Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/06627/2019

THE IMMIGRATION ACTS

Heard at Field House (via MS Teams)	**Decision & Reasons Promulgated**
On 25 May 2021	**On 22 June 2021**

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SYED MAHBUBUL HAQUE
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms Petterson, Senior Presenting Officer
For the Respondent: Mr Mustafa, instructed by Barclay Solicitors

DECISION AND REASONS

1. The Secretary of State for the Home Department appeals, with permission granted by First-tier Tribunal Judge O'Brien, against the decision of First-tier Tribunal Judge Buckwell to allow Mr Haque's appeal on human rights grounds.

2. To avoid confusion, I shall refer to the parties as they were before the First-tier Tribunal ("FtT"): Mr Haque as the appellant and the Secretary of State as the respondent.

Background

3. The appellant first entered the United Kingdom as a student, in 2009. Whilst he was in the UK, he met and married a British citizen. He applied for and was granted leave to remain as her spouse. That leave was valid until 21 July 2016.

4. The appellant and his wife went to Bangladesh for a holiday in 2014. When they returned to the UK on 13 August 2014, he was interviewed on suspicion of using a proxy to take a TOEIC English language test on his behalf and subsequently relying on the results of that test in support of his application for leave as a spouse. There was a further interview on 14 September 2014, after which the appellant's leave was cancelled by a Chief Immigration Officer ("CIO") on that basis.

5. The appellant appealed against the decision of the CIO. His appeal was heard by FtT Judge Griffith on 13 November 2015. There was no appearance by or on behalf of the appellant. The judge proceeded with the appeal in the appellant's absence. She gave the following reasons for doing so:

> [13] This appeal was set down to be heard on 13 November 2015. On 9 November 2015 a request for an adjournment was received from the appellant's representatives RMS Immigration Limited. The letter states that the appellant was in detention and wished for an adjournment in the interests of justice. The request was refused by the Tribunal on the grounds that the appeal had been ongoing in excess of twelve months during the whole of which time RMS Immigration Limited had been instructed. The decision was communicated to the representatives by fax on 11 November 2015.
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> [14] On the morning of the hearing the representatives did not attend before the Tribunal and no explanation for their absence was received. The Tribunal was also informed on the morning of the hearing that the appellant, who is detained, had refused to leave to attend the appeal hearing. In the circumstances, being satisfied that the appellant and his representatives had been properly notified that the adjournment of the hearing had been refused, I proceeded to deal with the hearing in the absence of the appellant pursuant to Rule 28 of the Tribunal Procedure Rules 2014.

6. Judge Griffith reviewed the evidence upon which the CIO's decision was based, including the generic witness statements of Peter Millington and Rebecca Collings and information relating to the specific TOEIC tests

taken by the appellant at Eden College International. She concluded that the respondent had discharged the burden of showing that the appellant had made a false representation in his application for leave as a spouse: [25]. She went on to conclude, for reasons she gave at [27]-[32] of her decision, that the appellant's removal from the United Kingdom was a proportionate course in Article 8 ECHR terms.

7. The appellant sought permission to appeal from the FtT and the Upper Tribunal. Both applications were refused and the appellant became appeal rights exhausted.

8. Whilst his first appeal was in train, the appellant and his wife divorced. On 31 August 2016, he applied for Indefinite Leave to Remain ("ILR") as the victim of Domestic Violence. That application was refused on 13 January 2017. The respondent considered that the appellant fell to be refused on grounds of prior false representations (his prior reliance on the TOEIC certificate) and because she did not accept that his marriage had broken down as a result of domestic violence. The appellant made an unsuccessful application for Administrative Review of that decision, after which he was refused permission to apply for judicial review, both on paper (by Upper Tribunal Judge Pitt) and following renewal at an oral hearing before Upper Tribunal Judge Gleeson.

