Neutral Citation Number: [2021] EWCA Civ 1538

Case No: C2/2020/1939

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM the Upper Tribunal (Immigration and Asylum Chamber)
Mr Justice Dove
[2020] UKAITUR JR 1318 2014

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/10/2021

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LADY JUSTICE ELISABETH LAING
and
SIR NIGEL DAVIS

- -

Between :

MOHAMMED JAHANGIR ALAM	**Claimant/ Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

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The Appellant appeared in person
Zane Malik QC (instructed by **the Treasury Solicitor**) for the **Respondent**

Hearing date: 30th June 2021

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Approved Judgment

Lord Justice Underhill :

1. The Appellant is a national of Bangladesh. He came to the UK in February 2010. On 24 October 2013 he made a further application for leave to remain as a Tier 4 (General) student. In order to meet the requirement in the Immigration Rules that he demonstrate proficiency in written and spoken English he submitted a TOEIC (Test of English for International Communication) certificate from the accredited testing service ETS. The certificate was based on a test which he had apparently taken at the Queensway College in Walthamstow in June 2012. On 10 January 2014 he was granted leave valid until 7 March 2015.

2. On 31 July 2014 the Secretary of State made a decision under section 10 of the Immigration and Asylum Act 1999 (as it then stood) that the Appellant should be removed on the basis that data supplied by ETS showed that he had cheated in the TOEIC test. That decision was withdrawn for formal reasons but a fresh decision to the same effect was made on 30 September 2014. The Appellant denies having used a proxy and says that he took the tests in question himself.

3. As has been very widely reported, similar decisions were made in over 30,000 cases, and there has been considerable criticism of the way in which the Home Office proceeded. There has been extensive litigation, some of it still ongoing, in which aggrieved claimants have sought to challenge the decision taken in their case; and it is now established that in the generality of cases they are entitled to have the issue of whether they in fact cheated determined by a court or tribunal which has heard them give oral evidence.

4. The Appellant applied for permission to apply for judicial review of the Secretary of State's decision. Permission was initially refused but it was eventually granted following an appeal to this Court. The substantive application was heard in the Upper Tribunal (Immigration and Asylum Chamber) by Dove J, sitting alone, on 7 November 2019. The Appellant was represented by Mr Shahadoth Karim of counsel, who has particular experience in the TOEIC litigation. The Secretary of State was represented by Mr Zane Malik. The Appellant gave oral evidence and was cross-examined. As I explain later, both counsel made further written submissions following the hearing.

5. By a decision promulgated on 24 September 2020 – i.e. over ten months after the hearing – the application was dismissed. This is an appeal against that decision with the permission of Andrews LJ.

6. At the time that the appeal was filed the Appellant continued to be represented by Mr Karim, who drafted his grounds of appeal and skeleton argument. On 20 May this year he notified the Civil Appeals Office that he was no longer represented. He was given advice about how to apply for pro bono representation, but he confirmed to the Office shortly before the hearing that he would be appearing in person and did not wish to apply for an adjournment. Before us, although he articulately conveyed the sense of injustice which he says he feels about how he has been treated and the situation in which he finds himself and made some points which do not fall within the scope of the grounds of appeal, he made it clear that he did not feel able to advance specific legal submissions in support of those grounds. However we have the advantage of Mr Karim's skeleton argument, and Mr Malik (now QC), who continues to represent the Secretary of State, has drawn to our attention points which he believes that counsel would have wished to

make for the Appellant. We are satisfied that we are in a position to reach a fair decision.

7. Dove J records at para. 14 of his judgment that it was common ground between counsel before him that he should apply the three-stage approach endorsed in the authorities to which I refer below. At the first stage it is for the Secretary of State to adduce sufficient evidence to raise the issue of fraud. Dove J notes that Mr Karim accepted in his closing submissions that she had satisfied that burden in this case by producing the so-called "generic evidence" of TOEIC fraud conventionally relied on in these cases, coupled with the "look-up tool", which showed that ETS had identified the results in the Appellant's particular case as invalid. At the second stage it is for the applicant/claimant to give sufficient evidence of an innocent explanation – i.e., in practice, that they did not cheat – to shift the burden back to the Secretary of State. Mr Malik had accepted that the Appellant had done so in this case. The only issue, therefore, was whether the Secretary of State had discharged the burden on her at the third stage, namely, as the Judge put it, to "[establish] on the balance of probabilities that the applicant's explanation can properly be rejected". As he said:

> "It is this third and final stage of the analysis which is determinative of the present application for judicial review, and which was the focus of the assessment and submissions made at the hearing."

I will come back to Dove J's reasons for concluding that the Secretary of State had discharged the burden on her.

