



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005085
First-tier Tribunal No: HU/55919/2021
IA/14477/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 24 October 2023

Before

UPPER TRIBUNAL JUDGE HANSON

Between

FARAZ ALI
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: In person.
For the Respondent: Ms Arif, a Senior Home Office Presenting Officer.

Heard at Birmingham Civil Justice Centre on 19 October 2023

DECISION AND REASONS

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Athwal ('the Judge'), promulgated following a hearing at Birmingham on 28 July 2022, in which the Judge dismissed the appellant's appeal against the refusal of his application for leave to remain in the United Kingdom on the basis of family life with his sister, Safia Khatoon, her son, and his private life. The application was refused on 16 September 2021.
2. The appellant is a citizen of Pakistan born on 22 July 1980 who entered the UK lawfully as a Tier 4 Student in April 2011 with leave valid 30 November 2014. However, on 2 September 2014, his leave was curtailed after which he overstayed.
3. The Judge notes that the latest application was refused on the grounds of suitability pursuant to section S-LTR and paragraph 276 ADE (1) (i) of the Immigration Rules as in applications dated 28 July 2012 and 16 July 2013 the applicant had submitted a TOEIC certificate from Educational Testing Service ('ETS') which ETS, having undertaken relevant checks, concluded that there was significant evidence that the appellant's TOEIC certificate was fraudulently obtained by the use of a proxy test taker. The appellants scores from the test taken on 15 May 2012 at Stanfords College were cancelled and as a result the respondent was satisfied that the appellant's certificate was fraudulently obtained and that he used deception in his applications.

4. There is substantial evidence that Stanfords College was complicit in an organised and serious attempt to defraud the respondent and others in relation to TOEIC certificates. The Secretary of State was satisfied the appellant made false representations in a previous application for leave to remain in the UK and did so in order to obtain a document required to support such an application, leading to refusal under S-LTR.4.2.
5. The Judge's findings commence from [40] of the decision under challenge. Having considered the documentary and oral evidence the Judge finds that on the balance of probabilities the respondent had established that the appellant acted dishonestly and fraudulently, and discharged the burden of proving that the appellant's test was sat by proxy and that the appellant acted fraudulently [49].
6. Thereafter the Judge went on to consider whether there were exceptional circumstances that warrant a grant of leave notwithstanding the above, [50].
7. The Judge notes a concession by the Presenting Officer that family life recognised by Article 8 existed between the appellant, his sister and nephew. It also follows, therefore, that the appellant has a private life recognised by Article 8 in the UK.
8. The Judge considered documentary evidence from all sources and the oral evidence that had been provided. The Judge was not satisfied at [57] that the appellant's sister, Ms Khatoon, suffers from any medical condition that limits her ability to care for her son.
9. The Judge accepts it would be in the child's best interest to maintain his close contact with the appellant which was taken into account [59]. The Judge notes the appellant confirmed he was not relying on any expert evidence that could address the impact his physical absence would have on the child and that his own evidence did not explain how he knows that what he alleges will occur will happen, or the basis on which he had made any assessment, and how he is qualified to arrive at his opinion that the child will be adversely affected if he is removed.
10. At [67] the Judge confirms, having considered the evidence in the round, that she finds it to be extremely contradictory. The Judge was not satisfied the appellant had told the truth about the extent of his sister's dependency upon him, nor that his sister had health issues that made him dependent upon her. The Judge was not satisfied at [68] that either the appellant's sister or her child would be adversely affected if he was returned to Pakistan and that the sister was, in any event, being adequately supported by her child's school, the local council, and NHS, which will continue if the appellant is removed.
11. The Judge concludes not being satisfied that there are very significant obstacles to the appellant's integration into Pakistan [79].
12. Thereafter the Judge considers Article 8 outside the Immigration Rules in a properly structured manner, setting out the points considered both for and against the appellant's case, before concluding his removal will be proportionate [82].
13. The appellant sought permission to appeal claiming the Judge erred in the application of the dicta in DK and RK and erred in the assessment of the appellant's evidence and made irrational findings.
14. Permission to appeal was refused by another judge of the First-tier Tribunal and renewed to the Upper Tribunal. Permission was granted by Upper Tribunal Judge Jackson on 9 December 2022, the operative part of the grant being in the following terms:

The Appellant seeks permission to appeal one day out of time against the decision of FirstTier Tribunal Judge Athwal dated 2 August 2022 dismissing his against the Respondent's refusal of his human rights application. It is in the interests of justice to extend time.