9. The appellant then made three applications for leave to remain on human rights grounds. The first two were rejected because the respondent did not accept the appellant's application for a fee waiver. The third application was made on 28 September 2018. The appellant submitted that there would be very significant obstacles to his reintegration to Bangladesh and that his removal to that country would be in breach of Article 8 ECHR. Reference was made to the appellant's poor relationship with his family in Bangladesh and to his mental health. The letter of representation also included the following section, which related to the hearing before Judge Griffith:

> Our client requests that the Secretary of State considers that he did not attend court to provide oral evidence during the appeal hearing as he was in immigration detention at the time and had acted upon the advice of his previous legal representatives. Our client wished to attend court to rebut the Secretary of State's allegation but regrettably, he was advised not to attend the hearing and a request for the appeal to be considered on the papers was made instead by his previous representatives who also failed to attend court to represent his case. This is [sic] of course prejudiced his appeal as the case was heard in his absence and our client strongly believes that if he had given oral evidence during the appeal he would have been able to properly rebut the Secretary of State's allegation that he

fraudulently obtained the TOEIC English Language certificate as part of his application for leave as a spouse.

10. The respondent refused the application on 26 March 2019. There were three grounds of refusal under the Immigration Rules: (i) the appellant had failed to declare a December 2014 police caution for common assault in his application form (S-LTR 1.6); ii) the appellant had used deception in his application for leave as a spouse by relying on an improperly obtained TOEIC certificate (S-LTR4.2); and (iii) there would not be very significant obstacles to the appellant's reintegration to Bangladesh (276ADE(1)(vi)). The respondent considered whether the appellant's removal to Bangladesh would be contrary to Article 8 ECHR and concluded that it would not.

The Appeal to the First-tier Tribunal

11. The appellant therefore appealed to the FtT for a second time. The lengthy grounds of appeal reiterated the arguments made in the application to the respondent as regards the prior deception point and Article 8 ECHR. It was also submitted that the appellant would encounter very significant obstacles to reintegration on return to Bangladesh. He averred that he had not attempted to mislead the respondent in failing to declare his police caution from 2014. Reference was also made to the applicant having suffered spousal abuse.

12. The appeal came before FtT Judge Buckwell ("the judge") on 12 January 2021. The appellant and the respondent were represented by counsel. The judge heard oral evidence from the appellant and submissions from both representatives before reserving his decision.

13. The judge's decision is detailed and carefully reasoned. It is clearly the product of a great deal of thought, care and analysis. It spans 146 paragraphs and 31 pages of single-spaced type and what follows is intended to be merely a summary of his critical conclusions.

14. For reasons he gave at [117]-[119], the judge concluded that the appellant had given credible evidence that his non-disclosure of the conviction was an innocent omission to which paragraph S-LTR 1.6 did not apply. At [120]-[134], the judge explained why he found that the respondent had failed to discharge the burden upon her of showing that the appellant had used a proxy to take his TOEIC test. At [137]-[139], the judge nevertheless concluded that the appellant could not succeed under the Immigration Rules because he was unable to show that there would be very significant obstacles to his reintegration to Bangladesh. At [140]-[143], the judge explained his reasons for allowing the appeal on Article 8 ECHR grounds.

The Appeal to the Upper Tribunal

15. The respondent's three pages of grounds of appeal are grouped under a single and rather uninformative heading "Making a material misdirection in law". On analysis, however, the grounds contain the following complaints:

    (i) The judge misdirected himself in law by failing to follow *Devaseelan* * [2003] Imm AR 1 and *BT (Nepal)* [2004] UKIAT 311 in departing from Judge Griffith's decision on the TOEIC issue.

    (ii) The judge erred in concluding that the appellant's failure to disclose his caution was innocent, in that he overlooked the precise question asked in the application for leave to remain.

    (iii) The judge failed to provide sufficient reasons for his conclusion that the appellant had not used a proxy to take his English test.

    (iv) The judge erred in law in taking account of what had been said in the All Party Parliamentary Group report on TOEIC, since to do so was contrary to *OGC v ICO & HM Attorney General* [2008] EWHC 737 (Admin); [2010] QB 98.

