IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-001334
HU/58612/2022
LH/02979/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 10 June 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

MOHAMMAD MASHURUL HAQUE
(ANONYMITY ORDER NOT MADE) Respondent

Representation:

For the Appellant: Ms A Everett, Senior Presenting Officer
For the Respondent: Mr M Biggs, Counsel instructed by Legit Solicitors

Heard at Field House on 29 May 2024

The appellant is not granted anonymity pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

DECISION AND REASONS

Introduction

0. This is an appeal by the Secretary of State for the Home Department against the decision of First-tier Tribunal Judge Morgan to allow an appeal by Mohammad Mashurul Haque against their decision, dated the 10th November 2022, to refuse his human rights claim. For ease of exposition, I shall refer to the parties in accordance with their status before the First-tier

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Tribunal; that is to say, Mohammed Masharul Haque as ‘the appellant’, and the Secretary of State as ‘the respondent’.

1. I do not make an anonymity order. No such order was made by the First-tier Tribunal, and it would thus serve no useful purpose to make an anonymity order at this stage. I am not in any event satisfied that there is an applicable exception to the general rule of ‘open justice’.

Background

2. The appellant is a citizen of Bangladesh who was born on the 2nd September 1983. He was granted limited leave to enter and remain in the United Kingdom in December 2020 for the purpose of study, and this was subsequently extended until August 2015. However, that leave was curtailed in 2014 on the ground that it had been obtained by fraud, namely, by reliance on an English language test that had been taken by proxy That decision did not carry a right of appeal. However, the appellant made a human rights claim in December 2021. This was refused on essentially the same ground as his earlier leave to remain had been curtailed. The First-tier Tribunal allowed the appellant’s appeal against the refusal his human rights claim, and it is the respondent’s appeal against that decision that brings the matter before the Upper Tribunal.

The decision of the First-tier Tribunal

3. The judge records that the respondent did not attend the hearing before the Tribunal without referring to any reason that may have been given for their absence. However Ms Everett did not suggest that the Tribunal had acted unfairly by proceeding in their absence.

4. In giving reasons for their decision, the judge noted that the documentary evidence recorded that, “the test score for the test taken by the appellant was invalid”, and that the respondent had accordingly, “discharged the evidential burden of proving that the appellant’s TOEIC certificate had been procured by dishonesty”. This meant that it was, “incumbent on the appellant to provide evidence in response raising an innocent explanation”. The judge noted that the appellant had set out his explanation at paragraph 10 of his witness statement. In summary, he said that he had not used a proxy test taker, but had, “sat the test himself”. He provided detailed evidence as to why he had, “chosen the particular test centre and as to what had happened during the exam at the test centre”. He did not need to use a test a proxy test-taker, “given his mastery of English obtained both during his undergraduate degree in Bangladesh, which involved the study of English and during his post-graduate studies in the United Kingdom” [5].

5. The judge then set out their conclusions at paragraphs 7 and 8 -

> 7. The difficulty for the respondent is that whilst I have found that the respondent has discharged the evidential burden I find in line with SM, that the respondent has failed to establish, on the balance of probabilities, that the appellant's prima facie innocent explanation is to be rejected. The

jurisprudence of [SM and Quadir (ETS - Evidence -Burden of Proof) [2016] UKUT 00229 (IAC)] noted the multiple frailties with which the generic evidence was considered to suffer and I note in particular, in relation to the generic evidence of Professor French who confirmed, at 3.2 of his report that the approach used is extremely likely to produce some false positives. In conclusion I find the legal burden of proof falling on the respondent has not been discharged.

8. In summary I find that the respondent has not demonstrated to the requisite standard that the appellant's English language test certificate, relied upon in the application for student leave was fraudulently obtained by the use of proxy test taker.

