IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006196
First-tier Tribunal Nos:
HU/55398/2021
LH/00318/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 14 May 2023

Before

UPPER TRIBUNAL JUDGE KEITH

Between

Secretary of State for the Home Department

Appellant

and

Mr Amran Hussain
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Ms Everett, Senior Home Office Presenting Officer
For the Respondent: Mr Karim, Counsel, instructed by Liberty Legal Solicitors

Heard at Field House on 17 April 2023

DECISION AND REASONS

1. These reasons reflect the oral decision which I gave to the parties at the end of the hearing. I refer to Mr Hussain as the claimant, and the appellant as the Secretary of State for the remainder of these reasons.

2. The Secretary of State appeals against the decision of a Judge of the First-tier Tribunal, Judge Bibi (the 'FtT'), who in a decision dated 18th November 2022, allowed the claimant's appeal on human rights grounds, based on the right to respect for his private life, pursuant to Article 8 ECHR. At the core of the appeal was whether the claimant had engaged in deception by arranging for a proxy to take an English language test with a provider, ETS. Allegations of this nature are frequently referred to as 'TOEIC' frauds and have been the subject of well-known litigation. The FtT concluded that the Secretary of State had not shown that the claimant had engaged in deception, and also concluded that absent the issue of suitability, his Article 8 claim should succeed. This was because of the "historical injustice" which the claimant had suffered.

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3. The Secretary of State appealed on 5th December 2022. She did so on grounds which I summarise. First, the FtT had erred in concluding that a voice recording of the test, which the claimant himself confirmed was not the recording of his voice, did not serve as prima facie evidence that he had cheated. Second, the FtT erred in concluding that protestations of innocence, a recollection of the test day, and educational qualifications were sufficient to satisfy her that the claimant had not cheated.

4. Judge Monaghan of the First-tier tribunal granted permission on 22nd December 2022. She arguably granted permission on grounds that went beyond the application for permission, in particular, the adequacy of reasons on the Article 8 assessment. There has been no application to amend the grounds.

The Hearing Before Me

5. I began by discussing with the representatives the fact that Judge Monaghan's grant of permission appeared to go beyond the grounds. In particular, at §2 of the grant, Judge Monaghan had said that there were inadequate reasons in relation to insurmountable obstacles to integration into Bangladesh. Mr Karim submitted, and Ms Everett accepted, that the FtT's reasoning was not on that basis. Instead, it was on the basis that if it were found that the claimant had not engaged in a TOEIC deception, then ordinarily, the Secretary of State granted a period of discretionary leave. Ms Everett was careful to add that she did not accept that this was a formal policy which applied in all cases, or that it was current practice. Nevertheless, she accepted that this was the basis of the FtT's reasons, where she had decided that absent the TOEIC deception, the Article 8 claim should succeed. The Secretary of State had not appealed that aspect of the reasons, and Ms Everett accepted that it could not be pursued now. The FtT did not err on that ground, for the simple reason that the Secretary of State had never appealed that point. The grant of permission was, in that respect, misconceived.

6. I therefore turn to what both representatives accept is the crux of the challenge, which is in relation to the FtT's reasoning on the TEOIC deception. In doing so, I remind myself not to substitute my view for what I would have decided and also, not to take particular comments out of context, or to equate challenges to the particular weight placed on evidence with an error of law (see Joseph (permission to appeal requirements) [2022] UKUT 00218) (IAC).

7. I do not recite the representatives' submissions, which I have considered in full, except where it is necessary for me to explain my reasons. I accept Mr Karim's submissions that the FtT referred expressly at §32 to DK and RK (ETS: SSHD evidence; proof) India [2022] UKUT 112 (IAC) and SSHD v Akter & Ors [2022] EWCA Civ 741. The claimant had himself contacted ETS and Mr Karim listed the various evidential factors that the FtT had permissibly considered, including the appellant's prior qualifications and his recall of the TOEIC test day. The FtT had accepted that the respondent had discharged prima facie evidential burden, which the claimant had to answer (§57), and I accept Mr Karim's submission that even in so-called "fraud factories", ie. locations where the proportion of those cheating was high, it was permissible for an FtT to allow an appeal. To use Mr Karim's memorable phrase, the Secretary of State's case was not a '"slam dunk"

and the door to a successful appeal remained open, see Ahsan v SSHD [2017] EWCA Civ 2009.

