].

7. In relation to Devaseelan [2002] UKIAT 00702 Mr Biggs submitted that this does not detract from the force of this submission but enhances it and it was clear from [21] of the First-tier Tribunal decision that the two witness statements prepared by the Appellant had not been before the earlier Tribunal, that the evidence submitted was new and this, therefore, required consideration and if challenged, cross-examination. Mr Biggs submitted that it is clear from [28] that the earlier Tribunal operated on the basis of a concession that the Secretary of State had discharged the eventual burden. Mr Biggs submitted that the judge did not apply the correct approach in terms of *Devaseelan*. The judgment in *BK (Afghanistan)* makes clear that the Tribunal itself needs to apply the guidelines and it was not fair and just to depart from an earlier finding, when it is not bound by that finding, so there is no need to find evidence to dislodge or undermine those earlier findings.

8. Therefore, in relation to ground 2, Mr Biggs submitted that the issue of cross-examination was vital to the *Devaseelan* issue. Having heard oral evidence tested in cross-examination, the First-tier Tribunal might have been persuaded to depart from the earlier finding. The two witness statements were new. The judge did not know what evidence had been given before the previous Tribunal. The Home Office failed to produce any evidence to support an allegation of cheating in this case, nor was there clear evidence of an evaluation by the earlier Tribunal because there had been a concession.

9. In relation to ground 1 of the grounds of appeal, Mr Biggs submitted that the judge had erred in principle by failing to consider whether it was appropriate to allow the Secretary of State to resile from the concession that no suitability points are to be taken and this is set out at [2] to [8] of the grounds of appeal. Mr Biggs submitted that it is not known why there was a concession, but if there is a concession and the party wishes to withdraw that then a proper consideration needs to take place. It may be the Respondent's policy applied so that the Appellant should not have been treated as having utilised a TOEIC fraudulently because he did not rely on the TOEIC. He submitted that what underlies ground 1 is a question of fairness, in part because a party should be able to rely on a concession, see *AM (Iran).* He submitted that the reasons given by the First-tier Judge effectively overlooked the concession. The judge's reasons are essentially that the point was taken in the review and she assumed that that was sufficient. Mr Biggs submitted that the judge has to consider as a matter of judicial discretion whether or not to permit withdrawal of a concession and the judge had overlooked that important procedural requirement.

10. In her submissions, Ms Isherwood submitted there was no material error of law. She relied on the Appellant's immigration history and asserted that he had continually been putting in unsuccessful applications. There was no valid CAS in 2017. She submitted that it was incorrect that the Secretary of State had never put evidence as to the Appellant's TOEIC, relying on [17] of the decision of DUTJ Lever at AB 86:

> *"The evidence provided by the respondent demonstrates that between the 18 October 2011 and 18 October 2012 Westlink College undertook 915 TOIEC cases. ETS identified 72% of those cases as being invalid and 0% were not withdrawn. The balance of 28% tests were found to be questionable. Further on 15 May 2012 an ETS audit was undertaken at Westlink College when a test was taking place. There are the dramatic findings of that visit as recorded in the Operation Façade statement. The findings on the spot check on 15 May 2012 do not allow or suggest an inference that circumstances on that day were necessarily different to the circumstances on any other day at least within the period that produced a high level of invalid and questionable tests. The appellant took his tests within this period of time".*

11. Ms Isherwood submitted that the Appellant was essentially re-arguing the same point, that Judge Oliver had only allowed the appeal to the extent that the Appellant should have been given 60 days in which to make a further application and taking into account the evidence and statements the Appellant is simply arguing that he did not provide a false TOEIC report when it was already found that he had. . She submitted that DK & RK (India) 2021 UKUT 61 (IAC) had been maintained by the Court of Appeal and this was clearly no different. There was nothing new. At [32] the judge looked at the ETS case and at [34] says that applications for ILR should not be used as a reason for refusal. Ms Isherwood submitted that at [36] it is clear the Appellant was seeking to reargue a point that was settled. He took a test in the relevant time period and his explanation had not been accepted. She submitted that the judge was entitled to consider the evidence and make findings and that the case of *Ullah* did not address the TOEIC point. Just because the Appellant has not been cross-examined does not mean his evidence has been accepted. You can clearly see from the judge's determination that she had considered everything.

12. In relation to ground 1, Ms Isherwood sought to rely on the decision in Lata [2023] UKUT 163, which postdated the hearing and application for permission to appeal and sought to rely on [33] of that decision. She submitted the parties were well-aware of what the current issues were to the extent that the case had previously been adjourned in the First-tier Tribunal and that the grounds of appeal were simply arguing the same points throughout and that the judge was entitled to make the findings that she did.

