IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-000440
First-tier Tribunal No:
HU/55079/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 15 August 2024

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

Kuldip Singh
(NO ANONYMITY DIRECTION MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Ms M. Hodgson, Counsel instructed by Abbott and Harris Solicitors
For the Respondent: Mr P. Lawson, Senior Home Office Presenting Officer

Heard at Birmingham Civil Justice Centre on 11 June 2024

DECISION AND REASONS

1. This case concerns allegations that the appellant cheated in two English language tests administered by ETS (Educational Testing Service). On 4 August 2022, the Secretary of State refused a human rights claim made by the appellant for reasons including suitability grounds because, by an application for leave to remain made on 12 July 2012 ("the July 2012 application"), the appellant had relied on two "TOEIC" certificates which had subsequently been declared by ETS to be "invalid". The certificates were obtained in respect of listening, reading, speaking and writing tests undertaken by the appellant at Samford International College and Colwell College on 20 June and 17 July 2012.

2. The appellant appealed against the decision of 4 August 2022 to the First-tier Tribunal under section 82(1) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). By a decision promulgated on 2 May 2023, First-tier Tribunal Judge Freer ("the judge") dismissed the appeal. The appellant now appeals against the decision of judge with the permission of First-tier Tribunal Judge Bibi.

Factual background

3. The appellant is a citizen of India born in 1985. He arrived in the United Kingdom as a student in March 2010. He made the July 2012 application as he neared the end of his then extant leave. It was refused for reasons that are immaterial for present purposes, and the appellant made a number of additional, unsuccessful attempts to regularise his status in the years that followed.

4. On 30 June 2022 the appellant made a further human rights claim, relying on his private life. It was the refusal of that application which led to the Secretary of State's decision of 4 August 2022 which was under appeal before the judge below.

5. There were essentially two issues for resolution by the judge. First, whether the Secretary of State had established to the balance of probabilities standard that the appellant had cheated in the two TOEIC tests he relied upon in the July 2012 application. If so, the Secretary of State's suitability concerns were made out. Secondly, whether, in light of the appellant's private and family life established in the United Kingdom, it would be disproportionate for him to be removed from the United Kingdom, for the purposes of Article 8(2) of the European Convention on Human Rights ("the ECHR").

6. Although the appellant's original human rights claim was made only on the basis of his private life, on 16 March 2023 Secretary of State consented to the First-tier Tribunal considering the appellant's subsequent relationship with his partner, Neha Thapar, with whom he has a religious marriage.

7. In relation to the first issue, the judge found that the Secretary of State had established to the balance of probabilities standard that the appellant had used a proxy test-taker in the TOEIC tests he relied upon in the July 2012 application. Consequently, the judge agreed with the Secretary of State that the appellant could not meet the suitability requirements in the Immigration Rules. These are the findings challenged by the appellant in this appeal.

8. In relation to the second issue, the judge found that the appellant could not satisfy the private or family life provisions of the Immigration Rules. It would be proportionate for him to be removed. There is no challenge to these findings. I need not address them further. The challenge to the judge's findings on first issue is material, however, as the appellant understandably wishes to clear his name.

The decision of the judge

9. Having summarised the evidence and the submissions of the parties, the judge's operative analysis commenced at para. 42. He directed himself as to the balance of probabilities standard to which the Secretary of State was subject when establishing the allegations (paras 43, 51(ii), 61). The judge went on to address what could be gleaned about the appellant's English skills from his Indian qualifications (paras 46 and 47), his proficiency in spoken English at the hearing (para. 48), and other factors, such as weight attracted by the appellant's recollection of the testing process (para. 49), and the different motives candidates may have had to cheat (para. 50). At para. 51 and following, the judge set out the headnote to *DK & RK (ETS: SSHD evidence; proof) India* [2022] UKUT 112 IAC and addressed the impact of its findings concerning a report from the All Party Parliamentary Group on TOEIC in 2019 ("the APPG Report").

10. The judge noted that the evidence provided by ETS was that there was "significant evidence" that the appellant had used a proxy test-taker (para. 53).

11. At para. 55, the judge summarised some of the appellant's results from his studies in the UK, in the following terms:

> "I note that the Appellant passed another exam in the same year with One-Tech Training, using his language skills, and I have weighed this agreed fact in the round. The details are found at page 1 of 5 in the small recent bundle. The relevant programme was an advanced diploma in business management awarded by the Association of Tourism and Hospitality Management. There were six units tested out of a range of 100 marks. The average marks achieved by this Appellant were 54.33%. I find that these scores are modest, a technical pass but a very narrow pass in some papers. The lowest scores were 50 in international marketing, 50 in strategic business planning, and 52 in financial management. The highest score was 61 in communication process. Given that scores in the range of 0-49% were failed, this is the narrowest of passes. The date in question was 22 June 2012, so contemporaneous. I find that it provides dramatically good evidence to suppose that in the summer of 2012 the Appellant had a very real and reasonable fear of failing the TOEIC test. This goes to motive and credibility."