    (v) The judge took an immaterial matter into account in deciding that the appellant had suffered domestic violence in his marriage, since that claim had been rejected by the respondent and by the Upper Tribunal.

16. Permission to appeal was granted by FtT Judge O'Brien, who considered each of the grounds to be arguable.

17. On 20 May 2021, the appellant's solicitors filed and served a detailed response to the respondent's grounds of appeal. The response had been settled by Mr Mustafa of counsel earlier that day. I shall return to its contents in due course.

Submissions

18. For the Secretary of State, Ms Petterson submitted as follows. The point raised by the first ground was a simple one which stood irrespective of whether the appellant had sought to appeal against Judge Griffith's decision on the basis that he had been failed by his then representatives. What was required by *Devaseelan* and *BT (Nepal*) was for the appellant's current solicitors to put the appellant's allegations to his former representatives. They had not done so and the judge had overlooked that

failure, which was material to his evaluation of the appellant's account. The judge had also failed to take account of the fact that the appellant had not produced the recordings of his TOEIC test before Judge Griffith, which should have caused him to approach that evidence with the utmost circumspection.

19. The judge had also erred, Ms Petterson submitted, in simply accepting what was said by the appellant without considering what had been said in *MA (Nigeria)*; there might be any number of reasons why a person who is able to speak English fluently might nevertheless use a proxy to take an English test. The APPG report should not have been considered by the judge for the reasons given in *DK & RK (India)* [2021] UKUT 61 (IAC). The evidence given by Professor French to the Group did not nullify the conclusions reached in the authorities in any event. The judge had been wrong to attach weight to the appellant's claim that he was a victim of domestic violence without considering what had been said by the respondent and the Upper Tribunal in respect of that claim.

20. Ms Petterson confirmed that she was not pursuing ground two in light of the submissions made by Mr Mustafa in his rule 24 response.

21. Mr Mustafa relied on his rule 24 response and confirmed, with reference to the 2016 grounds of appeal, that it had been submitted in support of the application for permission to appeal that the appellant had been poorly served by his previous representatives. At my request, he took me to the parts of the judge's decision in which he had considered the domestic violence assertion, making reference to [9], [16], [54] and [136] in particular. He submitted that what was said in [142] about domestic violence was a 'remark, not a finding' and that the allegation of domestic violence had not been challenged by the respondent at the hearing. The judge had been entitled to attach weight to the point in all the circumstances.

22. As to the respondent's complaint about *Devaseelan*, it was quite clear that the judge had been aware of that starred decision. He had cited it at [7] and had referred to the IAT's decision and to other authority cited by the appellant at [120] and [122]. The judge was not required to expect there to be evidence from the appellant's previous advisers, bearing in mind the flexibility with which the guidelines were to applied: *SSHD v BK (Afghanistan)* [2019] EWCA Civ 1358; [2019] 4 WLR 111, at [31]-[39]. There had been a properly reasoned basis for Judge Buckwell to reach a different conclusion from Judge Griffith. He had been able to hear from the appellant and to reach a view about his credibility, whereas Judge Griffith had been deprived of that opportunity. In any event, the law had clearly and significantly moved on since Judge Griffith had considered the allegation. That point had not been lost on the judge, as was clear from his [124] in particular. The respondent's grounds were nothing more than a

disagreement and the respondent continued to overlook the point that she had failed to adduce before either Tribunal the record of the initial interview at Heathrow Airport. The appellant was noted to have provided plausible answers in that interview. If Judge Griffith had been given that interview, she would have been bound to find that the appellant had discharged the evidential burden upon him of adducing an innocent explanation for the respondent's concern.

23. As to the respondent's third ground, it was quite clear that the judge's finding was not based solely on his acceptance that the appellant spoke good English. He had given a number of reasons for his conclusion that the appellant had not cheated by using a proxy and his reasoning could not properly be impugned for the reason given by the respondent. The judge was plainly well aware that the issue was whether or not the appellant had used a proxy and he had given good reasons for resolving that conclusion in the appellant's favour.