8. The Appellant sought permission to appeal on several grounds, settled by Mr Karim; but Andrews LJ only gave permission on two – being grounds 1 and 2 (d). I will consider them in reverse order.

9. Ground 2 (d) depended on the delay between the hearing in the Upper Tribunal and the promulgation of Dove J's decision. Andrews LJ was understandably concerned that a delay of over ten months, in a case which depended essentially on the credibility of the Appellant's evidence, might have impacted on the safety of the decision.

10. However, shortly before the hearing before us the Secretary of State applied to adduce evidence, derived from the records both of Dove J's then clerk and of the Upper Tribunal, which showed that a copy of the judgment had been sent to the Tribunal office on 30 January 2021 and that the further eight months' delay in its promulgation was due to an administrative error. Reprehensible though that delay is, the evidence plainly established that the Judge had completed his judgment well within the normal three-month limit and that there could be no question of his ability to reach a fair decision having been impaired by the passage of time.

11. It is regrettable that the Secretary of State did not adduce this evidence a good deal sooner, but we can see no prejudice to the Appellant in its late admission, and indeed sensibly he made no objection. Its effect is that ground 2 (d) must fail.

12. Ground 1 relates to a report published in June 2019 by an All Party Parliamentary Group ("the APPG") investigating the TOEIC fraud issue ("the APPG report"). The APPG, which comprised some eighteen MPs, had heard evidence from, among others, three witnesses – Professor Sommer, Dr Harrison and Professor French – who had given expert evidence in the

TOEIC litigation about the data which ETS had supplied to the Home Office ("the three experts"); and in the report it made observations which were critical of the reliability of that data. The APPG report was not supplied to the Upper Tribunal in advance of the hearing and was first referred to by Mr Karim in his closing submissions. Mr Malik was given the opportunity to put in written submissions following the hearing directed to that and one other issue; and Mr Karim put in written submissions in response. Dove J considered the report in his judgment but it is the Appellant's case that he did not give it proper weight.

13. I should deal first with a potential issue about the admissibility of the APPG report. In *DK and RK v Secretary of State for the Home Department* [2021] UKUT 61 (IAC), in which the claimants sought to rely on it in order to impugn the reliability of the ETS data, a Presidential Panel of the Upper Tribunal (Lane J (P) and Mr Mark Ockelton (V-P)) held at a preliminary hearing that the report as such was not admissible. This was for two reasons:

    (1) The Tribunal believed that reference to the report would contravene article 9 of the Bill of Rights. That was not on the basis that the report itself constituted a "proceeding in Parliament" (see para. 12 of the judgment), but rather that the views of the APPG about information that had been given to the Home Affairs Select Committee and the Public Accounts Committee would "[draw] the Tribunal into this forbidden area" (para. 16).

    (2) The views of the APPG constituted inadmissible opinion evidence (see paras. 19-21).

The Tribunal did, however, indicate that it would be prepared to admit at the subsequent substantive hearing a transcript of the oral evidence which the three experts had given to a sitting of the APPG. There has been no appeal against that decision.

14. In the present case, although it is fair to say that in his written post-hearing submissions below Mr Malik alluded to a possible problem about Parliamentary privilege, the Secretary of State raised no positive objection to the admissibility of the APPG report for the purposes for which Mr Karim sought to rely on it; and, as I have said, Dove J did in fact consider it. There has been no Respondent's Notice contending that he was wrong to do so, and Mr Malik confirmed that he was taking no point on admissibility. We might nevertheless have felt obliged to decline to consider ground 1 if it appeared to us that doing so would involve a breach of Parliamentary privilege. But, as already noted, the report of an APPG does not in itself constitute Parliamentary proceedings, and none of the particular submissions in Mr Karim's skeleton argument appeared to us to raise problems of the kind referred to by the Upper Tribunal in *DK and RK* (see para. 13 (1) above).

15. I can accordingly turn to the substance of ground 1. This is that "the UT erred in its consideration of [the APPG report] and failed to fully recognise the consequences of that report".

16. I start by identifying the aspects of the report on which Mr Karim apparently relied in the Upper Tribunal. He sets these out at para. 15 of his skeleton argument for this Court. I can summarise them as follows:

    (1) In para. 1 of its summary of key findings the report records that the three experts believed the data supplied by ETS to the Home Office to be "questionable" (not least because of problems about "continuity", i.e. ensuring that test results were

attributed to the correct individuals); and it concludes that accordingly such decisions should not be based "on this evidence alone", as the Home Office had done in making its initial decisions. Essentially the same point is made in slightly more detail in two passages from the body of the report quoted by Mr Karim.

