Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/15893/2019
HU/15895/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 June 2022	**On 22 June 2022**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

MRS NIRAMALA POKHAREL DHUNGANA (FIRST APPELLANT)
MR SANTOSH DHUNGANA (SECOND APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr P Turner, Counsel (Direct Access)
For the Respondent: Ms A Everett, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants were granted permission to appeal by First-tier Tribunal Judge Osborne on 17 April 2020 against the decision of First-tier Tribunal Judge Verghis who dismissed their appeals against the decision of the SSHD dated 9 September 2019 to refuse their human rights claims. The Appellants are married. The second named Appellant is dependent on the first. I shall refer to the first named Appellant as "the Appellant" in this decision.

2. The matter came before me on 16 March 2021 to consider whether the First-tier Tribunal erred in law. At that hearing the parties agreed that the matter should be adjourned pending the outcome of appeals before a presidential panel concerning the same issues. I agreed to adjourn the appeal. Two reported decisions emerged from the UT from those appeals; DK and RK (Parliamentary privilege: evidence [2021] UKUT 00061 (DK and RK (1)) and DK and RK (ETS: SSHD evidence) [2022] UKUT 00112 (DK and RK (2)). On 16 March 2021 I permitted the Appellant to amend his grounds of appeal to cover issues arising from Mahmood (paras SLTR1.6 and SLTR4.2 Scope) [2020] UKUT 00376. The SSHD indicated that there was no objection to the Appellant amending his grounds

3. The First-tier Tribunal found that the SSHD had discharged the burden proof and shown that the certificates concerning a speaking and a writing test that the Appellant said he took in 2013 were fraudulently obtained. The judge found that the Appellant had not given a credible explanation. The judge relied on the SSHD's evidence which has been described as "generic" and the evidence of the look up tool showing that the Appellant's test on 18 June 2013, taken at Standford's College was marked as invalid. The judge considered the Appellant's evidence. She found that it was not plausible that the Appellant would chose a test centre which would involve a "cumbersome" journey and rejected the evidence that the Appellant had received a recommendation from a colleague with whom she was no longer in contact and that this person accompanied her to the test centre. The judge took into account the evidence relating to the high incidence of fraud at the college during the relevant period.

4. Further submissions were received by the Appellant's representative Mr P Turner dated 8 April 2022 addressing DK and RK (1) and (2) and the application for permission with reference to Mahmood. Ms Everett relied on Mr Tufan's written submissions of 16 May 2022.

5. The primary submission in Mr Turner's written submissions was that DK and RK (1) did not materially alter ground 1 as it stands, in respect of Mr Sharma's grounds of appeal; namely that the judge's approach to the question of deception was erroneous. The second of Mr Sharma's grounds, concerns the judge's approach to the correspondence between he Appellant and ETS. Mr Turner did not address me on this point.

6. Mr Turner in written submissions relied on the judgement in Alam v SSHD [2021] EWCA 1538 which he submitted was contradictory to the UT's decision in DK and RK (1). He stated that it is "alarming" that the UT's determination of DK and RK (1) contains no reference to Alam despite it being a decision which is binding on the UT. The Court of Appeal considered whether having regard to the APPG material would constitute a breach of parliamentary privilege. At [14]-[15] the court found that there would be no such breach. It is submitted that this is authority for the proposition that the APPG material is admissible. The failure of the UT to consider Alam let alone follow its ratio renders the findings in DK and RK potentially unsafe.

7. The written submissions are primarily a challenge to DK and RK (1) and (2). In so far as they assert that the case of Alam is authority for the proposition that the APPG material is admissible, this discloses a misunderstanding of the decision of the Court of Appeal. The issue for the Court of Appeal in Alam was whether the UT erred in law. The UT had dismissed the appellant's appeal having found that he had cheated in a TOEIC test. The appellant had relied on the APPG report. The appellant argued before the Court of Appeal that the judge had underrated the effect of the report and that the report was not just a factor to be taken into account as potentially diminishing the weight to be attached to the generic material relied on by the SSHD but should be treated as definitively undermining it. The SSHD in Alam raised no objection to the admissibility of the APPG report which in that case had been considered by the UT. Underhill LJ stated as follows;

> 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).

