Upper Tribunal
(Immigration and Asylum Chamber)

DK and RK (Parliamentary privilege; evidence) [2021] UKUT 00061 (IAC)

THE IMMIGRATION ACTS

Heard at Field House by Skype	**Decision & Reasons Promulgated**
On 17 December 2020	.....

Before

THE HON. MR JUSTICE LANE, PRESIDENT
MR C M G OCKELTON, VICE PRESIDENT

Between

DK (INDIA)
RK (INDIA)
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

MIGRANT VOICE

Intervener

Representation:

For the appellants (DK): Mr P Turner and Mr J Gajjar (Direct Access)
(RK): Mr R Ahmed and Mr Z Raza, instructed by Charles Simmons Immigration Solicitors

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For the respondent: Ms L Giovannetti QC and Mr C Thomann,
instructed by Government Legal Department

For the intervener: Mr M Biggs

(1) Although the Upper Tribunal is not bound by formal rules of evidence, it cannot act in such a way as to violate Parliamentary privilege, whether that be to interfere with free speech in Parliament or by reference to the separation of powers doctrine. The Tribunal cannot interfere with or criticise proceedings of the legislature.

(2) 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.

DECISION AND REASONS

1. These appeals have been remitted to the Upper Tribunal by the Court of Appeal. Both appellants have brought human rights appeals, in which they contend that the respondent was wrong to curtail their leave to remain and, subsequently, to refuse their human rights claims, on the basis that they had cheated in oral English tests set by the Educational Testing Service ("ETS"), which the appellants needed to pass in order to obtain further leave to remain in the United Kingdom.

2. Both DK's and RK's appeals were remitted on the basis of discrete errors of law. A further reason for remittal, common to both, was the appearance in July 2019 of a report of the All Party Parliamentary Group ("APPG") on TOEIC (Test of English for International Communication). The APPG was chaired by Right Hon. Stephen Timms MP and comprised six other MPs. The Secretariat to the APPG was "Migrant Voice", a charity describing itself as a "migrant-led" body "established to develop the skills, capacity and confidence of members of migrant communities, including asylum seekers and refugees". Migrant Voice works "to amplify migrant voices in the media and public life to counter xenophobia and build support for our rights".

3. On 17 December 2020, the Tribunal addressed two matters. First, it heard submissions on the question of whether the APPG report should be admitted in evidence in the appeals. Secondly, it considered an application by Mr Biggs of Counsel that Migrant Voice should be allowed to intervene in the appeals.

4. At the conclusion of the hearing, we informed the parties that the APPG report would not be admitted; but that, subject to one matter, the transcript, prepared by Migrant Voice, of the APPG hearing on 11 June 2019, would be admitted as a factual record of what was said on that occasion by and to Professor Peter Sommer, Dr Philip Harrison and Professor Peter French. The matter just mentioned was that Migrant Voice would file and serve its recording of the session, so that this could be checked by the respondent against the written transcript.

5. We also gave Migrant Voice permission to intervene, on a limited basis. Mr Biggs, who had helpfully produced written submissions on behalf of Migrant Voice, would re-cast those submissions, so as to exclude reliance upon the APPG report. The witness statements proffered by Migrant Voice would not be admitted. However, Mr Biggs and Migrant Voice would consider who might be best placed to provide a witness statement that exhibited the recording and transcript of the 11 June hearing.

6. Our reasons for our decisions on these issues are as follows.

7. Article 9 of the Bill of Rights 1689 provides that:-

> "… The freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament."

8. In Prebble v Television New Zealand Ltd [1994] UKPC 4, the respondent TV company wished to defend a libel action by contending that statements made by Ministers in the House of Representatives were misleading, in that they suggested the government did not intend to sell off state-owned assets, when in fact its spokesman was allegedly conspiring to do so.

9. Giving the judgment of the Privy Council, Lord Browne-Wilkinson held that Article 9 of the Bill of Rights was accompanied by a long line of authority that supported the wider principle "that the courts and Parliament are both astute to recognise their respective constitutional roles. So far as the courts are concerned they will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions and protection of its established privileges". The Privy Council held that "parties to litigation, by whomsoever commenced, cannot bring into question anything said or done in the House by suggesting (whether by direct evidence, cross-examination, inference or submission) that the actions or words were inspired by improper motives or were untrue or misleading". Those matters lay "entirely within the jurisdiction of the House" subject to any statutory exception. There was, however, "no objection to the use of *Hansard* to prove what was done and said in Parliament as a matter of history".

10. In Office of Government, Commerce and Information Commissioner v HM Attorney General obo the Speaker of the House of Commons [2008] EWHC 737 (Admin), Stanley Burnton J held that the Information Commissioner and the Information Tribunal had been wrong to consider the adequacy of

a Ministerial reply to a Parliamentary question and that the Tribunal infringed Article 9 of the Bill of Rights and/or the wider principle of Parliamentary privilege by relying on the conclusions of a Parliamentary Select Committee as authority supporting its decision on a contested issue before it.

