Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/04154/2020**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On the 24 November 2021	**On the 23 December 2021**

Before

UPPER TRIBUNAL JUDGE CANAVAN
DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

BILAL AHMAD ISHTIAQ
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Secretary of State: Ms S. Cunha, Senior Home Office Presenting Office
For the Respondent: Mr M. Biggs, counsel instructed by Lawfare solicitors

DECISION AND REASONS

1. The Respondent is a national of Pakistan, born on 10 March 1990. He arrived in the United Kingdom on 11 May 2011, with leave to remain as a student. His leave was subsequently curtailed and further leave to remain refused by the SSHD on the basis that his ETS test results from 22 August 2012 at New London College were

fraudulently obtained by use of a proxy. The most recent refusal decision was 26 February 2020, with a right of appeal, which the Respondent exercised.

2. The appeal came before First tier Tribunal Judge Kainth for hearing on 22 April 2021. In a decision and reasons promulgated on 5 May 2021 the Judge allowed the appeal. He found, directing himself correctly with regard to the relevant caselaw *cf.* Khan [2018] EWCA Civ 1684 and R ota Abbas v SSHD [2017] EWHC 78 (Admin) that the Respondent had adduced sufficient evidence to raise the issue of fraud from the information contained within the Look Up Tool and the Project Façade report [20]-[22] but the Appellant (as he then was) had been able to raise an innocent explanation [23]-[29] in that his account of taking the exam had not been challenged under cross-examination and the Respondent had not produced any supporting material to suggest that the Appellant's personal details had been found in documentation seized from the director's home addresses and consequently, the Respondent had failed on a balance of probabilities to show that the Appellant's innocent explanation should be rejected [30]. At [33] the Judge went on to make reference to the Appellant meeting the requirements of the Immigration Rules which, albeit this was not correct, was not a finding that was subsequently challenged by the Respondent. The Judge then proceeded to allow the appeal on the basis that the Respondent's decision was not proportionate [34]-[35].

3. The Respondent sought permission to appeal to the Upper Tribunal on the basis of grounds of appeal which alleged:

   (i) a lack of adequate findings on material matters. It was asserted that the FtT Judge failed to give reasons why he concluded in the Respondent's favour; and

   (ii) the Judge failed to give reasons why he considered that the Respondent is said to have offered an "innocent explanation."

4. Permission to appeal to the Upper Tribunal was granted by First tier Tribunal Judge Andrew in a decision dated 8 June 2021.

Hearing

5. Shortly prior to the commencement of the hearing on 24 November 2021, Ms Cunha submitted an undated skeleton argument in support of the SSHD's appeal, raising a new issue "a *Robinson obvious procedural irregularity in attributing weight to something the FtT had no jurisdiction to do so"*. At [8]-[11] this is particularised as a challenge to [13] of the Judge's decision and reasons where, it is asserted, the Judge attached weight to the Respondent's family

life, despite the SSHD having refused to consent for this to be considered as a "new matter,"

6. Whilst the skeleton argument had apparently been served on Mr Biggs' solicitors, he had not received it. We made clear to Ms Cunha that it was not satisfactory to seek to amend the grounds of challenge on the morning of the hearing. No explanation had been provided within the application as to why the grounds of appeal had not been pleaded properly in the first place and why they were only being pleaded now. The SSHD is a party to the proceedings and should have resources to support Home Office staff to come to court and do their jobs. We offered Mr Biggs time to consider the skeleton argument but he declined this opportunity in light of our comments.

7. Ms Cunha submitted that the grounds of appeal raise the issue of inadequate reasoning, which did not therefore require a separate amendment. We disputed this and pointed out that Ground 2 was concerned with innocent explanation. Ms Cunha submitted that there no direct finding that there was an innocent explanation. The Respondent accepts it was not his voice on the voice recording and states that he was not able to go to the school in order to deal with the fact it was not his voice because the college was closed. Ms Cunha submitted that this is the only place where the judge deals with whether or not there is an innocent explanation. She submitted that the SSHD was entitled in her submissions to refer to the voice recording; that there was no innocent explanation and no evidence that the person on the recording was not a proxy user. The SSHD's overall position in this appeal is set out at [25]. It is not unreasonable for the SSHD to have inferred from her own evidence that the TOEIC test was not his first choice, he needed to submit a test result by September 2012 so it was not unreasonable for her to infer this.

8. When asked which error of law she was inferring, Ms Cunha stated that it was a failure to make findings in light of a point made by the SSHD at the hearing which was that there were clear motivations behind why the Appellant could have cheated and no innocent explanation had been provided. She submitted that this point had not been dealt with by the judge and that the lack of findings and reasons were problematic.