(2) At para. 4 of its summary the report records that Professor French, who had given evidence for the Secretary of State in some proceedings that the false positive rate for ETS reports of TOEIC fraud was only 1%, had accepted that that evidence was only reliable if the ETS data on which it was based was reliable – which was itself questionable: see (1) above. He had cautioned against using that figure to argue that any particular student had cheated.

17. Dove J paraphrases those points at para. 19 of his Reasons, adding a further point to the effect that Professor French told the APPG that he had asked the Home Office to obtain further information from ETS which would help to verify their data but that he had never heard anything further. Mr Karim refers to that passage in his skeleton argument without adverse comment.

18. As noted above, there were post-hearing submissions from both parties. Both were short, and only partly addressed to the APPG report. Mr Malik submitted (in summary) that the report was not the product of any kind of judicial process – in particular, there had been no cross-examination of the witnesses, and no evidence from ETS or the Home Office; whereas the evidence relied on by the Secretary of State, including that of Professor French, had been considered and evaluated in a number of decisions of the Courts and the Upper Tribunal – namely, *R (Abbas) v Secretary of State for the Home Department* [2017] EWHC 78 (Admin), [2017] 4 WLR 34; *SM and Qadir v Secretary of State for the Home Department* [2016] UKUT 229 (IAC); *Secretary of State for the Home Department v Shehzad and Chowdhury* [2016] EWCA Civ 615; *Majumder and Qadir v Secretary of State for the Home Department* [2016] EWCA Civ 1167; and *MA v Secretary of State for the Home Department* [2016] UKUT 450 (IAC), to all of which the Judge had been taken in the hearing. Mr Karim in response submitted that none of those points undermined the importance of the evidence of the three experts as reported by the APPG. Neither party made substantive submissions about the content of the report going beyond the passages that Mr Karim had relied on at the hearing.

19. I turn to how Dove J took account of the APPG report in reaching his conclusion. His dispositive reasoning is at paras. 22-28 of his Reasons. I note by way of preliminary that at para. 22 he repeats that it was common ground that the Secretary of State had satisfied the "first-stage" burden on her. It follows that he did not understand the Appellant to be relying on the report as relevant to that stage of the enquiry, and that is not challenged in Mr Karim's skeleton argument for this appeal. He refers to an error in recording the Appellant's nationality and says that he regards it as an administrative error of no significance. Mr Karim does not in his skeleton argument suggest that that approach was undermined by the evidence given to the APPG.

20. In the remaining paragraphs Dove J reviews the evidence and various factors weighing for and against the Appellant's account that he took the test himself. He notes various points in the Appellant's favour, which I need not enumerate here because no issue arises about them. I can summarise the points which he puts into the opposite scale, as follows.

21. First, at para. 23 he refers to the absence of detail in the Appellant's account of how he

took the tests.

22. Second, also at para. 23 but again in para. 28, he refers to the fact that the Appellant took no steps at any stage to contact Queensway College, or to seek copies of the voice-files, in order to find out what had happened and to try to rebut the allegation of cheating.

23. Third, at para. 24 he says that "the significance of the relatively small proportion of inaccurate results in relation to invalidity found in the case of *Abbas* is difficult to ignore". That is a reference to one of the cases noted at para. 18 above in which William Davis J had accepted evidence from Professor French that "the overall number of what he called false positives was likely to be modest, i.e. less than 1% of the overall number of results" (see para. 11 of the judgment). After referring briefly to the evidence about Queensway College, to which I will return, Dove J says:

> "[A]lthough the subject of dispute and contention after the hearing, the findings of the All-Party Parliamentary Group and the record of the evidence which they received from, for instance, Prof French, questioning the reliability of the generic evidence cannot be overlooked. The evaluation of the generic material and the Group's report is not straightforward, but doing the best that I can it appears that the evidence which the Group received potentially diminishes the weight to be attached to the generic material on the basis that it appears to raise issues which have yet to be forensically explored and definitively concluded upon. Thus, all of these factors have to be placed into the balance in assessing whether or not the respondent has discharged the burden upon her."

He is accordingly clearly saying that he will take the experts' evidence, as recorded in the report, into account as "potentially diminishing the weight to be attached to the generic material" but that it has not definitively undermined its reliability. That approach is reflected in the formulation that he uses in his concluding summary at para. 28, where he refers to "the weight that can *still* properly be attributed to the generic evidence [my emphasis]".

24. Fourth, in para. 24 and again in para. 26, he finds that at Queensway College, where the Appellant took his test,

> "there was a significant amount of cheating being undertaken … it was a location at which proxy tests were occurring: it was a fraud factory."