11. Stanley Burnton J said:-

> "46. … the law of Parliamentary privilege is essentially based on two principles. The first is the need to avoid any risk of interference with free speech in Parliament. The second is the principle of the separation of powers, which in our Constitution is restricted to the judicial function of government, and requires the executive and the legislature to abstain from interference with the judicial function, and conversely requires the judiciary not to interfere with or to criticise the proceedings of the legislature. These basic principles lead to the requirement of mutual respect by the Courts for the proceedings and decisions of the legislature and by the legislature (and the executive) for the proceedings and decisions of the Courts.
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> 47. Conflicts between Parliament and the Courts are to be avoided. The above principles lead to the conclusion that the Courts cannot consider allegations of impropriety or inadequacy or lack of accuracy in the proceedings of Parliament. Such allegations are for Parliament to address, if it thinks fit, and if an allegation is well-founded any sanction is for Parliament to determine. The proceedings of Parliament include Parliamentary questions and answers to. These are not matters for the Courts to consider.
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> 48. In my judgment, the irrelevance of an opinion expressed by a Parliamentary Select Committee to an issue that falls to be determined by the Courts arises from the nature of the judicial process, the independence of the judiciary and of its decisions, and the respect that the legislative and judicial branches of government owe to each other.
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> …
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> 57. … It was the duty of the Tribunal to determine the issues before it judicially, on the basis of the evidence and arguments before the Tribunal. … The Select Committee had arrived at its view on the evidence before it, and not on the evidence that was before the Tribunal. Indirectly, in relying on the opinion of the Select Committee, the Tribunal relied on evidence that was not before it, and failed to make its decision only on the basis of the evidence and submissions before it.
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> 58. … If a party to proceedings before a court (or the Information Tribunal) seeks to rely on an opinion expressed by a Select Committee, the other party, if it wishes to contend for a different result, must either contend that the opinion of the Committee was wrong (and give reasons why), thereby at the very least risking a breach of Parliamentary privilege, if not committing an actual breach, or, because of the risk of that breach, accept that opinion notwithstanding that it would not otherwise wish to do so. This would be unfair to that party.

…”

12. It is common ground that the APPG report is not within the scope of Article 9. Its report is not a proceeding in Parliament. The APPG has no official Parliamentary status, unlike the Public Accounts Committee or the Home Affairs Select Committee. As is stated at page 35 of the APPG report:-

> “This is not an official publication of the House of Commons or the House of Lords. It has not been approved by either House or its Committees. All Party Parliamentary Groups are informal groups of Members of both Houses with a common interest in particular issues. The views expressed in this report are those of the group.”

13. The APPG report, however, makes reference to proceedings before the Home Affairs Select Committee and the Public Accounts Committee. Paragraph 1.1 of the report expresses a view about the findings of the Home Affairs Select Committee and the National Audit Office (to which we shall turn in due course). At paragraph 2.1 and its footnote, further reference is made to evidence provided by the respondent to the Home Affairs Select Committee. At paragraph 2.3, under the heading “Misuse of expert evidence” reference is made in the footnote to what was said at the Public Accounts Committee hearing on 10 July 2019. At paragraph 2.5, under the heading ”‘Questionable’ students unjustly targeted”, doubt is thrown over evidence given by the respondent to the Public Accounts Committee. By contrast, evidence given to the Home Affairs Select Committee by an individual who runs a college is referred to in approbatory terms.

14. Mr Turner submitted that the APPG report was based upon evidence and that it was therefore legitimate to have regard to the report’s conclusions, emanating from that evidence. Mr Turner drew specific attention to the judgment of Cockerill J in R (Cartref Care Home Ltd & Others) v Commissioners for HM Revenue and Customs [2019] EWHC 3382 (Admin) as authority for the proposition that the APPG report was not itself covered by Article 9. Mr Ahmed made submissions, basically in line with those of Mr Turner on this issue.

15. Although the Upper Tribunal is not bound by formal rules of evidence, it cannot act in such a way as to violate Parliamentary privilege, whether that be to interfere with free speech in Parliament or by reference to the separation of powers doctrine. The Tribunal cannot interfere with or criticise proceedings of the legislature.

16. Were the APPG report to be admitted, we are in no doubt that the Tribunal would be drawn into this forbidden area. The views of the APPG about the accuracy or otherwise of what was said to the Home Affairs Select Committee and the Public Accounts Committee is an integral aspect of the APPG report. They serve to inform the overall conclusions of the Group.