12. The judge ascribed significance to the fact that the appellant had not obtained "the tape" of the recording of his speaking tests from ETS (para. 56). His failure to do so went to his credibility.

13. At para. 58, the judge concluded that *DK and RK* was authority for the proposition that the Secretary of State's evidence, based on voice recognition conducted by ETS and the provision of the ETS look-up tool, provided "a reliable basis in evidence" for the decision challenged in the appeal. Against that background, he added, at para. 59:

> "There is no alternative explanation forthcoming for or from the Appellant. Over-writing of any innocent student's voice tapes has never been established and is highly unlikely (see *DK and RK*). **It is my view that any alternative explanation needs both a theory and scientific proof of that same theory.** Where there is neither, it is simply speculation, not evidence. One supposes that very likely there would be at least one concrete example by now, of an alternative explanation plus proof of it, if this alternative explanation hypothesis was based on reality. None has been cited." (Emphasis added to reflect the grounds of appeal)

14. At para. 61, the judge concluded the TOEIC analysis in the following terms:

> "On this basis, I am satisfied that it is right to apply *stare decisis* and follow *DK and RK*; there is no legal basis to find that it has been set aside in any way by the APPG report. The weight I give to the Home Office generic evidence is strong and the relevant specific evidence is strong, not least because no audio tape has been produced by the Appellant (who could have contacted ETS for the tape and told the Court what he heard on the audio tape and then played it). In using the word strong, I mean well above the balance of probabilities."

Issues on appeal to the Upper Tribunal

15. There are three grounds of appeal:

    a. Ground 1: the judge reversed the burden of proof by requiring the appellant to disprove the Secretary of State's allegations;

    b. Ground 2: the judge's assessment of the appellant's evidence was inadequate and/or unreasonable;

    c. Ground 3: the judge erred in his consideration and assessment of the Secretary of State's evidence concerning alleged TOEIC fraud.

16. There was a rule 24 notice from the Secretary of State dated 21 February 2024 resisting the appeal. Ms Hodgson relied on her helpful skeleton argument dated 3 June 2024.

17. I highlighted to the parties that *Varkey & Joseph (ETS - Hidden rooms)* [2024] UKUT 142 (IAC) has been reported since the hearing before the judge. Ms Hodgson said that she wanted to advance submissions based on the evidence and authorities as they stood at the time of the judge's decision. Neither party sought to rely on it. In my judgment, it would be relevant to the materiality of any error of law by the judge, if established, so is not relevant for present purposes.

The law

18. Ground 1 alleges a misdirection of law on the judge's part in relation to the application of the burden and standard of proof. It is for the Secretary of State to prove an allegation of fraud. The allegation must be established to the balance of probabilities standard. The headnote to *DK and RK* summarises the position in the following terms:

> "1. The evidence currently being tendered on behalf of the Secretary of State in ETS cases is amply sufficient to discharge the burden of proof and so requires a response from any appellant whose test entry is attributed to a proxy.
>
> 2. The burden of proving the fraud or dishonesty is on the Secretary of State and the standard of proof is the balance of probabilities.
>
> 3. The burdens of proof do not switch between parties but are those assigned by law."

19. Grounds 2 and 3 challenge findings of fact reached by a first instance judge.

20. In *Perry v Raleys Solicitors* [2019] UKSC 5 at para. 52, Lady Hale PSC held that the constraints to which appellate judges are subject in relation to reviewing first instance judges' findings of fact may be summarised as:

> "… requiring a conclusion either that there was no evidence to support a challenged finding of fact, or that the trial judge's finding was one that no reasonable judge could have reached."