("Fraud factory" is a term used in the TOEIC case-law to denote a testing centre which offered the services of proxies on a regular basis and a large scale.) In reaching that conclusion he expressly refers to the doubts expressed in the APPG report about the reliability of the ETS data, but he says that on the evidence before him it was difficult to reach any other conclusion.

25. Fifth, at para, 27 he refers to a difference between the Appellant's score on an ETS TOEIC test taken about a year before and his score on the impugned test (from "120-149" to 190) and accepts Mr Malik's submission that so dramatic an improvement is suspicious.

26. I should record that at para. 28 Dove J said that although he was dismissing the claim he had found the case "finely balanced" and said:

> "I emphasise that this is a conclusion which I have reached solely on the basis of the balance of the evidence contained in this application. Plainly, were additional evidence or analysis to emerge then then a different conclusion might be justified."

27. The essential point made by Mr Karim at paras. 17-20 of his skeleton argument is that the approach taken by Dove J, as identified at para. 23 above, understated the effect of the APPG report. The report was not just a factor to be taken into account as potentially diminishing the weight to be attached to the generic material: it should have been treated as definitively undermining it, so that the Judge should have placed no weight either on the low false positive rate found in *Abbas* or on the data showing that Queensway College was a fraud factory, both of which depended on the reliability of the ETS data.

28. As appears from the foregoing, Dove J was not shown transcripts of the evidence of the three expert witnesses who gave evidence to the APPG, but only the summary contained in the report of the APPG itself. Mr Malik offered to show us copies of the transcripts, on the basis that he was sure that Mr Karim would have wished us to see them in the light of the decision in *DK and RK*. We agreed to look at them without prejudice to the question whether we should take account of material that was not before the UT, and he showed us what he believed to be the passages which might potentially support the Appellant's case. In the event, however, the passages that we saw went no further than the summary given by the APPG and accordingly did not advance the argument.

29. The role of this Court is not of course to reach our own conclusion about whether the Appellant cheated in his TOEIC test. The question for us is only whether there is any error in Dove J's approach or reasoning on the basis of the evidence and arguments before him. More specifically, the question is whether he was obliged wholly to disregard the evidence which derived from ETS. If he was entitled to take it into account at all, in the qualified way that he did, then the exercise which he performed at paras. 22-28 of his decision is a classic "multifactorial" factual evaluation of a kind with which this Court could not interfere.

30. In my opinion the evidence and arguments before Dove J did not require him wholly to disregard the evidence based on the ETS data. The APPG report was put before him without any supporting evidence or explanation, beyond anything Mr Karim may have said in his closing submissions, and its conclusions, and the evidence on which they were based, were explored before him only to the very limited extent identified above. In those circumstances I think that he was entitled to attach weight to the two points made by to him by Mr Malik as noted at para. 18 above; and I do not believe that he can be criticised for treating the report as "raising issues which have yet to be forensically explored and definitively concluded upon" and taking it into account in the qualified way that he did. I would add that the logic of Mr Karim's position would appear to be that the Secretary of State had not satisfied "stage 1", but that there is no challenge to Dove J's conclusion that she had done so (see para. 19 above).

31. I would accordingly dismiss this appeal. I understand that Elisabeth Laing LJ and Sir Nigel Davis agree with my conclusion and reasoning. I should emphasise the very limited basis for our decision. I can understand that tribunals and practitioners might welcome some general guidance on the proper approach to the ETS data in the light of the evidence which the three expert witnesses gave to the APPG; but it will be apparent that this appeal is not a suitable vehicle for such guidance. That is not only because the Appellant is unrepresented, or because we did not have the advantage of a critical analysis of the transcripts of the evidence of the three experts, but also because of the very limited material, and argument, before Dove J: it is clear from his observation quoted at para. 26 above that he was likewise concerned that he was not in a position to reach a definitive conclusion about the criticisms of the ETS data. I would certainly not wish our very case-specific reasoning to inhibit any wider analysis that the UT may undertake in the pending appeal in *DK and RK*.

32. I should add a footnote about the final sentence of the previous paragraph. At the date of the hearing before us the substantive appeal in *DK and RK* had been heard but no decision had been promulgated. When this judgment was circulated in draft Mr Malik informed us that on 15 July 2021 the UT had issued directions in that appeal recording that it had "reached the conclusion that the Secretary of State's evidence in these appeals is sufficient to make her case if unopposed, and that the appellants therefore need to put their cases". It said that the reasons for that conclusion would form part of its eventual decision and gave directions for a further hearing.

Elisabeth Laing LJ:

33. I agree.

Sir Nigel Davis:

34. I also agree.