24. Mr Mustafa submitted that the judge had been entitled to consider the APPG report and that he had not, contrary to the assertion in the respondent's grounds, found that the report had 'displaced' the respondent's evidence. The judge's approach was not contrary to *DK & RK*. The reality of this case was that there were good reasons given for the judge's conclusion that the appellant had not cheated. The appellant had adduced the voice recordings from Eden College, which the judge had examined in some detail. There was no metadata to link the appellant to those recordings. The respondent's preparation before the FtT had been lacklustre, with the key witness statement referring to a different person. The Project Façade report which the respondent relied upon related to a period after the appellant had taken the test. The ultimate conclusion that the appeal should be allowed on Article 8 ECHR grounds was open to the judge, particularly when it was recalled that the respondent's published policy mandated a grant of leave to remain for six months when an ETS allegation was not proved in a human rights appeal.

25. Ms Petterson did not seek to respond.

26. I reserved my decision.

Analysis

27. Ms Petterson was correct not to pursue the second of the grounds I have summarised above. As submitted by Mr Mustafa, the appellant was not obliged to disclose his police caution because it was spent and the respondent failed to follow her published policy (*Grounds for refusal – Criminality*, version 1, 1 December 2020) when she based a ground of refusal on this point.

28. The respondent's third ground is equally unmeritorious. The suggestion in that ground is that the judge based his decision on the appellant's ability to speak English and that he gave legally inadequate reasons for concluding that the appellant had not cheated in his English language test. The point is made with reference to the decision of the Upper Tribunal in *MA (Nigeria)* [2016] UKUT 450 (IAC), in which the following appears:

> [57] Second, we acknowledge the suggestion that the Appellant had no reason to engage in the deception which we have found proven. However, this has not deflected us in any way from reaching our main findings and conclusions. In the abstract, of course, there is a range of reasons why persons proficient in English may engage in TOEIC fraud. These include, inexhaustively, lack of confidence, fear of failure, lack of time and commitment and contempt for the immigration system. These reasons could conceivably overlap in individual cases and there is scope for other explanations for deceitful conduct in this sphere. We are not required to make the further finding of why the Appellant engaged in deception and to this we add that this issue was not explored during the hearing. We resist any temptation to speculate about this discrete matter.

29. As contended by Mr Mustafa in his thorough rule 24 response, however, the judge did not base his conclusion on the fact that the appellant is proficient in English. He gave a raft of reasons for concluding that the appellant had not cheated in his test, including his assessment that the appellant was a witness of truth [128]; the appellant's decision to adduce before the FtT the voice recordings provided to him by ETS [129]; and the 'extremely careless' preparation of the appeal by the respondent, who had furnished the FtT with a witness statement which related to a different case [131]. In light of all of these reasons, the judge was entitled to note, as he did at [128], that the appellant had demonstrated his proficiency in English long before he came to the UK. The judge was not required, in addition, to undertake a further process of reasoning about why the appellant might nevertheless have chosen to cheat in an English language test.

30. The remaining grounds are more meritorious. The first concerns the judge's decision to depart from the starting point provided by Judge Griffith's earlier decision on the TOEIC issue. I should state immediately that this experienced judge cited not only *Devaseelan* but also some of the subsequent authorities in which the flexibility of the guidance given in that starred decision has been underscored by the Court of Appeal. Citation of *Devaseelan* appears at [84] and [94] (during the judge's summary of the competing submissions) and at [120]. There is reference to *SSHD v BK (Afghanistan)* and *Djebbar v SSHD* [2004] EWCA Civ 804; [2004] Imm AR 497 at [122]. The judge made reference to the 'considerable

significance' of the question of whether he should follow the decision of Judge Griffith or whether he should consider the question of deception afresh, in light of all of the evidence before him: [120]. Having set the scene in that way, the judge reasoned as follows:

> [121] It is appropriate to consider the circumstances faced by the appellant in 2015 when his appeal was heard. Again he gave specific evidence before me in that respect, amplifying points made in his adopted witness statement and clarifying certain aspects. In essence the appellant maintains that his representatives at the time had informed him that the appeal hearing would not be a substantive hearing. Indeed, they had assured him that the appeal hearing would be adjourned. For such reasons he was told that he need not attend. I am conscious that at the time the appellant was detained and therefore communication with any representatives would not have been as easy or straightforward as between a person at liberty and their legal representative. As stated, the appellant provided an explanation. He was confident that he had not needed to attend the hearing. He strongly denied that he had not attended because he had refused to take a conveyance offered to him from Brook House at Gatwick to Taylor House. In that respect what was stated by Judge Griffith in relation to his non-attendance was factually incorrect. There is no other evidence before me beyond the brief remarks of Judge Griffith and the oral evidence which I heard from the appellant. I do not know exactly what information Judge Griffith received or how she received it. She does not refer to any written documentation wherein it was stated, for example, by the detention centre that the appellant had specifically refused to join a conveyance to Taylor House which had been offered to him. On balance I find the evidence given by the appellant on this particular aspect to be credible. I do not believe that he wilfully refused to attend the 2015 hearing at Taylor House.
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> [122] Judge Griffith determined that she should proceed with the appeal hearing. The appellant was unrepresented and therefore only the views of the respondent were taken into account, by way of oral contribution to the appeal hearing. Judge Griffith thereafter found against the appellant and subsequently permission was not granted for a challenge to her decision. Taking into account caselaw guidance such as BK Afghanistan (above) and Djebbar [2004] EWCA Civ 804, and taking into account the submissions made by both representatives on the Devaseelan Sri Lanka * principles overall, for the following reasons I find that it is appropriate for me to depart from the findings of Judge Griffith. Consequently,

> it is appropriate that I will make my own findings in relation to the allegations of cheating which were brought against the appellant. My reasons for finding it appropriate to deport from the previous decision are based, among other reasons, on applying a consideration of fairness. A fair approach must always be shown to both parties but here I find that it would be specifically unfair for further consideration not to be given to the ETS issue and the cheating allegations. I set out further reasoning in that respect.
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> [123] No evidence from the appellant was heard before Judge Griffith. He has provided to my satisfaction an entirely plausible reason why he did not attend the 2015 hearing. No evidence was before me to show that that particular issue had been considered in the permission applications made by or on behalf of the appellant subsequent to the promulgation of the decision of Judge Griffith. However, the reality remains that the appellant could not personally contribute to his own appeal hearing at which the very significant issue of the accusation of cheating had been at the very centre of that appeal.

31. At [124], the judge agreed with a submission made then and now by Mr Mustafa, which is that the correct three-stage approach to determining such allegations has only crystallised in authorities which post-date the decision of the Judge Griffith. At [125], the judge also considered that the APPG report amounted to 'further evidence' in support of his conclusion that he should reconsider the issue of the appellant's deception for himself.

32. At first blush, therefore, this was a specialist Tribunal judge who was well aware of the law and who was clearly at pains to apply it to the facts before him. What is said by the respondent, however, is that the judge omitted a necessary consideration from his assessment of whether he should depart from Judge Griffith's conclusion regarding the appellant's past conduct. To express the same point in a different way, it is contended that the judge failed to consider a relevant matter when he decided at [121] that the appellant had given a credible explanation of what had happened at the time of his appeal in 2015. The respondent's ground is founded upon a specific part of the *Devaseelan* guidance and on what was also said by the IAT in *BT (Nepal)*.