21. The First-tier Tribunal is a specialist tribunal. In *HA (Iraq) v Secretary of State for the Home Department* [2022] UKSC 22, [2022] 1 WLR 3784, [2023] 1 All ER 365 Lord Hamblen said, at para. 72:

> "It is well established that judicial caution and restraint is required when considering whether to set aside a decision of a specialist fact finding tribunal. In particular:

> (i) They alone are the judges of the facts. Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. It is probable that in understanding and applying the law in their specialised field the tribunal will have got it right. Appellate courts should not rush to find misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently - see *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49; [2008] AC 678 per Baroness Hale of Richmond at para 30.
>
> (ii) Where a relevant point is not expressly mentioned by the tribunal, the court should be slow to infer that it has not been taken into account - see *MA (Somalia) v Secretary of State for the Home Department* [2010] UKSC 49; [2011] 2 All ER 65 at para 45 per Sir John Dyson.
>
> (iii) When it comes to the reasons given by the tribunal, the court should exercise judicial restraint and should not assume that the tribunal misdirected itself just because not every step in its reasoning is fully set out - see *R (Jones) v First-tier Tribunal (Social Entitlement Chamber)* [2013] UKSC 19; [2013] 2 AC 48 at para 25 per Lord Hope."

Ground 1: no error in relation to the burden and standard of proof

22. There are a number of facets to Ms Hodgson's submissions under this ground. I will consider them individually for ease of reference. I have, of course, considered all grounds holistically, in the round.

23. I deal first with the burden of proof issue. Ms Hodgson submitted that there was no obligation on the appellant to rebut the allegations made by the Secretary of State. The burden of proof remains on the Secretary of State at all times, and does not shift to the appellant, she submitted. That being so, it was an error of law for the judge to expect the appellant to have obtained "the tape" of the TOEIC tests from ETS, and to reach adverse credibility findings against him accordingly.

24. The judge concluded that the evidence relied upon by the Secretary of State was, as he put it at para. 61, "strong", by which he said he meant "well above the balance of probabilities." That finding is, in reality, a complete answer to this ground. The operative analysis by the judge found that the evidence relied upon by the Secretary of State against the appellant went "well above" the balance of probabilities standard. The judge held the correct party, namely the Secretary of State, to the correct standard, namely the balance of probabilities, throughout his analysis.

25. In any event, properly understood, the judge's scrutiny of the appellant's evidence involved no error of approach. As part of the judge's evaluative fact-finding process, the judge was entitled to consider the strength of the evidence in the round. That included the Secretary of State's evidence, and any evidence relied upon by the appellant in response. While the appellant was not subject to any evidential or legal burden to disprove the allegations, it was legitimate for the judge, sitting as a first instance fact-finding tribunal, to ascribe significance to the response of the appellant to the allegations against him as part of that overall assessment. The judge's observations about "the tape" were in reality no more than an assessment of the strength of the appellant's written and oral evidence.

The appellant denied the allegations. There were reasonable steps he could have taken to substantiate his position, including obtaining, or attempting to obtain, the recordings. The appellant had had many years to take those steps. He had not done so. That affected the weight the judge ascribed to his evidence. The judge was entitled to adopt that approach. This was an assessment of weight, not an assignment of the burden of proof. This aspect of ground 1 is without merit.

26. Next, the appellant challenges the judge's reference to needing "scientific proof" to dislodge the findings of *DK and RK* concerning the Secretary of State's evidence in TOEIC cases, at para. 59. It is important to place this remark in context.

27. First, the judge had repeatedly directed himself correctly concerning the balance of probabilities standard to which the Secretary of State was subject. The decision must be read as a whole.

28. Secondly, the "scientific proof" comment was in the context of considering whether there was an alternative explanation for the conclusions reached by *DK and RK*. The APPG Report does not appear to have been before the judge, and I was not taken to any extracts from it. However, it was considered in depth in *DK and RK*. A key criticism of the APPG Report of the Secretary of State's reliance on ETS evidence in TOEIC cases rested on so-called "chain of custody" concerns. Put simply, the criticism is that there has never been any evidence addressing the "chain of custody" from the point at which a test centre captures the recording of a candidate's performance during an oral speaking test, to digital storage on ETS servers, and subsequent analysis pursuant to the ETS voice recognition and analysis processes leading to the provision of data to the Secretary of State, pursuant to which the look-up tool is generated. Those concerns were addressed and rejected in *DK and RK*. At para. 114 of *DK and RK*, it was held:

> "That takes us to a crucial observation about the appellants' arguments in these proceedings. The appellants' arguments have been largely directed to demonstrating the possibility of error in the evidence - or error in determining the conclusion to which the evidence points. In particular, attention is drawn to the possibility of a false positive in voice recognition, or a failure in maintaining proper labelling of test data. As we have indicated, the former is assessed to be likely but low; the latter, the 'chain of custody' argument, remains only a theoretical possibility not supported by any detailed evidence, and rendered less likely by some of the general evidence. But it is important to appreciate that **although these possibilities prevent the data conclusively proving fraud in a scientific sense**, they do not substantially remove the impact of the evidence as capable of establishing facts in issue so that a human trier of fact is satisfied of the matter on the balance of probabilities." (Emphasis added)