17. The APPG report also makes reference to the National Audit Office report on TOEIC. The reports of the National Audit Office are documents that

attract the protection of the Parliamentary Papers Act 1840. This protects the publisher of any document ordered to be printed by either House of Parliament from any legal action that may result from it.

18. In Warsama & Gannon v Foreign & Commonwealth Office [2020] EWCA Civ 142, the Court of Appeal was concerned with the application of privilege to an unopposed return; that is to say, a paper ordered by the House of Commons to be printed following a motion on the floor of the House. In a letter of 15 December 2020 to the respondent in regard to the present appeals, Counsel to the Speaker of the House of Commons considers the factual position in Warsama to be analogous with that of documents covered by the Parliamentary Papers Act 1840. In both cases, the House of Commons has an interest in the reporting in question being full and frank. Thus, as is the case with evidence provided to a Select Committee, the protection of privilege extends to a person who is not a Member of Parliament, in order to protect that person's ability to report fully and honestly to the House. That, we find, is the position with the National Audit Office report.

19. There is, however, a broader point, which emerges from the caselaw and which we respectfully consider was articulated well by Cockerill J in Cartref. This is the principle that 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.

20. Considerations of this kind informed why Cockerill J not only rejected the opinions in the APPG report before her as admissible opinion evidence but also voiced concerns about the factual statements in that report:-

> "170. I conclude therefore that while I am not barred from looking at such material by reason of any issue as to breach of Parliamentary privilege, I do need to ask myself serious questions about the nature of the evidence, and its admissibility as relevant factual or opinion evidence.
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> 171. As for the APPG Report I conclude that, following the authorities set out above, I cannot properly regard it as providing me with admissible factual evidence. It does not fall within any of the recognised categories where the contents of such documents can be adduced. It is not a witness statement, provided under the safeguards of the witness statement process. It was not written for the purpose of being relied on as a statement of facts; it is plainly written, although carefully and I am sure with much consideration, as a call to action. The sources for the factual statements are not given and are not capable of being checked. The process was not one where HMRC gave a response to the factual assertions; and it was apparent from the submissions made on the main conclusions that HMRC does indeed take issue with significant parts of what is said in the report.

> 172. So far as the opinions relied on are concerned I may properly take into account the fact that concerned Parliamentarians expressed these views based on the material available to them; however, those opinions again must be taken with a rider as to the purposes for which they were given and the absence of the safeguards which would be expected of opinion evidence admitted in court in the usual way. I do not therefore regard the opinions expressed as admissible opinion evidence."

21. The same is true of the APPG report on TOEIC. The opinions of the Group are clearly and forcefully expressed in the report. They are not, however, opinions to which we can have any material regard in reaching conclusions about the evidence which will be placed before us in these remitted appeals.

22. Furthermore, much of the evidence given to the APPG is not relevant to the task we face in determining these appeals.

23. We do, however, consider that, once verified, the record of what was actually said to and by Professors Sommer and French and Dr Harrison on 11 June 2019 should be admitted. Those three individuals have given expert evidence in other ETS cases. What they had to say on that date may, therefore, be of relevance. Admitting the transcript on this basis would not infringe Parliamentary privilege or the principle that courts and tribunals make up their own minds about the matters to be decided by them on the basis of the evidence before them.

24. The fact that the respondent chose not to appear before the APPG, though relied on by Mr Turner, is nothing to the point. Mr Turner attempted to analogise by reference to a party who does not appear before a tribunal, without explanation for their absence. Mr Turner said that the resulting decision of the Tribunal was not necessarily impugned because of that party's absence. Whilst that is of course true, it misses the fundamental difference between a body such as the APPG and this Tribunal, or any other judicial body.

25. We turn to Mr Biggs's application on behalf of Migrant Voice to intervene in the proceedings. Insofar as Migrant Voice seeks to express opinions about the respondent's actions in ETS cases, whether in its own regard or by reference to the APPG report, we are not persuaded that a case for intervention has been made out. Though no doubt sincerely and forcefully held, those views are not expert opinion and therefore run the risk of deflecting the Tribunal from its judicial task.

26. Mr Biggs's written submissions on behalf of Migrant Voice are of a different order. They concern legal and procedural issues of potentially wider relevance than in relation to the two appeals before us. In so saying, we are mindful of the fact that both Mr Turner and Mr Ahmed supported Mr Biggs's application. We would be assisted by these written submissions, which do not need to be supplemented by any oral element.

27. As we have already stated, we would, in addition, find it useful for Migrant Voice to adduce the recording of the APPG hearing of 11 June 2019 and the agreed transcript, once the process we have described has been undertaken.

28. We permit Migrant Voice to intervene in the appeals on the basis described in paragraphs 5, 26 and 27.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Mr Justice Lane Date: 20 January 2021

The Hon. Mr Justice Lane
President of the Upper Tribunal
Immigration and Asylum Chamber