Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/51899/2021
CE-File Number: UI-2022-003651
IA/06171/2021

THE IMMIGRATION ACTS

Heard at Field House IAC
On the 18 November 2022

Decision & Reasons Promulgated
On the 07 February 2023

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MM
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer
For the Respondent: Mr P Lewis, counsel instructed by NN Solicitors

DECISION AND REASONS

Introduction

1. This is an appeal by the Secretary of State against the decision of First-tier Tribunal Judge ML Brewer, heard on 21 April 2022. For ease of reference the parties are referred to as they were before the First-tier Tribunal.

2. Permission to appeal was granted by First-tier Tribunal Judge Parkes on 8 August 2022.

Anonymity

3. No direction has been made previously and no application was made before me. I have nonetheless decided to make such a direction owing to the appellant's mental health diagnosis.

Background

4. The appellant arrived in the United Kingdom in September 2009 with leave to enter as a Tier 4 migrant. Following an allowed appeal, the appellant was granted leave to remain until 29 May 2014. An in-time application for further leave to remain was refused on 26 August 2015 and in that decision an allegation was made that he had used deception. The appellant's appeal against that decision proceeded in his absence and was dismissed. On 12 December 2018 when his appeal rights were exhausted. On 20 December 2018 the appellant unsuccessfully applied for indefinite leave to remain outside of the Immigration Rules. His appeal against that decision was dismissed and his appeal rights exhausted on 5 August 2020. Both judges concluded that the appellant had relied upon a TOEIC certificate produced by fraud.

5. On 15 August 2020, the appellant made a human rights claim, seeking a grant of indefinite leave to remain outside the Rules. That application was refused by way of a decision dated 6 May 2021. Specifically, the respondent concluded that the appellant did not meet the residence requirements of paragraph 276B(i) of the Rules because his lawful leave was 9 years and 3 months. In addition, the application was refused under paragraph 322(2) and 276B(iii) of the Rules as the appellant had previously submitted a false TOEIC certificate. The appellant's private life claim based on his mental health condition was refused under paragraph 322(1) as being sought for a reason not covered the Rules. In addition, the claim under paragraph 276ADE (1) was also refused, with reference to 276ADE(1)(i), (iii), (iv), (v) and (vi).

The decision of the First-tier Tribunal

6. At the hearing before the First-tier Tribunal, the respondent's representative confirmed that if the appellant had not used deception, his appeal should be allowed under Article 8 ECHR on the basis it would be disproportionate to remove him from the UK.

7. The appellant relied on a psychiatric report which included the opinion that he was not fit to give evidence. That evidence was accepted by the judge and was unchallenged by the respondent. Therefore, the appeal proceeded by way of submissions only. Ultimately. The judge found that the appellant had provided an accurate account of taking his own tests and not using deception. The appeal was allowed.

The grounds of appeal

8. The sole ground of appeal was that the First-tier Tribunal had misdirected itself in relation to the judge's treatment of the decision in *DK & RK (ETS: SSHD evidence; proof) India (2)* UKUT 00112 [2022]in relation to her favourable findings to the effect that the appellant did not use deception.

9. Permission to appeal was granted on the basis sought with the grant of permission including the following comment.

> *I note that there are 2 previous decisions in which the Appellant's case was rejected and he was found to have used deception. It is arguable that the Judge did not properly approach the issue of Devaseelan and did not explain how the evidence justified departing from the previous findings.*

10. In advance of the error of law hearing, the respondent filed a skeleton argument dated 15 November 2022. Reliance was placed on the grounds of appeal. In addition, it was further argued that the judge materially misdirected herself in the application of *Devaseelan* in this matter. The appellant's Rule 24 response, in the form of a skeleton argument was received on 16 November 2022.

The error of law hearing

11. I heard submissions from both representatives which are summarised below.

12. Mr Melvin relied on his skeleton argument and submitted that he would be expanding on the grant of submission but not making new points. He argued that the appellant was represented before Judge Griffiths and at no time during that hearing was any medical issue raised. Judge Brewer should have treated the submissions being made and the psychiatric report with caution and in this she materially erred. The chain of custody argument made on behalf of the appellant was becoming more popular and was an attempt to undermine the findings of the presidential panel in *DK and RK.* The National Audit Office report is inadmissible as evidence and the judge materially erred in adopting Mr Lewis' argument on that report, which went behind this. At [105] it was found that the voice recognition process was clearly and overwhelmingly reliable and the appellant admitted that the recording was not his voice. The Upper Tribunal in *DK and RK* rejected the submissions made on behalf of appellants and the First-tier Tribunal should have placed weight on the declaratory nature of the presidential panel.