29. I have emphasised the use of the term "scientific sense" because it is the terminology the judge adopted at para. 61 of his decision in these proceedings. Viewed in that light, any concern arising from the judge's use of the term falls away. In the course of explaining why *DK and RK* applied to the proceedings before him, the judge adopted the terminology of *DK and RK* ("scientific") in order to reject the criticisms advanced by the appellant. As in *DK and RK*, the 'chain of custody' submissions before the judge were "simply speculation, not evidence". The judge did not misapply the standard of proof. He simply rejected a speculative, alternative theory that was evidentially unsubstantiated, and in

doing so adopted the terminology of the leading authority on the issue when it dealt with the same point. This submission is without merit.

Ground 3: no error in the judge's analysis of the Secretary of State's evidence

30. Ms Hodgson addressed ground 3 next in her submissions, and I will do likewise. The essential complaint is that the judge erred in his reliance on Secretary of State's evidence against the appellant. Ms Hodgson submitted that there were no details of the "significant evidence" the Secretary of State had contended that ETS had found as part of its analysis of the appellant's test results which led to his TOEIC certificates being invalidated.

31. This ground amounts to a contention that the so-called ETS look-up tool is an insufficient basis for the Secretary of State to establish allegations of TOEIC cheating against an individual. Put in that way, it is clear that this ground is without merit. The Secretary of State has relied on extensive evidence in these proceedings, of which the lookup tool is only one part. The evidence includes witness statements from key Home Office officials explaining the processes adopted both by ETS and by the Secretary of State in order to determine whether a TOEIC certificate was valid, questionable or invalid. *DK and RK* concluded that that evidence was amply sufficient for the Secretary of State to demonstrate that a TOEIC certificate had been fraudulently obtained. There is no additional requirement to which the Secretary of State is subject beyond the provision of the lookup tool and the broader evidence relied upon in cases of this nature.

32. It follows that the judge reached findings of fact which were entirely consistent with the then leading authority on TOEIC certificates (*Varkey* of course now being the latest Upper Tribunal authority). He had the benefit of considering the whole sea of evidence that was before him, including the oral evidence of the appellant. While the appellant may well disagree with the judge's approach to the evidence, he has not established that the judge fell into error such that this appellate tribunal is able to interfere with those findings. In the words of *Perry v Raleys Solicitors*, the judge had not reached findings of fact that no reasonable judge could have reached.

Ground 2: no error in the assessment of the appellant's evidence

33. Ground 2 challenges the judge's approach to the evidence of the appellant. Again, it has a number of facets.

34. Ms Hodgson submitted that it was unfair for the judge to have referred to the "BBC programme" in the course of his analysis of the appellant's evidence because questions about "the BBC programme" were not put to the appellant by the Secretary of State or the judge at the hearing. Judge Bibi referred to this aspect of the appellant's challenge when granting permission to appeal. The "BBC programme" must have been a reference to the *Panorama* documentary which revealed widespread cheating at test centres administered by ETS.

35. By way of a preliminary observation on this issue, as I observed to Ms Hodgson at the hearing, there has been no application for a transcript of the hearing before the judge, or for a direction that the recording of the hearing be made available, and there is no evidence (for example, in the form of the witness statement) as to what took place at the hearing before the judge. Ms Hodgson accepted that that was the case.

36. There is a brief reference to para. 15 of the judge's decision to the appellant having said that he attended the test centre along with 20 other students, and that he didn't see anyone cheat. The TOEIC certificate dated 17 July 2012 also bears his image, suggesting that he must have attended on at least that day. That is the best evidence that this appellate tribunal has as to what took place at the hearing before the judge.

37. There are structural limitations in any appellate review of a first instance judge's findings of fact. They were notably referred to in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 at para. 114 in the following terms:

> "i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.
>
> ii) The trial is not a dress rehearsal. It is the first and last night of the show.
>
> iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.
>
> iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.
>
> v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).
>
> vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done."

38. Para. 114(v) is apposite. While the Secretary of State has not contested the factual assertion in the grounds about the appellant not being asked about "the BBC programme", it is very difficult to assess the tenor or content of any cross-examination that *did* take place. Even a transcript would be a pale imitation. Without a transcript it is even harder.

39. Assuming for present purposes, however, that the appellant was not expressly asked about the Panorama documentary, no unfairness has resulted.

40. The first reference to the "BBC programme" in the judge's decision was at para. 49:

> "The recollections of the Appellant about his days of testing are not greatly significant in my weighing exercise. He has had many chances to go over his memories since the tests; and the BBC programme showed students staying in the room while a proxy moved into their seat. Thus, a cheating student who had stayed in the room would know more or less as much as an honest one, about what they did and saw."