13. In his reply to ground 2, Mr Biggs submitted that the interesting question that arises is whether the *TUI* point applies in a *Devaseelan* context and in *Ullah*, where dishonesty is in issue. He submitted that Ms Isherwood was arguing that the failure to comply does not matter in light of the *Devaseelan* decision and it was open to the judge to say that the Appellant had not put anything new forward and so could rely on *Devaseelan*. However, this was incorrect. At [42] of *Devaseelan* this requires that evidence is treated with circumspection, which is correct as a matter of principle, and at [42] it was important to apply a different

test. He submitted that the judge erred at [43] in asking for evidence to overturn or dislodge earlier findings. Had there been cross-examination, the judge may have felt circumspection and he submitted this defeated the *"makes no difference"* argument.

14. In relation to the decision of DUTJ Lever at [17], set out by the First-tier Tribunal at [27], this dealt only with the generic general evidence, not evidence specific to this Appellant and that evidence was about the Westlink College Test Centre. Whilst this was where the Appellant took his test, the generic evidence was not enough to discharge the evidential burden as specific evidence, i.e. the lookup tool is needed and Mr Biggs submitted that Judge Lever did not engage with the lookup tool, but looked generally and it appears from [18] of the Judge Lever decision that this was predicated entirely on the concession. There was no specific evidence of the Appellant's cheating and that this all impacts on the application of *Devaseelan*. He submitted that cross-examination would have been significant.

15. In response to submissions on ground 1, Mr Biggs submitted the case of Lata [2023] UKUT 163 (IAC) does not help. Whilst it was clearly guidance to the parties and the Tribunal he did not consider what constituted a concession and when it would be appropriate for the Tribunal to permit withdrawal of the concession, which had not been used in the decision letter, which made clear that suitability was not being relied upon.

16. Whilst the review had been served in advance, he submitted that the Home Office had previously conceded the suitability issue and should be held to that concession at [18] of the First-tier Tribunal, page 19. The reasons for the concession had not been explored and the parties might have been taken by surprise.

Decision and reasons

17. I reserve my decision which I now give with my reasons.

18. With regard to ground 1 of the grounds of appeal I find no material error of law in the decision and reasons of the First tier Tribunal Judge who held as follows at [37]-[38]:

> *"37. As to the TOIEC issue, I find that the respondent may have been correct in not relying on the TOIEC fraud in this application with reference to the guidance. However it was clear from the December 2021 review that the matter was clarified and that the respondent was maintaining the finding that the appellant had cheated in the TOIEC test. Whilst the original decision had not considered the documentation submitted by the appellant this was rectified and the respondent set out her reasons at [3] to [8] of the review. Contrary to the assertions made by Mr Malik the evidence produced by the appellant had been challenged by the respondent.*
>
> *38. I find that the respondent had fairly revived the suitability issue in the reviews of 6 December 2021 and 1 April 2022 and the further evidence produced by the appellant had been considered and challenged."*

19. I have considered the specific facts in this case, the judgment in *Kalidas* where the concessions made were ones of fact and the judgment of the Court of Appeal

in *AM (Iran)* where the concession by the SSHD related to risk on return and I find they are distinguishable, given that the concessions were not based on previous findings subject to reconsideration pursuant to the principles set out in *Devaseelan.*

20. In this case the Appellant had been found in a previous decision by the Upper Tribunal, promulgated on 11 February 2019, to have obtained a TOEIC fraudulently and he did not succeed in obtaining permission to appeal to the Court of Appeal against that decision. Whilst in the refusal decision of 30 May 2021 in respect of his subsequent application for ILR based on 10 years continuous residence did not take a point with regard to the Appellant's ability to meet the suitability requirements, this was remedied in the Respondent's review dated 6 December 2021, which also considered the effect of the APPG report but noted it had not been upheld in DK and RK Consequently, as the Respondent's review stated at [8]:

> *"8. Therefore, the previous findings that a fraudulent TOIEC certificate must stand, and with it the appellant's suitability."*

21. As the First tier Tribunal Judge makes clear at [10] and [11] of the decision and reasons, when the appeal came before the First tier Tribunal for hearing on 14 March 2022, Mr Malik QC representing the Appellant at that time, asserted that the Respondent had abandoned the fraud allegation. The hearing was adjourned and directions were issued as to whether suitability should now be raised, which resulted in a second review of 1 April 2022. Consequently, when the hearing went ahead on 5 May 2022, the Appellant and his representatives had been on notice since 6 December 2021, so for 5 months, that the Appellant was not considered to meet the suitability requirements.

22. I am far from convinced that in omitting to refer to the suitability requirements in the refusal decision that the Respondent was intentionally making a concession but rather it was an oversight which was subsequently remedied in the Respondent's review. Moreover, as a matter of principle, given that there was no procedural unfairness to the Appellant because the matter was raised well in advance of the appeal hearing, I consider that it was open to the Respondent to remedy what was essentially an omission in the refusal decision of 30 May 2021 and to take the point that the Appellant was unable to meet the suitability requirements. I find that this approach is in accordance with *AM (Iran)* at [44]. I find no error of law in the approach of the First tier Tribunal Judge to this issue.