13. As for the medical evidence, Mr Melvin argued that the First-tier Tribunal accepted submissions made without hearing any oral evidence albeit the appellant gave evidence less than two years ago. Headnote 4 of *Devaseelan* refers to evidence which could have been provided previously should be treated with great circumspection and the judge clearly did not do so. The medical evidence before the First-tier Tribunal was of a stand-alone variety. In *HA (Expert evidence; mental health)* [2022] UKUT 00111, a presidential decision had urged caution when a psychiatric report is unsupported by GP records, as in this case.

14. Mr Melvin submitted that Judge Brewer could not see what treatment the appellant was receiving at time of the previous hearing when had been found to lack credibility. Mr Melvin argued that this was an obvious point and urged the Upper Tribunal to find a material error of law and set the decision of the First-tier Tribunal aside.

15. In reply, Mr Lewis relied on his own skeleton argument and opposed what he saw as application to amend the grounds at a very late stage of the appeal process rather than an expansion of the original grounds. In the grounds, there had been no mention of either the psychiatric evidence or *Devaseelan.* The only point made in the grounds was that *DK and RK* is authority for all cases where a recording is not that of the appellant. The grounds did not identify any misdirection of law as *DK and RK* did not state that a recording of another is determinative, rather it was something to be considered in individual cases. The panel in *DK and RK* considered the individual cases and found them to be wanting.

16. In the alternative if *DK and RK* found that the recording issue was determinative, the judge was not obliged to follow any factual issues found by the Upper Tribunal, applying *MN and KY* [2014] UKSC. The First-tier Tribunal Judge invited the parties to address her on *DK and RK* as it had not been promulgated at the time and the Secretary of State chose not to make any submissions. As such it was wrong to suggest that the judge did not have regard to *DK and RK*, with reference to [66] onwards. This was not the case of the judge having regard to evidence, but uncontentious facts and she stated that she could have regard to the opinion expressed in the report. Those facts were unchallenged by the respondent. The grounds as drafted are a disagreement and do not identify any error of law.

17. Mr Lewis engaged with the additional grounds raised by the respondent and made the following points. The analysis and conclusions of Dr Dhumad were not challenged by the respondent however the judge analysed and considered the report in accordance with the Practice Direction. She referred to the lack of evidence from a GP and accepted the explanation given in the psychiatric report. As for the alleged failure to refer to *HA*, there was nothing cited in that decision which was inconsistent with the judge's decision and reasons. The judge properly analysed the evidence, had proper regard to the medical evidence and proper regard to the previous findings and gave reasons for reaching findings of her own, which she was entitled to do so based on *DK*.

18. In response, Mr Melvin reiterated that there had no medical evidence before the previous judges and no reference to the appellant having a speech impediment.

19. At the end of the hearing, I granted the Secretary of State's permission to make the amendments to the grounds referred to above. I also announced that I found there to be no material error of law contained in the decision of the First-tier Tribunal. My reasons are set out below.

Decision on error of law

20. The arguments raised on behalf of the respondent went well beyond the grounds of appeal however, the grant of permission extended upon those grounds, in that the application of *Devaseelan* appeared to the judge granting permission to be a *Robinson*- obvious matter.

21. The judge's consideration of the medical evidence is a substantial part of the *Devaseelan* issue. The appellant was on notice of the respondent's argument owing to both the grant of permission as well as the respondent's skeleton argument I therefore granted Mr Melvin's late application to vary the grounds of appeal to encompass the aforementioned points.

22. The respondent accepts that no issue was taken with the opinion expressed in Dr Dhumad's psychiatric report on the appellant but argues that it was incumbent on the judge to address the Presidential panel decision in *HA*, specifically headnote 5.