41. The evidence before the First-tier Tribunal, which would have been served on the appellant, was replete with references to the *Panorama* documentary. See paras 16, 17, 18, 19, 20, of the statement of Rebecca Collins, a Home Office Civil Servant, and para. 5 of the statement of Peter Millington, also a Home Office Civil Servant. Ms Collins' statement summarised some of the practices that were adopted in test centres when proxy-test takers were being used (see para. 17). By referring to the *Panorama* documentary, the judge simply referred to evidence

that was before the tribunal. This evidence had been disclosed to the appellant and his legal advisers. There was nothing unfair about the judge's reliance upon it, or references to it in the course of his analysis.

42. To the extent that this ground contends that the judge engaged in his own research, that is also without merit. The contents of the *Panorama* documentary were referred to at length in authorities that were before the court; including authorities upon which Ms Hodgson had referred to directly, such as *DK and RK* at paras 61 and 62.

43. Thirdly, the point being made by the judge at para. 49 is simply that any account provided by the appellant of attending the test centre, and explaining what took place on the day, would be of little relevance when determining whether he used a proxy test-taker. That was an aspect of the judge's analysis that was rationally open to him on the evidence before him.

44. Frequently in cases concerning TOEIC allegations, a witness will seek to establish their participation as a genuine test taker by explaining their attendance at the test centre, and the process that they had to follow in order to set the test. Such evidence may be capable of attracting some weight in appropriate proceedings, but whether it does so is a matter for the judge. In many cases such testimony is of little relevance. That is because, as the evidence before the judge in these proceedings demonstrated, candidates relying on a proxy test taker often had to attend the premises alongside their proxy in any event, and so would have a degree of knowledge of what took place. In these proceedings, the appellant's TOEIC certificate dated 17 July 2012 features his photograph, meaning that he must have attended the centre in person on that day. Establishing presence at the test centre does not necessarily amount to having not used a proxy.

45. It follows that it was not unfair for the judge to discount the appellant's evidence about what took place at the test centre as attracting weight. The judge was rationally entitled to adopt that approach, for the reasons he gave.

46. Another facet of this ground is that it was unreasonable for the judge to ascribe significance to the appellant's in-country academic scores from his initial studies in the country. I have set out the judge's para. 55 concerning this issue at para. 11, above.

47. Ms Hodgson submitted that it did not logically follow from the appellant's low pass marks in 2012 that he had a motive to cheat in the course of securing the TOEIC certificates. In the round, this was a factor that the judge was entitled to take into account. The appellant's English appears to have been poor even by the time this appeal was heard in 2023; see para. 48, concerning the presenting officer's submissions that the appellant's English had not improved in the decade following the tests he took in 2012. Ms Hodgson appears to have submitted that the appellant did not need "brilliant" language skills. The judge accepted that point.

48. When viewed in the round, the judge's analysis of the appellant's English skills, both in 2012, and at the hearing in 2023, rationally entitled him to take into account the fact that the appellant had barely scraped a pass in his academic studies in 2012. That rationally established the proposition that the appellant may have had a motive to use a proxy test taker in order to guarantee success in the TOEIC tests which he was due to take at the same time. I accept that it does not necessarily follow that mediocre (intending no discourtesy to the appellant)

academic results for a course taught in English provide a motive for cheating in subsequent English tests. But it might. The judge was entitled to take that factor into account as part of his assessment of the whole sea of evidence in these proceedings. The judge considered that aspect of the evidence in the round with all remaining evidence. In doing so, he did not reach a conclusion, or give reasons, that no reasonable judge could have reached or relied upon.

49. I conclude my analysis by turning to the opening of the judge's operative analysis, at para. 42:

> "Both the advocates tried very hard to put across widely divergent points of view. Naturally I had to consider very many aspects of the case in the round, as I have tried to illustrate."

50. The above extract is a further practical example of the point at para. 114(v) of *Fage v Chobani*. The judge was charged with reconciling the competing submissions and evidence relied upon by both sides. He correctly directed himself concerning the burden and standard of proof, analysed the evidence, and reached findings of fact which were rationally open to him, for the reasons he gave. The grounds of appeal are, in reality, a series of disagreements of fact and weight do not establish that the judge fell into error.

51. Drawing this analysis together, I conclude that the grounds of appeal are without merit. This appeal is dismissed.

Notice of Decision

The appeal is dismissed.

The decision of Judge Freer did not involve the making of an error on a point of law.

Stephen H Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

10 August 2024