The grounds

6. The essence of the basis upon which permission to appeal against the judge’s decision has been granted is contained within the first three grounds of the application -

> 1. The Tribunal made its decision on this case without considering the Upper Tribunal’s most recent guidance on TOEIC cases as set out in DK & RK India [2022] UKUT 00112 (IAC). If it had done so it would have noted that the Upper Tribunal found that the SSHD’s evidence was reliable and, usually, persuasive. The Upper Tribunal found that “… the real position is that mere assertions of ignorance or honesty by those whose results are identified as obtained by a proxy are very unlikely to prevent the Secretary of State from showing that, on the balance of probabilities, the story shown by the documents is the true one. It will be and remain not merely the probable fact, but the highly probable fact. Any determination of an appeal of this sort must take that into account in assessing whether the respondent has proved the dishonesty on the balance of probabilities.”
>
> 2. It is respectfully submitted that if the Tribunal had applied the findings in DK & RK it would have used a different approach to its findings at paragraph 7 of its determination.
>
> 3. Furthermore, it is submitted that the Tribunal erred in its consideration of the evidence of Professor French. At paragraph 7 of its determination , the Tribunal noted Professor French’s conclusions. However, DK & RK noted at paragraph 103: “… the truth of the matter is that although those who have their own process for voice recognition examination (such as Professor French) can suggest other ways in which this examination of the data could have been made, there is no reason to suppose that the voice recognition process was substantially defective. There may be a false positive rate of one per cent, or even possibly three per cent, but there is no proper basis for saying that the false positive rate was or would be any higher than that. (There would also be a substantial false negative rate, but that does not fall for consideration here: we are not concerned with people who should have been caught as cheating, but were not.) ETS would have no known motive for exaggerating the level of the fraud on their system, and a reputational motive for confining the declared fraud to that clearly demonstrated by the data. We conclude that the voice recognition process is clearly and overwhelmingly reliable in pointing to an individual test entry as the product of a repeated voice. By "overwhelmingly reliable" we do not mean

conclusive, but in general there is no good reason to doubt the result of the analysis."

The hearing

7. Both representatives made helpful submissions in support of their respective positions. Each agreed that in the event of the appeal being allowed on the above grounds, the appropriate course would be to remit the appeal for a complete rehearing in the First-tier Tribunal.

Legal analysis

8. The judge correctly followed the now-familiar approach to assessing the evidence in appeals of this kind, by asking and answering the following three question: (1) does the respondent's evidence provide a case for the appellant to answer? (2) if so, has the appellant provided a plausible 'innocent explanation' for that evidence? (3) if so, does the evidence, taken as a whole, prove on a balance of probabilities that the appellant obtained his English language test certificate by fraudulent means? The judge answered the first two questions in the affirmative and the third in the negative. It is essentially the judge's approach to the second and third questions that lies at the heart of this appeal.

9. Ms Everett submitted that the judge's decision was fatally flawed in appearing to accept the appellant's 'innocent explanation' at face value, and in basing it upon the supposed "frailties" in the Secretary of State's voice-recognition evidence without also considering the views expressed by the Presidential panel of the Upper Tribunal in <u>DK & R</u> as quoted in the grounds of appeal (see paragraph 7, above). For his part, Mr Biggs submitted that the Tribunal's findings of fact were reasonably open to it on the evidence, that I should be slow to assume that a specialist fact-finding Tribunal had not taken account of relevant evidence simply because it did not refer to it in its decision, and that given the respondent's failure to attend the hearing, and thus put their case to the appellant in cross-examination, the judge would in any event have been bound to treat that evidence as unchallenged. He also helpfully referred me to the latest Upper Tribunal learning relating to fraudulent immigration claims in <u>Varkey & Joseph (ETS – Hidden rooms)</u> [2024] UKUT 00142, which helpfully identifies some of the methods by which cheating in English language speaking tests has historically taken place.

