IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-003545
UI-2024-003548
First-tier Tribunal No: EA/12580/2022
&
IA/02587/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 24th of October 2024

Before

UPPER TRIBUNAL JUDGE LODATO

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SUMBUL FAYYAZ
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Ms Cunha, Senior Presenting Officer
For the Respondent: Mr Haywood, counsel

Heard at Field House on 9 October 2024

DECISION AND REASONS

Introduction

1. The Secretary of State for the Home Department, the appellant in these proceedings, appeals, with permission, against the decision of First-tier Tribunal Judge Gaskell ('the judge') dated 20 May 2024. In broad summary, the Secretary of State challenges the decision of the judge to find that Ms Fayyaz had successfully rebutted the allegation that she had cheated in an English language test and that it would amount to a breach of her Article 8 human right to require her to return to Pakistan.

2. To avoid confusion, I will refer to the parties as they were before the First-tier Tribunal: the Secretary of State as the respondent and Ms Fayyaz as the appellant.

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Background

3. The factual and procedural background which led to the appeal in the First-tier is not in dispute and is set out in the reasons for refusal letter dated 14 December 2020 and the judge's decision, between [2] and [8].

Appeal to the First-tier Tribunal

4. The judge heard the appellant's appeal against the refusal of her human rights claim on 13 May 2024. The respondent did not field a representative for the hearing and the matter proceeded in their absence. The central factual issue to be determined in the appeal was whether the respondent had discharged her burden to prove on the balance of probabilities that the appellant had cheated in an English language test. The appellant sought to rebut the allegation that she had acted dishonestly by cheating in the test and further argued that she would encounter very significant obstacles to integration on return to Pakistan and that the decision to refuse her claim otherwise amounted to a disproportionate interference with her Article 8 private life rights.

5. At [11]-[13], the judge referred to the evidence he considered. He noted that he heard testimonial evidence from the appellant, "generic background evidence" contained within three statements from witnesses relied upon by the respondent and that this did not refer to specific matters related to this appellant. At [14]-[15], the judge summarised the legal principles which apply in Article 8 human rights appeals before he cited the leading case in the sphere of fraudulent ETS tests: DK & RK (ETS: SSHD evidence; proof) India [2022] UKUT 00112 IAC. The judge expressed some frustration, at [16], that the respondent had not assisted the tribunal with a skeleton argument to support their case.

6. The core reasoning for finding that the appellant had rebutted the case for dishonesty levelled against her is at [17]:

> *As I have stated above, the evidence provided by the respondent is generic and there is nothing specific to the appellant. To the contrary, the appellant has provided all detailed specific evidence of the test which she undertook; which she undertook personally; and which was not fraudulent. Furthermore, I find the proposition that the appellant resorted to a fraudulent English test to be quite implausible: she speaks good, clear, fluent English and is educated to Masters level through the medium of English. What need would she have to resort to fraud?*

7. The above findings of fact functioned as the platform to conclude that the appellant's leave should never have been curtailed and that this wrongful decision deprived her of a viable route to settlement in the UK ([18]). The adverse suitability conclusion which underpinned the decision to refuse the application within the rules, and outside the rules, was found to be unsustainable ([19]). The judge then looked to the appellant's personal circumstances and weighed them against country conditions to conclude that she would indeed encounter very significant obstacles to integration ([20]-[22]). The appeal was allowed on Article 8 human rights grounds.

Appeal to the Upper Tribunal

8. The respondent sought permission to appeal, relying on a single ground of appeal suggesting that the judge had misdirected himself in law and relied upon mistakes of fact. The grounds consisted of two central planks. The first was that the judge had wrongly characterised the respondent's evidence as generic and did not therefore attach the significant weight DK & RK strongly suggested such evidence should attract. The second was that the judge was not faithful to the clear guidance in DK & RK that caution was needed before accepting that an individual did not have a good reason to cheat. The grounds also challenged the judge's findings of fact in relation to the existence of very significant obstacles to integration.