> *'Accordingly, as a general matter, GP records are likely to be regarded by the Tribunal as directly relevant to the assessment of the individual's mental health and should be engaged with in the Expert report... the Tribunal is unlikely to be satisfied by a report that merely attempts to brush aside GP records.'*

23. It is somewhat late for the respondent to seek to challenge Dr Dhumad's report given the acceptance of his evidence before the First-tier Tribunal. In this I am guided by what was said in *Kalidas (agreed facts-best practice)* [2012] UKUT 327 (IAC), at {35}

> *'Judges, unless in exceptional circumstances, do not look behind factual concessions. Such exceptional circumstances may arise where the concession is partial or unclear, and evidence develops in such a way that a judge considers that the extent and correctness of the concession must be revisited. If so, she must draw that immediately to attention of representatives so that they have an opportunity to ask such further questions, lead such further evidence and make such further submissions as required. An adjournment may become necessary.'*

24. No such exceptional circumstances arise here.

25. The Secretary of State argues that the judge should not have accorded weight to the diagnosis contained in the psychiatric report, principally, because Dr Dhumad had not seen the appellant's GP records. The difficulty with this argument is that the judge took this issue into consideration. At [16] the judge states, *'In assessing weight to be given to this report, I take into account that there is no reference to consideration of the Appellant's GP or other medical records in the report.'* The judge further took into account that it is explained in the report that the appellant had visited a GP on one occasion, in 2014 and was prescribed medication for his mental health but that he had not returned owing to a sense of shame. The judge considered all this evidence contained in the report including the methodology used, that Dr Dhumad complied with Practice Direction 6, as well as the fact that the Presenting Officer did not challenge the opinions of the doctor and concluded, at [17] that while she was not bound by the expert's analyses, she placed significant weight on Dr Dhumad's opinion and would take it into account in reaching her subsequent findings of fact.

26. It is the case that the judge did not refer directly to *HA* which was published on the date of the appellant's hearing before the First-tier Tribunal. However, Mr Melvin did not point to any part of the decision and reasons which was inconsistent with that case. The judge did not overlook the lack of GP records, as indicated above, but engaged with this issue, and reached a sustainable finding as to the weight to be given, which was a matter for her.

27. The respondent also argues that Dr Dhumad's report should have been treated with the greatest circumspection however this submission expresses disagreement rather identifies a material error of law. All the more so when the respondent's representative had no criticism of the said document. The judge was required to consider the new evidence, which was not before the previous judges with care, out of fairness, applying *BK (Afghanistan)* [2019] EWCA Civ 1358 at [44].

> *"I do not accept that in addressing the question of whether the [first tribunal's] finding of fact should be carried forward... the tribunal is only entitled to look at material which either post-dates the earlier tribunal's decision or which was not relevant to the earlier tribunal's determination. To restrict the second tribunal in that way would be inconsistent with the recognition in the case law that every tribunal must conscientiously decide the case in front of them. The basis for the guidance is not estoppel or res judicata but fairness."*

28. Dr Dhumad's report went some way to providing an explanation for the lack of submission of psychiatric evidence at his previous hearings, in that it was owing to the appellant's feelings of shame regarding experiencing mental health symptoms. Furthermore, the report provided support to the appellant's claim that he had existing mental health difficulties at the time he gave oral evidence in his previous appeal before Judge Griffith. An explanation which the judge accepted at [40].

> *Applying the principles in BK (Afghanistan) [2019] EWCA Civ 1358 at [44] and Djebbar, I approach the evidence and specifically this Appellant's credibility in this case afresh for these reasons: The evidence is that this Appellant at the time of both previous appeals was a vulnerable witness, but was not treated as such. Further, the judges in his previous appeals were not assisted by medical evidence when reaching their findings of fact. In the absence of these safeguards and medical evidence, I consider it necessary to approach this Appellant's credibility afresh.*

29. In relation to the appellant's claim that his mental state had a negative impact on his memory. Dr Dhumad's said the following. '*I have been asked to comment on whether his mental health condition could impact upon his memory. My diagnosis of severe depression is very relevant to this. Evidence shows that depression can cause a phenomenon known as "overgeneral memory", which impairs autobiographical memory specificity. Overgeneral memory is associated with PTSD and depression, and this can impair the ability to recount specific autobiographical memories.*'

30. In expressing the above opinion Dr Dhumad referred to published studies on this topic. There has been no challenge to this opinion or the studies he relied upon.