33. The relevant section of *Devaseelan* is as follows (the emboldening is in the original):

> (7) **The force of the reasoning underlying guidelines (4) and (6) is greatly reduced if there is *some very good reason* why the Appellant's failure to adduce relevant evidence before the first Adjudicator should not be, as it were, held against him.**

> We think such reasons will be rare. There is an increasing tendency to suggest that unfavourable decisions by Adjudicators are brought about by error or incompetence on the part of representatives. New representatives blame old representatives; sometimes representatives blame themselves for prolonging the litigation by their inadequacy (without, of course, offering the public any compensation for the wrong from which they have profited by fees). Immigration practitioners come within the supervision of the Immigration Services Commissioner under part V of the 1999 Act. He has power to register, investigate and cancel the registration of any practitioner, and solicitors and counsel are, in addition, subject to their own professional bodies. An Adjudicator should be very slow to conclude that an appeal before another Adjudicator has been materially affected by a representative's error or incompetence; and such a finding should always be reported (through arrangements made by the Chief Adjudicator) to the Immigration Services Commissioner.
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> Having said that, we do accept that there will be occasional cases where the circumstances of the first appeal were such that it would be right for the second Adjudicator to look at the matter as if the first determination had never been made. (We think it unlikely that the second Adjudicator would, in such a case, be able to build very meaningfully on the first Adjudicator's determination; but we emphasise that, even in such a case, the first determination stands as the determination of the first appeal.)

34. The headnote to *BT (Nepal)*, which is a decision of a three judge panel of the Immigration Appeal Tribunal ("IAT") chaired by the (then) Deputy President, is as follows:

> If an appeal is based in whole or in part on allegations about the conduct of former representatives, there must be evidence that those allegations have been put to the former representative, and the Tribunal must be shown either the response or correspondence indicating that there has been no response.

35. *BT (Nepal)* was a case which shares an important feature with the present case. The appellant was initially represented by a firm of solicitors but they wrote to the Immigration Appellate Authority ("IAA") sixteen days before the hearing to state that they no longer acted. Nothing was received to suggest that another firm had received instructions to act. When the appeal was called on before the Adjudicator, there was no appearance by or on behalf of the appellant. The judge proceeded in her absence and went on to dismiss the appeal.

36. On appeal to the IAT, BT stated that she had been let down by her solicitors, who had written to the IAA to come off the record because the appellant had not paid their fees. The IAT declined to make a finding of fact against the former solicitors because they had not been given an opportunity to respond and said that it would generally be inappropriate make such a finding unless the allegation has been put: [4]-[5]. The appeal was nevertheless allowed because the judge had failed to engage properly with the issues beyond adopting the reasoning in the respondent's decision: [9].

37. *BT (Nepal)* was cited and applied by the High Court in *R (on the application of ROO (Nigeria)) v SSHD* [2018] EWHC 1295 (Admin) and by the Upper Tribunal in *HS (Zimbabwe) CG* [2007] UKAIT 94.

38. The rationale for the principle in BT (Nepal) is not rooted solely in the finality of litigation. As is clear from what was said at [4] of the IAT's decision, an equally important consideration is the significance of a judicial finding against a professional (whether an individual or a firm) who is not a party to the proceedings. Similar concerns have arisen in other contexts, as might be seen from the decision of the Court of Appeal in *W (a child) (care proceedings: non-party appeal)* [2016] EWCA Civ 1140; [2017] 1 WLR 2415, in which a judge in family proceedings had failed to give professional witnesses (a social worker and a police officer) any opportunity to know of, or respond to, substantially and professionally damning criticisms he came to make in his judgment.

39. Those concerns, and the principle in *BT (Nepal)*, were clearly applicable in the circumstances which arose in the instant appeal. Before Judge Griffith, the picture was quite clear. The appellant was represented by RMS Immigration of London E1. An adjournment had been refused on the papers and the appellant refused to leave his cell to attend the hearing. In the grounds of appeal to the Upper Tribunal dated 13 June 2016, it was asserted that the appellant had been 'advised by [RMS Immigration] that his attendance was not necessary'. There was no suggestion at that time that this serious allegation had been put to RMS Immigration.