8. The Court of Appeal was not asked to decide whether the APPG report was admissible. What is said at [14] is consistent with the UT having said that the report does not constitute Parliamentary proceedings. What is said about Mr Karim's skeleton argument must be considered in the light of the SSHD having raised no positive objection to the admissibility of the APPG report for the purposes for which Mr Karim sought to rely on it. In any event, anything said about admissibility of the APPG report by the Court of Appeal is obiter.

9. Insofar as the written submissions assert that ETS cases will not be decided differently following DK and RK (2), Mr Turner relied on [43] and what the UT said about Muhandiramge v SSHD [2015] UKUT 675. Having considered [43], [45] - [47] of DK and RK (2) and the analysis of Muhandiramge and Shen v SSHD [2014] UKUT 236 therein, the grounds before me are in reality a challenge DK and RK. They do not properly reflect what was said by the UT in respect of those two cases. The ratio of DK and RK (2) is clear and set out in the headnote.[1]

[1] The headnote in DK and RK v SSHD (2) reads as follows:
"1. 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.

10. Mr Turner in oral submissions accepted that the grounds of appeal had been "cut down" by the decisions in DK and RK and did not address me in any detail on the points made in his written submissions. He said that the primary challenge was that the judge did not have regard to the evidence of the Appellant's long standing ability to speak English. He relied also on the Mahmood point.

11. The Appellant's application was refused by the SSHD on grounds of suitability pursuant to para. 276ADE(1)(i) of the Immigration Rules (IR) with reference to S-LTR.1.6. Paragraph S-LTR.1.6. is a mandatory ground of refusal. It states:-

> The applicant will be refused limited leave to remain on grounds of suitability if … the presence of the applicant in the UK is not conducive to the public good because their conduct … character, associations, or other reasons, make it undesirable to allow them to remain in the UK.

12. Paragraph 276ADE reads as follows:-

> (1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:
>
> (i) does not fall for refusal under any of the grounds in Section S-LTR 1.1 to S-LTR 2.2. and S-LTR.3.1. to S-LTR.4.5. in Appendix FM; and
>
> (ii) has made a valid application for leave to remain on the grounds of private life in the UK; and
>
> (iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment); or
>
> (iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; or
>
> (v) is aged 18 years or above and under 25 years and has spent at least half of his life living continuously in the UK (discounting any period of imprisonment); or
>
> (vi) subject to sub-paragraph (2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK.

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2. The burden of proving the fraud or dishonesty is on the Secretary of State and the standard of proof is the balance of probabilities.
3. The burdens of proof do not switch between parties but are those assigned by law."

13. Additionally the SSHD decided that the Appellant could not satisfy para. 276ADE(iii), (iv) and (v). The decision maker concluded that the Appellant could not meet GEN.3.3 and considered Article 8 outside of the IR deciding that the she had remained here in breach of the IR. She had had no leave since 2014 and taking into account her character, conduct and associations the decision was proportionate. The judge at [34] found that the Appellant could not meet the requirements of para. 276ADE for the reasons set out in the refusal letter. The judge found that there were no very significant obstacles to integration to Nepal. She found that the Appellant has family in Nepal. There was no challenge to the findings of the judge at [34].

14. The dishonesty alleged by the SSHD, and as found by the judge to have been proved, concerned a TOEIC certificate from ETS submitted with an application in 2013. Mahmood is authority for S-LTR.1.6 not applying in such a case. Therefore the application should not have been refused under para 276ADE(1)(i). This much was conceded by Ms Everett. The judge fell into error when considering S-LTR.1.6. However, I accept that the error is not arguably material to the outcome of this appeal.