31. At [52], the judge made the following findings.

> *The unchallenged evidence before me was that his mental health was poor at the time of his appeal hearing before FtTJ Griffith, he was not sleeping and that he forgot the details about mode of testing at the appeal hearing as a result. The medical expert report, which was unchallenged, is that his speech impediment got worse under stress and his conditions could impair his ability to concentrate and recall, particularly under stressful conditions. Therefore, in all the circumstances, I do not place any weight on the adverse findings made by the judges when assessing the credibility of this Appellant.*

32. It is hard to see how the judge erred here, in accepting the explanation provided in the unchallenged medical evidence which she considered addressed the adverse credibility findings made by Judge Griffiths as well as the previous findings as to the appellant's level of English, which the medical evidence states, was also affected by his mild speech impediment. It follows, given that the judge directed herself appropriately regarding *Devaseelan*, at [35], that she made no error in departing from the findings of the previous judges.

33. Turning to the original ground of appeal which contains, in my view, a generalised criticism of the judge's assessment of *DK and RK*, among the many passages reproduced from that case. Mr Melvin did not engage with Mr Lewis' submission that the statistical data contained in the NAO report was admissible as agreed facts. This argument was made before the First-tier Tribunal in the form of the appellant's supplementary skeleton argument in response to the judge's direction to the parties to provide written submissions on the *ratio* in *DK and RK*, in advance of the hearing. The respondent did not comply with those directions. It is apparent from a complete reading of the decision and reasons, that the judge took account

of the limited oral submissions made on behalf of the respondent on the subject of *DK and RK,* as well as all other matters.

34. The tone of submissions made on behalf of the respondent before the Upper Tribunal, both written and oral is that *DK and RK* means that anyone identified as having an 'invalid' test result must have cheated and therefore the findings in the said decision prevented the judge from considering the credibility of the appellant's claim not to have cheated. This is an overly simplistic argument. At [131] the Tribunal said the following.

> *The appellants' cases are that there must have been a "chain of custody" error. They rely on their own assertions about the tests. If credible, and sufficiently comprehensive, such assertions might perhaps, in an individual case, suffice to prevent the Secretary of State establishing dishonesty on the balance of probabilities. In the present cases, however, there are good reasons to disbelieve the appellants' evidence.*

35. Given the above assessment of the individual cases of the appellants in *DK and RK*, which clearly indicate that an invalid test result is not necessarily conclusive evidence of fraud, the judge made no error in conducting a similar assessment.

36. The judge's consideration of *DK and RK* was detailed and thorough (set out at [32-34] and [66-79]), as was her assessment of the evidence before her which included a comparison of that available to the Upper Tribunal in *DK and RK* and that which related to the appellant. By way of example, at [70] she noted:

> *In the case of DK and RK, the above evidence is illustrative of test centres and their staff being directly complicit in the fraudulent activity. I take into account that in this Appellant's case, it is not alleged that his college was identified as a fraud factory and there was no evidence submitted by the Respondent (i.e. a Project Façade report) which evidenced staff complicity in fraud at his specific college.*

37. At [83] the judge sums up her findings following consideration of DK and RK.

> *Taking into account that the Tribunal in DK and RK were not attempting to usurp the role of the fact finding judge in their reported decision, to the contrary there was a plain expectation that the facts in the individual case must be weighed and considered. Further, it was not the position of the Tribunal that their evaluation of the general evidence of fraud would be dispositive or determinative of all TOEIC fraud cases When all the evidence in the present appeal is considered and weighted as already explained, I do not find the use of deception by the Appellant to be more probable than not. I believe the Appellant's account. I therefore find as a fact that the Appellant took his own tests, did not fraudulently obtain his TOEIC certificate and, did*

> *not utilise deception by relying upon it when seeking leave to remain in the United Kingdom.*

38. It might be said that the judge's findings were generous or that another judge might have come to a different conclusion. However, in the light of the guidance given by the Court of Appeal at paragraph [77] of *KM* [2021] EWCA Civ 693, I recognise that judicial restraint should be exercised when examining the reasons given by the First-tier Tribunal for reaching a decision and that it should not be assumed too readily that the judge misdirected themselves.

39. I conclude that the grounds of appeal amount to little more than a disagreement with the judge's assessment of the facts and as such they identify no error of law, let alone a material error.

40. The Secretary of State's appeal is dismissed.

Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error of on a point of law.

The decision of the First-tier Tribunal is upheld

Direction Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity. No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

Signed: T Kamara Date: 30 November 2022

Upper Tribunal Judge Kamara

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The

appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email