40. More than four years later, when the instant appeal came before the judge, the allegations against RMS Immigration had multiplied. As recorded in [121] of the judge's decision, the appellant stated that he had been told by his representatives that the hearing would not be a substantive hearing; that it would in any event be adjourned; and that he need not attend the hearing. At [77], the judge recorded that the appellant had confirmed that he had been 'given an opportunity' to attend the hearing but that he had decided not to attend precisely because he had accepted the advice from his representatives that 'the hearing would only be an adjournment at which he was not required'.

41. These are serious allegations indeed. They encompass not only an express allegation that the appellant was actively misled by his then representatives about the nature of the hearing and the course of action which the FtT would adopt. There is also an implication that the representatives had decided to 'play the system' by advising the appellant not to attend and by failing to attend themselves, thereby seeking to present the FtT with a situation in which it would feel compelled to adjourn the hearing.

42. It is not suggested that RMS Immigration has ceased to operate. I do not know whether it is a firm of solicitors or a firm regulated by the Office of the Immigration Services Commissioner. Nor do I have any detailed knowledge of the relevant provisions of the code of conduct for either profession. Even without such detailed knowledge, however, it is quite clear that these allegations are likely to amount to serious professional misconduct in either profession.

43. It is very easy to make such allegations, and to lay the blame for all that has gone before at the feet of previous representatives. But it is clear from *BT (Nepal)* that a judge should not generally accept such allegations unless the advisers in question have had a proper opportunity to respond. In failing to have regard to that principle, and in accepting what was said by the appellant about the wholesale failings of RMS Immigration, the judge erred in law by failing to have regard to a material consideration. The other reasons given for his decision do not, contrary to the submissions made by Mr Mustafa orally and in writing, serve to overcome that failing. This error tainted the judge's decision to depart from Judge Griffith's decision and it tainted his assessment of the appellant's credibility more widely.

44. The respondent's fourth grounds relates to the judge's decision to 'take the views expressed by the APPG into general account', as he put it at [125] of his decision. My conclusion in relation to this ground may be stated more succinctly than my conclusion in relation to the second. The judge erred in law in taking the views expressed in the APPG into account.

45. In *OGC v ICO*, one criticism of the Information Tribunal was that it had taken into account an opinion expressed by a Parliamentary Select Committee. In respect of that criticism, Stanley Burnton J (as he then was) held, inter alia, that in relying on the opinion of the select committee the tribunal had relied on evidence which had not been before it and had failed in its duty to make its decision only on the basis of the evidence and submissions before it. For reasons connected with parliamentary privilege, Stanley Burnton J went further and stated that neither a party to proceedings before a tribunal nor the tribunal itself should seek to rely on an opinion expressed by a parliamentary select committee. For these reasons, he concluded that the Tribunal had taken an illegitimate and

irrelevant matter into account in considering the views expressed by the select committee.

46. What was said by Stanley Burnton J in *OGC v ICO* was set out by the Upper Tribunal (Lane P and Ockelton V-P) at [10] of *DK & RK [2021] UKUT 61 (IAC)*. That was a case like the present, concerning the APPG report on TOEIC. The Upper Tribunal also considered what had been said by Cockerill J in *R (on the application of Cartref Care Home Ltd & Others) v HMRC* [2019] EWHC 3382 (Admin). In that case, as in the present, Cockerill J was asked to consider an APPG report which amounted, as she said at [169] and [171] to 'ex post facto commentary' and a 'call to action'. Cockerill J concluded at [172] that the opinions expressed in the APPG report were not admissible opinion evidence.

47. The Upper Tribunal reached the same conclusions in respect of the APPG report on TOEIC. At [21], the President said that the opinions in the APPG report were not 'opinions to which we can have any material regard in reaching conclusions about the evidence which will be placed before us'. The relevant part of the judicial headnote to the decision reads as follows:

> Courts and tribunals determine cases by reference to the evidence before them and not by reference to the views of others, expressed in a non-judicial setting, on evidence which is not the same as that before the court or tribunal. Indeed, even if the evidence were the same, the court or tribunal must reach its own views, applying the relevant burden and standard of proof.