15. On any account the Appellant was not able to meet the requirements of the IR so as her appeal had to be allowed with reference to them under Article 8. Furthermore, the judge properly considered whether the appeal should be allowed under Article 8 outside of the IR, taking into account dishonesty exercised by the Appellant, which she was entitled to do. The judge took into account the positive factors in favour of the Appellant and those in favour of the SSHD at [49]. She said that even in the absence of fraud, the decision of the SSHD would be proportionate. The judge properly applied s.117B of the 2002 Act. The Appellant came here in 2011. She had been without leave since 2014. There is no arguable material error of law arising from the decision of the judge resulting from Mahmood. Mr Turner made oral submissions on this point expanding on the grounds. He said that the decision of the SSHD was flawed and that this had "poisoned" the decision of the First-tier Tribunal. However, there is no support for this. Having permitted the Appellant to amend the grounds, I refuse permission to appeal on the Mahmood point.

16. In oral submissions, Mr Turner submitted that the judge did not take into account material evidence. He made reference to evidence which was before the First-tier Tribunal in the Respondent's bundle which was capable of supporting that the Appellant could speak English at the material time. The complaint was that the judge did not consider this evidence. I drew Mr Turner's attention to Mr Sharma's grounds of appeal which did not raise this as a discrete ground. Mr Turner relied on [25] of the grounds to argue that it was raised. However, [25] of the grounds related to the application of the burden of proof now resolved in DK and RK (2). The issue of the judge not taking into account material evidence was a matter raised for the first time at the hearing before me. There was no application to amend the grounds.

17. I remind myself that the UT should restrict the parties arguments to those upon which permission to appeal was granted Latayan v SSHD [2020] EWCA Civ 191 at [32]. In any event, there is no substance in the matter now raised. The judge did not expressly mention the evidence that Mr Turner referred me to. However, she set out the evidence before her at [18] including the Respondent's bundle. It was not necessary for the judge to mention each and every piece of evidence. There was no issue for the judge to resolve about the Appellant's qualifications before the 2013 test. It was accepted that the Appellant had qualifications. What the judge said at [26] (*the tribunal notes that the appellant demonstrated in oral evidence that she could speak English. However, this is not evidence of her ability to speak English seven years ago*) does not support that the judge did not take into account evidence of a school certificate from 2004 and/or that the Appellant had passed IELTS in 2008. This was not direct evidence of the Appellant's ability to speak English in 2013, particularly in the light of the "very high, almost perfect" test results in 2013 as noted by the judge at [24].

18. Mr Turner drew my attention to evidence of a Diploma in Business Management & Marketing from the London Centre of Marketing issued in in 2013. While it is evidence that the Appellant was taught in English and has an ability to understand and write in English at this time, it is not direct evidence of her spoken English at that time. The judge at [26] referred specifically to the Appellant's ability to speak English. It can be inferred from Mr Sharma's did not mention the evidence relating to the Appellant's English language ability in his skeleton argument before the First-tier Tribunal. Perhaps he did not consider it to be as significance as Mr Turner. In any event, that the judge did not specifically mention this evidence does not support that she was not aware of it and did not take it into account. Moreover, the judge correctly identified that there maybe a range of reasons why a person proficient in English would cheat (see [30]).

19. Mr Turner did not engage with the ground of appeal in respect of communication between the Appellant and ETS in his written or oral submissions. However, in so far as this is concerned, it is an attempt to re-argue the case and a disagreement with the findings of the judge. The evidence before the judge was that the Appellant had not challenged the dishonesty claim until 2017. This was a matter that the judge was entitled to take this into account and attach weight to.

20. The decision of the First-tier Tribunal to dismiss the Appellant's appeal is maintained. The appeal is dismissed

No anonymity direction is made.

Signed Joanna McWilliam Date 8 June 2022

Upper Tribunal Judge McWilliam