9. Regarding the first ground of challenge, which concerned the Judge's lack of reasoning, Ms Cunha submitted that the Appellant admits the test recording he obtained does not contain his voice. There is no record in the decision and reasons of the competing arguments so the Judge has not unnecessarily disregarded the evidence, but he has not made a finding to say that this could be a weighty factor. Ultimately the SSHD is left not knowing why the

decision is disproportionate as the Respondent has not committed a deception.

10. It was pointed out that the grounds of appeal only cover ETS and this, in turn, only goes to the public interest element of proportionality and if the Judge found there was no deception then he would go on to weigh up everything. Ms Cunha accepted this but submitted that ultimately the reason the ETS case has come about is because the SSHD has refused the Respondent leave to remain on the basis of his private life and so it was pertinent to the human rights assessment and would ultimately outweigh his Article 8 rights based on his private life.

11. Ms Cunha maintained her formal application to amend the grounds of appeal to include a challenge to the Judge's article 8 findings at [13] of the decision and reasons. She accepted that the points raised in her skeleton argument were only material if the Upper Tribunal were with her on grounds 1 and 2 and if not then it would not be necessary to consider the amended grounds as it would not be material. She further submitted, outwith both the grounds of appeal and the skeleton argument served that morning, that the Judge had not even identified the Immigration Rule the Appellant is said to meet, given there has been no continuous residence for 10 years and no very significant obstacles to his integration in his country of origin. Even if the Respondent has been in the United Kingdom for 10 years and is now married, she submitted that it would be an error of law procedurally to attach weight to his private life in light of the jurisprudence as the SSHD had refused to give consent for the new matter of his marriage to be considered. Even if the Respondent were to win on the ETS point, he would only receive 6 months leave under the policy and so it would not be proportionate for the appeal to be dismissed. In Khan [2018] EWCA Civ 3037 accepted that SSHD can put an applicant back in the position he would have been in. Ms Cunha submitted that it is in the interests of justice to permit the amendment to the grounds of appeal and to utilise the Robinson obvious principles.

12. In reply, Mr Biggs submitted that the Upper Tribunal would have to consider the incorrect allegation of TOEIC in evaluating the proportionality of removal in the context of historic injustice c*f* Patel [2020] UKUT 00351 (IAC). It is fact sensitive and not a binary inquiry and that might lead to an obligation on the SSHD to grant leave – see Ahsan]2017] EECA Civ 2009 at [120].

13. With regard to the SSHD's application to amend the grounds of appeal, Mr Biggs submitted that his first objection is procedural in that there has been no explanation as to why the point was not taken at the proper time, nor why it was made only today and the point about the FTT's analysis was only taken orally following

observations made by the Upper Tribunal about a potential error of law that had not been pleaded in the grounds. He submitted that in these circumstances it would be inappropriate for procedural reasons to allow the amendments. He submitted that it was not known how precisely the SSHD puts her case on the article 8 point, which he had not anticipated having to deal with, but there were no reasons why the Upper Tribunal should not adopt the procedure set out in the CPR with regard to the relief from sanctions jurisdiction *cf.* Hysaj [2014] ECA Civ 1633 and R (ota) Onowu v First tier Tribunal IJR [2016] UKUT 00185 (IAC) regarding late applications for permission to appeal. Mr Biggs submitted that this approach was warranted to encourage procedural rigour. He submitted that on any view we would need to apply the overriding objective whenever judicial discretion is exercised, to have regard to the totality of the circumstances and to treat cases fairly and justly. He submitted that it was unfair for the SSHD to turn up at court and apply to amend the grounds of appeal because this is likely to result in adjournments, given that the Respondent had had no opportunity in advance of the hearing to consider the proposed amended grounds.

14. Mr Biggs submitted that, with regard to the oral amendment to the grounds of appeal, he submitted that the SSHD has not put the point in writing and has not properly considered the case and is dealing with it haphazardly. He submitted that it would be an unwarranted procedural indulgence to allow the amendment so as to include a challenge to the Judge's finding that the Respondent met the requirements of the Immigration Rules. With regard to Robinson [1997] EWCA Civ 3090, [1997] Imm AR 568, Mr Biggs respectfully endorsed the suggestion that it does not apply to the SSHD when she seeks to rely on an obvious point and that the Robinson jurisdiction was designed to apply to fundamental rights to establish a just outcome, is uni-directional and only goes so far. Mr Biggs submitted that procedural requirements do have teeth and have striking consequences on occasion. This very frequently means that a strong point cannot be taken as a consequence of procedural rigour, which *Hysaj* expressly acknowledges.

15. With regard to the merits of the application to amend the grounds of appeal, set out in Ms Cunha's skeleton argument, Mr Biggs submitted that there is no merit. Whilst at [13] of the FtT decision the Judge notes that the Respondent is married but that the SSHD did not give consent for this to be considered as part of the extant appeal. No impermissible consideration of this is indicated at [13] with the Judge's finding that private life, rather than family life is engaged. There was no family case before the Judge and no error of law.