48. Mr Mustafa has attempted, orally and at [19]-[23] of his rule 24 response, to submit that the judge was nevertheless entitled to reach the conclusions he reached in respect of the allegation made against this appellant. His submissions fail, however, to come to grips with the central point which is, to borrow the words of Stanley Burnton J, that the opinions expressed in the APPG report were 'illegitimate and irrelevant' considerations in a judicial assessment.

49. Mr Mustafa is necessarily correct to highlight the fact that the judge did not give the report any particular weight and the fact that the judge did not (contrary to the assertion in the respondent's grounds) consider that the report was capable of 'displacing' the respondent's evidence. What is clear, however, is that the judge attached some weight to those opinions, which clearly played a material part in his analysis. The APPG report clearly played a material part in the judge's decision to depart from Judge Griffith's assessment: [125]. It also played a material part in the judge's assessment of the appellant's 'innocent explanation', at the second stage of the process required by the authorities: [129]. It is clear from [134] that the

judge then considered 'in the round' whether the respondent had discharged the burden of proof which ultimately fell upon her. In so doing, he must be taken to have factored into his assessment what he had previously said about the APPG report, including what he described at [129] as the issues which were raised in the deliberations of the APPG. It is not possible to state with any certainty what conclusion the judge would have reached in the appeal without having attached some weight to those deliberations.

50. The respondent's final ground is also made out. It is quite clear from the respondent's decision dated 13 January 2017 that she did not accept that the appellant's marriage had broken down as a result of domestic violence. Judicial review proceedings in which that conclusion was under challenge were resolved in the respondent's favour, both on the papers and at an oral permission hearing. At [136], the judge stated that it was not for him to make distinct findings on the domestic violence grounds 'as though there were a specific appeal related to domestic violence under the Immigration Rules'. He was correct in that observation. It was incorrect, therefore, for the judge to proceed on the basis that the appellant was the 'victim of a cruel and aggressive former wife and her family members' when he came to balance the public interest against the appellant's private life, at [142] of his decision. There might not, as Mr Mustafa records in his rule 24 response, have been any questions about that issue asked by counsel for the respondent in the FtT but it was nevertheless clear from what had gone before that the respondent did not accept the allegations of domestic violence made by the appellant. It was wrong as a matter of law, in those circumstances, for the judge to treat this as an accepted fact which militated positively in the appellant's favour in the scales of proportionality. I do not accept Mr Mustafa's submission that what appeared in that section of the judge's decision was merely an observation; it was plainly a matter which he weighed in the balance in deciding that the appellant's removal would be disproportionate.

51. It follows that I find three of the respondent's grounds to be established. Despite the obvious (and characteristic) care which the judge took in writing this reserved decision, I am satisfied that it cannot stand. The errors into which the judge fell infect his assessment of the appellant's credibility, and his consideration of Article 8 ECHR as a whole.

52. In so finding, I should record my agreement with certain of the submissions made by Mr Mustafa and certain of the findings made by the judge. It is a matter of concern that the respondent has consistently failed to file and serve the interview which took place with the appellant shortly after he returned to the UK in 2014. That is particularly so when the appellant was thought by the interviewer to have given plausible answers in that interview. Secondly, it is a matter of at least equal concern that the respondent managed to file a witness statement which related to another

appellant. That sloppy case preparation and lacklustre record keeping cannot bear the weight suggested by Mr Mustafa, however. As the judge found, the generic evidence is nevertheless sufficient to discharge the evidential burden on the respondent and what really matters in a case such as the present is whether the appellant has an innocent explanation and whether, in the final analysis, the respondent has discharged the legal burden upon her. Whilst the respondent's failings are undoubtedly relevant at both of those stages, they are insufficient of themselves to carry the day. To a significant extent, the case therefore turns on the credibility of the appellant and the judge fell into clear error in his consideration of that question.

Notice of Decision

The decision of the FtT involved the making of errors on points of law. That decision is set aside and the appeal is remitted to the FtT, to be heard de novo by a judge other than Judge Buckwell.

No anonymity direction is made.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

16 June 2021