



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2023-002037

First-tier Tribunal No:
HU/51347/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

20th October 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE JARVIS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SULTAN AHMED

Respondent

Representation:

For the Appellant: Ms A. Everett, Senior Home Office Presenting Officer

For the Respondent: Mr M. Biggs, Counsel instructed by Ascentim Legal Solicitors

Heard at Field House on 4 October 2023

DECISION AND REASONS

Introduction

1. In this appeal, the Secretary of State for the Home Department is the Appellant in the proceedings but to maintain consistency I will refer to the parties as they were before First-tier Tribunal Judge Murshed (hereafter “the Judge”).

2. On 20 February 2023, the Judge allowed the Appellant's appeal against the decision of the Respondent to refuse his human rights claim dated 12 April 2021. Permission to appeal to the Upper Tribunal was originally refused by Judge Robinson on 16 May 2023 but was later granted by Upper Tribunal Judge Canavan on 25 July 2023.
3. In granting permission, Upper Tribunal Judge Canavan also raised two additional points relating to the Judge's approach to the Project Façade report and the findings from the previous decision of Judge Rowlands in 2016.

The error of law hearing

4. The error of law hearing was conducted in a hybrid format: the Appellant and his counsel attended the hearing centre whilst Ms Everett joined by video link due to the effect of the day's rail strikes. I am satisfied that there were no technical difficulties such as to have impeded Ms Everett's ability to engage with the proceedings.
5. In advance of the hearing, Mr Biggs provided a rule 24 response dated 3 October 2023 which Ms Everett did not oppose the admission of. Ms Everett was given time to read the rule 24 response prior to the error of law hearing and she indicated that she had had enough time to consider the Appellant's response.

The Respondent's appeal

6. As I indicated during the hearing, I am grateful for Ms Everett's assistance in this appeal. During initial discussion she very helpfully indicated that she would not be pursuing the two additional points raised in the grant of permission by Upper Tribunal Judge Canavan relating to the Project Façade report or the approach to the earlier decision of Judge Rowlands.
7. Instead, Ms Everett focused upon the Respondent's challenge to the assertion that the Judge had failed to properly apply the Presidential panel's decision in DK and RK (ETS: SSHD evidence, proof) India [2022] UKUT 112 (IAC) ("DK and RK 2022").
8. Again, during discussion Ms Everett helpfully accepted that paragraph 4 of the Respondent's Grounds of Appeal to the Upper Tribunal mischaracterised the decision of the Upper Tribunal in DK & RK 2022. In that paragraph, the author of the grounds contends that "*as per DK&RK once the voice recording has been disclosed and it does not match the Appellant's voice- the only defence and Appellant may mount is that regarding a chain of custody mix up of the recording-which in turn is bound to fail based on generic arguments that the process was unreliable because the UTT in DK&RK found the process is in fact wholly reliable*"

9. I fully agree with Ms Everett's clarification. It is clear from the decision of the Presidential panel that the assertion in para. 4 of the Grounds is wrong. At §117, the Upper Tribunal found that:

"117. ...Showing that the case is not watertight is not sufficient in civil proceedings to show that it need not be answered, or that it is insufficient to prove a fact in issue. The evidence the Respondent relies on in these cases is not shown to be unreliable in any general sense. On the contrary, the very limited concerns that have been raised tend to show that as a class the evidence is highly reliable, although not necessarily wholly free from error. All that the Appellants' and intervenor's arguments show in reality is that the evidence upon which the Respondent relies has a similar feature to almost all evidence in almost all cases: it is not infallible."

10. Ms Everett also did not pursue the further point made in the Grounds at para. 5 which is plainly phrased in the terms of re-argument rather than on any public law basis.
11. I also record that Ms Everett did not make any submission on para. 6 of the Grounds which sought to criticise the Judge for failing to assess Article 8(1) or Article 8(2) ECHR lawfully.
12. For completeness, should it be necessary, I agree with Mr Biggs that the Respondent has not sought to withdraw a concession made by counsel on behalf of the Respondent during the First-tier Tribunal hearing that there could be no public interest in removing the Appellant where dishonesty had not been shown, applying the Respondent's own ETS policy: 'ETS Casework Instructions dated 18 November 2020', (see para. 16).
13. In response to Ms Everett's single point about the proper interpretation of DK & RK 2022, Mr Biggs contended that para. 131 of DK & RK 2022 could not be read as requiring an Appellant to provide evidence about the chain of custody (or linkage as he puts it) nor should it be interpreted as directing the First-tier Tribunal to dismiss all ETS appeals.
14. In totality, Mr Biggs urged me to conclude that the decision of the Judge was a model determination and that the Judge had fully understood the conclusions reached by the Upper Tribunal in DK & RK 2022 and deployed this as the backdrop for the assessment of the Appellant's oral evidence about the test taken in 2012.

Findings and reasons

15. In light of Ms Everett's helpful refocusing of the Respondent's challenge, I need only consider her submissions about the proper interpretation of DK & RK 2022.
16. In respect of the chain of custody issues, I agree with Mr Biggs that para. 131 of DK and RK 2022 is not to be read as precluding an innocent explanation ever being given in a case, but merely reflects the Upper

Tribunal's earlier findings that there were no material flaws in ETS's general process in respect of collating and assessing the voice recordings and so on.

17. The relevant paragraphs are:

"129. In these circumstances 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.

...

131. 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."

18. There can be no doubt at all that the Upper Tribunal concluded that ETS evidence showing that the voice on the relevant recording is not that of the particular appellant is strong evidence that fraud was carried out. However, it is also clear in para. 131 that credible oral evidence given by the Appellant can be enough to show that the Respondent's allegation is not made out.

19. In this case the Judge proceeded on the basis that the Appellant had previously been found not to be credible and that he had not given an innocent explanation in the 2016 hearing but, with consent from both counsel, went on to consider the much broader range of material available to him in the hearing.

20. The Judge then made a series of highly detailed findings, some of which were against parts of the Appellant's legal/evidential arguments, see for instance paras. 37 - 40.

21. From para. 45 onwards the Judge concentrated upon the Appellant's oral evidence/explanation and made a series of positive credibility findings which have not been themselves challenged by the Respondent other than by reference to a mischaracterisation of the findings in DK and RK 2022.

22. It is also apparent, albeit the Respondent did not raise this point, that the Judge took into account whether, despite the Appellant's obvious academic abilities in English at the relevant time, he may nonetheless still have decided to cheat applying MA at para. 57 and DK & RK 2022 at para. 108.

23. The Judge concluded at para. 60 in the following way:

“Looking at the evidence as a whole, including the weighty general and individual evidence set out in DK and RK and the Appellant’s own credible evidence I do not find that the Respondent has proved on a balance of probabilities that this Appellant used a proxy and therefore used deception in his previous application.”

24. In my judgement the Judge’s assessment of DK & RK 2022 and the Appellant’s oral evidence is unimpeachable, and the conclusion reached at para. 60 perfectly permissible.

Notice of Decision

25. I therefore dismiss the Respondent’s appeal and the decision of the Judge stands.

I P Jarvis

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

12 October 2023