16. With regard to the oral ground of appeal, Mr Biggs acknowledged that the point has force in principle but in circumstances where Ms

Cunha properly accepts at [7] that the points on TOEIC mean there is no public interest in removal mean there is no materiality. The reason the SSHD takes that point is that it is set out in her ETS policy which, unless it has changed, permits for the grant of leave for 6 months. The Judge has to bear in mind the SSHD's policy albeit he cannot allow an appeal on that basis. Mr Biggs submitted that in light of the SSHD taking the position that the appeal should be dismissed, there is an entitlement to 6 months leave under the policy. He submitted that for his purposes he was entitled to rely on [7] of the SSHD's skeleton argument as a proper concession and what that means is that, however flawed the Judge's reasons on article 8, they are immaterial as they would make no difference to the outcome. If the Judge's TOEIC findings stand this is sufficient to justify allowing the appeal and that is the end of the Tribunal's task.

17. With regard to the merits of the first of the two grounds of appeal, Mr Biggs submitted that this is a reasons challenge based on the Judge failing to give any reasons for why he concludes in the Respondent's favour on the SSHD's case that the Respondent cheated on TOEIC and was misconceived. As is indicated by the test the FtT Judge simply concludes that he did sit the test. This is an adequate reason in terms of legal adequacy. It is clear from the Judge's reasoning at [23]-[30] why the Judge found the SSHD had failed to prove TOEIC cheating. It is important to understand the context and the Judge properly acknowledges the correct approach and there is no error of law in this respect. At [23] the Judge orientates himself regarding an innocent explanation. Reference is made to the witness statement at [25] and the limited cross-examination of the Respondent. Ms Cunha has not taken issue with the finding that the Presenting Officer only challenged the Respondent on a very limited basis. The Respondent provided a very detailed account and was cross-examined and emerged unscathed. In SM (Qadir) [2016] UKUT 229 (IAC) at [69] a number of factors are identified including cross examination and what an applicant had to gain and lose. However, the SSHD does not assert a failure to take account of material considerations, rather it is a reasons challenge. The Judge looked at all the relevant evidence and notes at [29] that there was nothing further and at [30] states his conclusion. Mr Biggs submitted that it is not appropriate for the Upper Tribunal to go through the reasoning with a fine tooth comb. The FtT Judge accepts the Respondent's account and in light of cross examination and acknowledges the SSHD's evidence was perhaps not as thorough as it might have been. There is nothing wrong with that reasoning, which is legally adequate and one can understand perfectly clearly why the Judge reaches his conclusion.

18. Mr Biggs submitted that Ground 2 is also a reasons challenge, which is here intermingled with a point of law *viz* that it is not clear why the evidence from the Respondent, which the Tribunal relies on,

would preclude the use of a proxy test taker during the test. However, the Judge correctly directs himself. With regard to the fact that the recording did not contain the Respondent's voice, all the Respondent had to do to satisfy the evidential burden was to put forward evidence that he sat the test himself and he did that. In light of the totality of the evidence, the SSHD has failed to prove her case. There is no requirement in the case law to obtain recordings. The reason why there is no difference of approach is clear from MA (ETS) [2016] UKUT 00450(IAC)
there is no evidence linking the voice recording to the accused person and enough evidence to constitute a minimum level of plausibility. In respect of the voice recording issue, the SM Qadir approach applies. The forensic focus shifts when the voice recording was provided as to whether it can be reliably linked to an accused person. All the Respondent had to do was put forward a minimum level which he did.

19. In reply, Ms Cunha reiterated that the judge failed to provide reasons as to why the Respondent said the recording was not his voice and why there could nonetheless be a proxy decision taker. The Judge had to deal with the SSHD's evidence put forward, which includes the reason the Respondent took the test, including the fact he had passed the test. There were no findings in respect of that more generally and a lack of evidence either way to support the Judge's decision, which was ultimately that there was an innocent explanation notwithstanding the evidence before him.

20. We asked the parties for their views on the basis that we found a material error of law in the decision and reasons of the First tier Tribunal Judge. Ms Cunha submitted that in terms of re-making the appeal should be retained in the Upper Tribunal but may need to go back to the First tier Tribunal in order to re-assess credibility. Ms Biggs submitted that in that event the appeal should go back to First tier Tribunal as there would need to be extensive new fact finding if material errors of law were found. Mr Biggs sought to further submit, with our permission, that regarding the "motive" point which is a repetition of the submission before the FtT recorded at [25] this is not in the grounds of appeal and the judge clearly had regard to that submission and clearly rejected it for the reasons given there. It should have been explored in cross examination and was not, which is perfectly sustainable.