8. So far, Mr Karim's submissions were persuasive. He also urged me to consider that the FtT was entitled to attach less weight to the fact that the ETS voice recording was not that of the appellant, in light of the other compelling evidence. I am conscious, as Ms Everett pragmatically accepts, that appeals which dispute the weight attached to particular evidence may, in many cases, amount to a disagreement, rather than identifying an error of law.

9. Where I conclude the FtT erred in law was in her assessment of the voice recording evidence, which the appellant accepts was not his. In an otherwise comprehensive and cogent decision, the FtT stated:

> "71. I should also make clear the fact the voice recording said to be that of the test taken by the Appellant, which he himself confirmed was not a recording of his voice, does not serve as prima-facie evidence that he cheated. The wider background evidence in TOEIC fraud cases shows that there were many irregularities in the way in which these tests were managed and administered, and it is therefore not inconceivable that the mismanagement and criminal activities that took place at the Colwell (and many other) College where TOEIC fraud took place included the substitution and/or falsification of legitimate tests and voice recordings taken by those such as the Appellant in this appeal.
>
> 72. In other words, this does not necessarily mean that the Appellant before me was complicit in such activities and I find the evidence before me is sufficient to show that the first Appellant was not in any way involved, and I also accept that he had taken his test in good faith and on the assumption that all was in order, and crucially, that she had no control over the fact that her test/voice recording was at some later point substituted with the voice of someone else, for which he was now being held responsible."

10. The claimant's representative's skeleton argument before the FtT (not drafted by Mr Karim) had argued that DK and RK was wrongly decided, advancing various arguments including a so-called 'hidden room' hypothesis, which explained how innocent test-takers might be oblivious to mass cheating, as well as issues around chains of custody, namely whether ETS's records were accurate. Mr Karim, who appeared below, said that he did not advance such arguments. The difficulty is that the FtT's reasons were clearly influenced by concerns about maladministration by ETS, to the extent that the FtT did not ascribe even the minimal weight necessary to amount to prima facie evidence. That is not consistent with the first headnote of DK and RK:

> "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."

11. That headnote is in the context of the Upper Tribunal's discussion of the general evidence in DK and RK. At §70 of DK and RK, the Upper Tribunal pointed out that "general evidence changes the starting point," the starting point being that a judge would need "a lot of persuading" that an allegation of fraud was made out. The general evidence linked test results to candidates, through a unique,

automatically generated registration number, which identified the specific session, location and part of the test being taken (§85). The Upper Tribunal considered submissions on the chain of custody (§86) and deliberate maladministration by a test centre, which it ultimately rejected at §§105 to 106. In this case, it is clear that the FtT did not regard the voice-recording evidence as changing the starting point. I accept Mr Karim's submission that the door remains open to a successful appeal, but not on the basis of the starting point as identified by the FtT, which undermined her otherwise detailed and comprehensive judgment. Given the fact-sensitive nature of such assessments of credibility, her decision is not safe and cannot stand. It is unnecessary for me to decide ground (2) and indeed it is more appropriate that the Judge remaking the decision assesses the live evidence as a whole.

12. In light of no preserved findings, so that all of the evidence will need to be considered afresh, both representatives agreed that I should remit remaking back to the First-tier Tribunal.

Notice of Decision

The decision of the First-tier Tribunal involved a material error of law and I set it aside.

I remit this appeal to the First-tier Tribunal for a complete rehearing.

Directions to the First-tier Tribunal

This appeal is remitted to the First-tier Tribunal for a complete rehearing with no preserved findings of fact;.

The remitted appeal shall not be heard by First-tier Tribunal Judge Bibi.

No anonymity direction is made.

J Keith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

2nd May 2023