10. I deal firstly with Mr Biggs' submission that, given the absence of challenge in cross-examination to the credibility of the appellant's 'innocent explanation' due to the non-attendance by the Secretary of State at the hearing, the judge was not only entitled but effectively bound to accept that explanation. Mr Biggs based this submission upon the judgements of the Court of Appeal in <u>Ullah v The Secretary of State for the Home Department</u> [2024] EWCA Civ 201, which emphasise the importance of an opposing party challenging in cross-examination those

aspects of a witness' evidence that they invite the court to reject; a principle that is especially important where, as here, the issue is one of dishonesty. However, the rationale that underpins this principle is one of procedural fairness. It is moreover not inflexible. This was emphasised by Lord Hodge in TUI UK Ltd v Griffiths [2023] UKSC Civ 1442, at paragraph 69 -

> Because the rule is a flexible one, there will also be circumstances where in the course of a cross-examination counsel omits to put a relevant matter to a witness and that does not prevent him or her from leading evidence on that matter from a witness thereafter. In some cases, the only fair response by the court faced with such a circumstance would be to allow the recall of the witness to address the matter. In other cases, it may be sufficient for the judge when considering what weight to attach to the evidence of the latter witness to bear in mind that the former witness had not been given the opportunity to comment on that evidence. The failure to cross-examine on a matter in such circumstances does not put the trial judge "into a straitjacket, dictating what evidence must be accepted and what must be rejected": *MBR Acres Ltd v McGivern* [2022] EWHC 2072 (QB), para 90 per Nicklin J. This is not because the rule does not apply to a trial judge when making findings of fact, but because, as a rule of fairness, it is not an inflexible one and a more nuanced judgment is called for. In any event, those circumstances, involving the substantive cross-examination of the witness, are far removed from the circumstances of a case such as this in which the opposing party did not require the witness to attend for cross-examination. [Emphasis added].

Unlike the present case in which cross-examination of the appellant did not take place at all, the case of Ullah was concerned with an issue that had not been put by the Home Office Presenting Officer in cross-examination and which had the potential for being determinative of the appeal. The risk of unfairness accordingly arose from the appellant having been deprived of an opportunity to deal with that issue in his evidence. By contrast, the whole purpose of the appellant giving evidence at the hearing of this appeal was in order to rebut the evidence relied upon by the Secretary of State as proof of his alleged complicity in a particular type of fraud. I do not therefore accept that the principle of procedural fairness would have required the judge in any event to accept the truth and accuracy of the appellant's evidence. If it were it otherwise, the Secretary of State would effectively be taken to concede any appeal where they did not attend the hearing.

11. Turning now to the question of the judge's approach to the evidence as a whole, I think it important to note that observations made by the Upper Tribunal in reported cases concerning the so-called 'generic evidence' relied upon by the Secretary of State in 'Educational Testing Services' (ETS) cases, represent nothing more or less than their view of the evidence that was before them at the time when those decisions were made. They do not to that extent involve any principle of law that may otherwise be binding upon the First-tier Tribunal. Whilst such decisions deserve great respect and carry substantial persuasive weight, their reasoning does not ultimately require a First-tier Tribunal judge to reach any particular factual conclusion. Each case is fact-specific, and Ms Everett did not seek to persuade me otherwise. It should also be borne in mind that the

processes employed by ETS have continued to evolve over time; something which McClosky J acknowledged at paragraph 15 of his decision in SM & Qadir. It follows from this that the more recent the reported decision in which such observations appear, the more likely it is that the evidence commented upon will be comparable to that being considered by the First-tier Tribunal judge. In this appeal, a significant part of the judge's reasoning was based upon an assumption that the 'generic evidence' that was relied upon by the Secretary of State in the present appeal was subject to the same "frailties" as those identified by McClosky J following a hearing that had taken place more than seven years' earlier, rather than comparing it with what appears to have been the considerably more robust evidence that was considered by a Presidential panel in the appeal of DK & RK less than 12 months before the Secretary of State had made their decision in the instant appeal. Moreover, the Presidential panel in DK & RK required the judge to take account of the 'overwhelming reliability' of that evidence in reaching its determination. It appears, however, that the judge did the precise opposite of this in reaching its conclusion that the evidence in this appeal suffered from the "frailties" identified in the earlier case. This in my judgement fatally undermines a substantial part of the judge's reasons for their conclusion, and their decision must accordingly be set aside for error of law.

Notice of Decision

The appeal is allowed. The decision of the First-tier Tribunal to allow the appeal is set aside and the matter is remitted for re-determination by the First-tier Tribunal with none of its original findings being preserved.

David Kelly
Deputy Judge of the Upper Tribunal
(Immigration and Asylum Chamber) 1st June 2024