Decision and reasons

21. We have decided to refuse the SSHD's application to amend the grounds of appeal. Whilst we entirely accept that Ms Cunha may have received the file late in the day, no explanation has been put forward as to why the application to amend was made so late, without notice to the Upper Tribunal or the Respondent's

representatives and in any event, we do not consider that the application to amend has merit. It is entirely clear from [13] of the Judge's decision that the Judge was well aware that the SSHD had refused consent for the Respondent's marriage to be part of the appeal and that only the Respondent's private life was before him for consideration, because he states this in terms.

22. Ms Cunha further sought orally to further amend the grounds so as to include an article 8 point, following an observation by the Upper Tribunal, which was only made because we drew her attention to the Judge's problematic finding at [30] that the Appellant meets the Immigration Rules appeared an obvious point that we could not be seen to entirely ignore. The point was raised within the context of a discussion relating to procedural rigour. However, it was not intended to encourage Ms Cunha to re-cast her grounds of challenge and we decline to entertain her application to amend for the same reasons, in particular that the application to amend was made far too late.

23. The judgment of Lord Justice Singh in Talpada v Secretary of State for the Home Department [2018] EWCA Civ 841 stated at [69]:

> *"Courts should be prepared to take robust decisions and not permit grounds to be advanced if they have not been properly pleaded or where permission has not been granted to raise them. Otherwise there is a risk that there will be unfairness, not only to the other party to the case, but potentially to the wider public interest, which is an important facet of public law litigation."*

24. Whilst we accepted that there is jurisdiction for the Upper Tribunal to entertain a new point not raised by the challenging party, the power to do so is to be exercised with real caution. Not only has the SSHD failed to raise the issue prior to the hearing, but there was in fact no formal application to amend even at that late stage. We were not invited to receive submissions on the law relating to the "Robinson obvious" principle. As has been highlighted elsewhere, the Executive will have, or should have, the resources to consider applications for permission to appeal with care and to draft grounds accordingly. It is the increasingly common experience of the Upper Tribunal that grounds drafted by the SSHD are not coterminous with the arguments sought to be put forward by Senior Presenting Officers at hearings, perhaps due to poor drafting of the original document or omissions which have not been rectified in advance. appeals before the Tribunal remain an adversarial process and are subject to the need for procedural rigour and fairness to the party opposing any challenge. It is reasonable to expect that a competent legal representative, whether representing an Appellant or a Respondent, should be able to identify obvious points in the original pleadings.

25. We find that the principle derived from Robinson [1997] EWCA Civ 3090; [1997] Imm AR 568 (commonly referred to as the "Robinson obvious" argument) *viz* the existence of an obvious error in a judicial decision which had not been included in grounds of appeal, is usually considered where it is to the benefit of an appellant. The only exception of which we are aware, which might work against an appellant, is when a court or tribunal might fail to consider the exclusion clauses of the Refugee Convention: see A (Iraq) v SSHD [2005] EWCA Civ 1438. At the heart of the Robinson principle is the duty not to breach the United Kingdom's obligations under the Refugee or Human Rights Conventions. It does not benefit the Secretary of State simply because she has failed to plead her case properly. Consequently, we consider that it would be unfair to the Respondent if we permitted the SSHD to rely on an argument pertaining to Article 8 of ECHR at this late stage, having neither raised it in the grounds seeking permission to appeal or prior to the hearing. We accept that the point the SSHD now wishes to raise does point to an obvious error of law in the decision and reasons of the FtT Judge, as the Appellant's circumstances do not appear to engage any Immigration Rules, but in the interests of procedural rigour we are not going to entertain the argument, which was raised far too late in the course of the hearing. We would note that, having found that the Respondent had provided an innocent explanation and that he discharged the burden of proving that he sat his ETS test, the Judge was entitled to find that his removal would be disproportionate.

26. As to the grounds of challenge in respect of which permission to appeal was granted, we do not consider that they have merit. Both are reasons challenges. The first ground of appeal fails to take account of the fact that the Judge at [23]-[30] engages with the evidence before him, including the Respondent's witness statement and the matters raised in cross-examination by the Presenting Officer and came to his conclusion in favour of the respondent based squarely on that evidence. We consider in these circumstances that his reasons were entirely adequate. The second ground of challenge regarding the adequacy of the reasons provided for finding that the Respondent provided an innocent explanation, is no more than a disagreement with the Judge's findings of fact, which were open to the Judge on the basis of the evidence. In particular, the Judge noted at [28]-[29] that there was a report from Project Façade but no evidence had been produced by the SSHD to prove the Respondent's guilt such as the Respondent's personal details being found in documentation seized from the directors' home addresses.

Decision

27. For the reasons set out above, we find that the First-tier Tribunal decision did not involve the making of an error of law in relation to the two grounds originally pleaded. As a consequence the decision of First tier Tribunal Judge Kainth is upheld.

Signed: Rebecca Chapman

Deputy Upper Tribunal Judge Chapman

Dated: 13 December 2021