23. In respect of the second ground of appeal, however, I do find a material error of law. The Appellant provided further evidence in the form of two witness statements, the first of which in the Respondent's bundle dated 24 March 2021 explained how he came to undertake his test at Westlink College and his second witness statement dated 21 October 2021 addressed in detail the allegation of fraud and his attempts to rebut it and the impact upon him eg at AB 16. It is unclear why exactly, given that the Appellant was called to adopt his witness statements, he was not cross-examined by the Presenting Officer, Mr Yeboah, who in his submissions at [16] relied on the refusal letter and the two reviews and asserted that the "*further evidence of the appellant was the certificates and diplomas. These did not disrupt the findings of the Upper Tribunal at [25].*" It is clear that the Presenting Officer was relying on the previous findings as having settled the issue of the Appellant's ability to meet the suitability requirements of

the Rules. It is further clear from Mr Malik's submissions that he relied upon new and detailed evidence submitted to the SSHD with the latest application [18].

24. I further note and accept Mr Biggs' submission that the previous decision by DUTJ Lever did not address the specific evidence in relation to this Appellant but rather the generic evidence. Thus, it was open to the Appellant to rely upon further evidence and for that evidence to be considered by the First tier Tribunal in order to build upon the previous findings: *cf Devaseelan* at [37].

25. In her consideration of the case, the First tier Tribunal Judge at [30] noted that it was clear the Appellant was seeking a review of the earlier decision based on further evidence including the APPG report of 18 July 2019 which postdated the Upper Tribunal's decision and noted at [31] that "*the statement was centred on the allegation of fraud*." The judge went on at [42]-[43] to find as follows:

> *"42. As to the appellant's own evidence and the witness statements submitted with the application and on appeal, I note that there had been a witness statement(s) before DUT Judge Lever and it contained significant detail as shown in the judge's findings and referred to above. Mr Malik sought to maintain that these statements were new but without the statement(s) previously before the Tribunal no firm findings can be made. In any event Devaseelan requires me to treat with circumspection any evidence now produced which could have been before the first judge. It was clear from the Upper Tribunal findings that the evidential burden had been established by the respondent and the appellant had not produced an innocent explanation. These findings were endorsed by the Court of Appeal.*
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> *43. No new evidence has been submitted which dislodges the original findings that the TOIEC certificate was obtained by fraud or that the findings concerning the breach of condition should be overturned."*

26. I have had careful regard to the recent judgment of the Court of Appeal in the case of *Ullah,* where the Appellant who had been accused of dishonesty, was not cross-examined. The Court considered the probative weight to be attached to evidence which is not challenged in the context of a finding about dishonesty, holding at [31]:

> "*31. The UT treated as decisive the fact that the Appellant had pleaded guilty to an offence which involved him knowing or suspecting that he was in possession of criminal property. In my judgment that amounts to an error of law. There may be cases where an individual's conduct almost inevitably leads to an inference of dishonesty; but that is by no means an immutable rule."*

The Court also considered the recent SC judgment in TUI v Griffiths [2023] UKSC 48 and their Lordships approval of the principles set out in Phipson on Evidence at [12]-[22]:

> "*In general a party is required to challenge in cross-examination the evidence of any witness of the opposing party if he wishes to submit to the court that the evidence should not be accepted on that point. The rule applies in civil cases … In general the CPR does not alter that position.*

> *This rule serves the important function of giving the witness the opportunity of explaining any contradiction or alleged problem with his evidence. If a party has decided not to cross-examine on a particular important point, he will be in difficulty in submitting that the evidence should be rejected.*"
>
> *37. As was pointed out, cross-examination enables a witness to explain, in greater detail, his position. True it is that cross-examination might undermine the evidence of a witness but not infrequently it serves to reinforce and strengthen it. In paragraph [70(vi)] of TUI Lord Hodge observed:*
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> > "*(vi) Cross-examination gives the witness the opportunity to explain or clarify his or her evidence. That opportunity is particularly important when the opposing party intends to accuse the witness of dishonesty, but there is no principled basis for confining the rule to cases of dishonesty".*

27. At [39] the Court agreed with the submission of Mr Malik KC that the principle applied not only to expert witnesses, but in the field of public law and to witnesses of fact.

28. Whilst as Mr Biggs fairly submitted, this case involves an interaction between *Devaseelan* and the principles set out in *Ullah* and *TUI v Griffiths,* I find that, given it was clear that a central part of the Appellant's case was directed at challenging the previous findings of the Upper Tribunal in relation to the finding that he had relied upon a false TOEIC certificate, it was procedurally unfair to uphold those findings in the absence of any challenge by way of cross-examination to the Appellant's evidence, which was set out in his witness statements and adopted by him at the outset of the hearing before the First tier Tribunal.

Notice of Decision

29. The decision and reasons of the First tier Tribunal contains a material error of law. Given that I have found procedural unfairness there is no question but that I set that decision aside and remit the appeal for a hearing *de novo* before a different Judge of the First tier Tribunal.

Rebecca Chapman
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

14 April 2024