The grounds of appeal are that the First-tier Tribunal erred in law in (i) applying dicta from the Upper Tribunal in DK & RK (ETS: SSHD evidence, proof) India [2022] UKUT 112; and (ii) the assessment of the Appellant's evidence and made irrational findings.

The first ground of appeal is not arguable, the generic evidence relied upon by the Respondent together with a look up tool for an individual with an invalid test is sufficient for the Respondent to meet the initial burden of proof before this shifts to the Appellant to give an innocent explanation to the minimum level of plausibility. I do not however exclude it from the grant of permission.

However, the second ground of appeal is arguable. The First-tier Tribunal appears to conclude that the Respondent had discharged the burden of proof in paragraph 7, in a section otherwise setting out the Respondent's position in the reasons for refusal letter and 2 then returns to a discussion on the point in paragraphs 40 to 49. It is arguable that the reasoning in this section is inadequate as it appears to rely heavily on an expectation that the Appellant would be aware of proxy test takers in the room with him during his speaking test. It is arguable that there is no rational basis for this or reason why an individual would be aware of the position of others taking the test. However, the Appellant will need to address the materiality of this given that the appeal was dismissed on human rights grounds without any express reliance on a finding of deception – the assessment under the Immigration Rules and outside of them on Article 8 grounds do not refer to this either as a reason why the rules were not met or as part of the public interest in the balancing exercise. It is noted that there is no challenge to any of the human rights findings.

The First-Tier Tribunal's decision does contain an arguable error of law capable of affecting the outcome of the appeal and permission to appeal is therefore granted.

Discussion and analysis

15. The appellant attended the hearing without the benefit of legal representation as a result of problems that had arisen in the interim. The appellant was able to explain his position with the Tribunal in English and did not request the assistance of an interpreter.
16. There is no merit in the challenge to the finding by the Judge that the Secretary of State had discharged the evidential burden, as recognised by the refusal of permission to appeal on Ground 1.
17. In relation to Ground 2, I do not find the Judge dismissed solely on the basis that the appellant did not appear to be aware of the fact there were proxy test takers in the room with him during his speaking test.
18. The Judge had the benefit of the documentary as well as oral evidence and submissions being made on the appellant's and the Secretary of State's behalf. It is not irrational, in the sense that it is not a decision outside the range of those available to a reasonable decision-maker, for the Judge to have expressed doubt about the plausibility of the appellant's claim that he was unaware of proxy test takers in relation to the other tests declared invalid by ETS, which must have occurred in the same room in which he was sat. It is more likely than not that if the appellant was being honest he would have confirmed he was aware of events occurring, although it is understandable he may have tried to deny this before the Judge, bearing in mind that his was one of the tests identified by ETS as having been taken by a proxy.
19. The Judge refers to the lack of any other evidence relating to the appellant's abilities in relation to speaking English prior to the date he took the test. There was nothing before the Judge to demonstrate an ability to speak English at the level of the score he allegedly obtained in the speaking test. The appellant then used the false certificate in two leave applications, and had his leave extended as a result.
20. The appellant's evidence was that he paid £300 for the test. In DK & RK is reference to the fact the test only cost £50, indicating the appellant must have been aware that he had paid for more than just taking the test, the balance being to cover the cost of the employed proxy test taker.
21. I find there is no merit to this challenge which is, in reality, no more than a disagreement with the Judge's findings on the outcome of the appeal. Whilst it is understandable the

appellant may wish to remain in the United Kingdom with his sister and her son, the grounds fail to establish legal error material to the decision to dismiss the appeal.

Notice of Decision

22. Appeal dismissed.

C J Hanson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

19 October 2023