9. Permission to appeal was granted by First-tier Tribunal Judge Sills for the following reasons:

> *The grounds identify an arguable error of law. The Judge arguably erred in law in finding that the evidence relied upon by the Respondent concerning the ETS issue was 'generic'. At C1 of the Respondent's bundle, the Appellant's test result is identified as being invalid, and so this evidence appears to be specific to the Appellant. Hence it is arguable that the Judge has made a material mistake of fact. All grounds may be argued.*

Discussion

10. The law touching on how tribunals must approach allegations of dishonesty in the context of suggested fraudulent ETS results was authoritatively settled by a Presidential panel in DK & RK. Two matters emerge with clarity from that decision which have a direct bearing on the present appeal. Firstly, the panel could scarcely have been clearer that the evidence typically advanced in this type of appeal by the Secretary of State is reliable and will be amply sufficient to discharge the burden of proof to establish dishonesty given the enormous scale of fraud in the identified testing centres at the relevant times (see [13]-[14], [70], [75]-[76], [103]-[106], [120] and [126]-[128]). The panel expressly referred to the cogency of the forensic process which resulted in the identification of 'invalid' results such as that recorded against the appellant's details [see pages 33-35 of the consolidated error of law hearing bundle]. Secondly, the panel were equally clear about the dangers of judicial reliance on assertions that a particular appellant had no good reason or motive to cheat. The second point is vividly emphasised at [108] and [129]:

> *As Professor Sommer said to the APPG, one of the features of evidence that one would look for is corroboration. He said "it might have been different if there was corroboration, but very often in circumstances there wasn't". We are unable to comment on "very often", but there are two sources of possible corroboration that may well be present when individual cases are examined: the individual's own account of the test and the evidence (if any) of fraud in the session at which that individual's test was taken. A further possible source of corroboration may be incompetence in English (i.e. English at a lower level than that required for the test); but it must not be thought that the converse applies: as the then President pointed out in SSHD v MA [2016] UKUT 450 (IAC) at [57], there are numerous reasons why a person who could pass a test might nevertheless decide to cheat. This is a point that seems to have escaped Professor Sommer in his comments to the APPG.*

> […]
>
> *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.*

11. I find it to be impossible to reconcile the above observations with the judge's finding that it was implausible that this appellant would be inclined to cheat given her proficiency in English. Mr Haywood argued that these findings must be seen in the context of a hearing where the respondent chose not to be represented. This does not, however obviate the judge's responsibility to faithfully apply the law as stated in DK & RK. The judge may have cited DK & RK, but in sidelining the respondent's evidence as being merely generic, he did not give effect to the clearest of guidance that such evidence is typically of sufficient strength to discharge the burden of proof. There was plainly evidence before the judge that the appellant was identified in the look-up tool as having provided an 'invalid' result. In asking himself "what need would she have to resort to fraud?", the judge erred in law in over-inflating an assertion that she had no cause to cheat while also diminishing sufficiently strong evidence relied upon by the Secretary of State to discharge the burden of proof. I reject Mr Haywood's argument that this part of the judge's findings was merely an adjunct to his acceptance of her specific evidence about the circumstances in which she claimed to have honestly taken the test. The reasons going to her lack of motive for cheating was the second half of a paragraph which essentially contained the full reasoning for finding that she had successfully rebutted the allegation of cheating. Seen within context, this finding was obviously integral to the central thrust of the reasoning which underpinned the overall decision.

12. There was no dispute between the parties that a finding that the judge's conclusion on the dishonesty aspect of the appeal must result in the overall decision being set aside. However, I was invited to preserve the judge's findings of fact at [21]. I decline to do so in view of the centrality of the dishonesty findings to the overall balancing exercise which would be needed. It is not appropriate to hive off favourable factual findings in circumstances where the judge has misapplied the law in finding the appellant to be a credible witness.

Disposal

13. The parties were agreed that the appropriate course on allowing the appeal was to remit the matter to the First-tier Tribunal in view of the scale of the fact-finding process which will be required.

Notice of Decision

I set aside the decision of the judge as it involved a material error of law. For the reasons given above, I decline to preserve any findings of fact and remit the matter to be decided *de novo* in the First-tier Tribunal by a judge other than Judge Gaskell.

Paul Lodato

Judge of the Upper Tribunal
Immigration and Asylum Chamber

21 October 2024