IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003454

First-tier Tribunal No: HU/59813/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 23rd of November 2023

Before

UPPER TRIBUNAL JUDGE GLEESON
DEPUTY UPPER TRIBUNAL JUDGE DAVIDGE

Between

THE SECRETARY OF STATE HOME DEPARTMENT

Appellant

and

ABUL HASAN NAHID
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr Michael Biggs of Counsel, instructed by Legit Solicitors
For the Respondent: Ms Alexandra Everett, a Senior Home Office Presenting Officer

Heard at Field House on 19 October 2023

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of the First-tier Tribunal allowing the claimant's appeal against his decision on 5 December 2022 to refuse the claimant of leave to remain on Article 8 ECHR grounds.

2. The Secretary of State did not consider the claimant's presence in the UK to be conducive to the public good on ETS/TOEIC grounds, pursuant and rejected his application on suitability grounds, by reference to Paragraph R-LTRP.1.1.(d)(i) and section S-LTR.1.6 and 4.4 of the Immigration Rules HC 395 (as amended). The claimant's scores from his TOEIC test at St John's College on 24 April 2013 were withdrawn by ETS as he was considered to have used a proxy test taker.

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3. The Secretary of State did not arrange representation for the First-tier Tribunal hearing.

4. The claimant did not dispute that the voice on the recording was not his. He gave oral and written evidence of the efforts he had made to clear his name, his journey to the test centre, and so on. The First-tier Judge accepted his evidence and found that he had taken the test himself. The First-tier found as a fact that the Secretary of State had not discharged the legal burden of proof on him, and that the claimant had taken the test himself: see [27] in his decision.

Permission to appeal

5. Permission to appeal was granted by the First-tier Tribunal in the following terms:

> "2. The grounds assert that the Judge erred in law by failing to provide adequate reasons for why the voice recording did not rebut the Appellant's claim that he did not cheat in his ETS speaking test. In doing so the Judge failed to have proper regard of *DK & RK (ETS: SSHD evidence, proof) India* [2022] UKUT 112."

Secretary of State's submissions

6. For the Secretary of State, Ms Everett submitted that the First-tier Tribunal Judge did not take into account properly the guidance in *DK and RK* (ETS: SSHD evidence, proof) India [2022] UKUT 00112 (IAC) which Ms Everett submitted 'very nearly closes the door' in terms of the evidence available to counter cases where as here the voice recording reveals that the voice is not that of the Appellant but of another.

7. The grounds assert:

> "The appellant's evidence is nothing more than pleas of innocence and he has not provided a shred of direct evidence that demonstrates that he sat the test that could explain away the fact that the test recording is not his, which renders it more probable than not that he did not sit the test".

   Ms Everett acknowledged that assertive evidence can be sufficient and that weight is a matter for the judge. She did not address us in any detail in respect of the impugned decision.

8. For the claimant, Mr Biggs relied on his skeleton argument and contended that the Secretary of State had misrepresented and/or misunderstood the guidance of the Upper Tribunal in *DK and RK*. Properly understood, the Secretary of State's grounds of appeal were merely a disagreement with a finding of fact which was open to the First-tier Judge on the evidence before him. The judge's reasoning was careful, adequate and sufficient. The latest version of the Secretary of State's ETS casework instructions entitled the claimant to at least 6 months' leave to remain if his appeal was dismissed: see [40(a)] in the First-tier Tribunal decision.

Discussion

9. We considered the grounds and submissions in the context of the judgement. We have regard to the fact that the Secretary of State opted not to test the claimant's evidence in cross-examination, by arranging representation at the hearing. That was his choice.

10. The First-tier Tribunal's finding that the claimant did take the test himself is a finding of fact. The First-tier Judge noted that the claimant had no incentive to use a proxy test taker and that he had done well in the other components of the test , the results of which were not impugned.

11. We remind ourselves of the high threshold for interference with a finding of fact by a judge who has seen and heard the claimant give evidence: see *Volpi & Anor v Volpi* [2022] EWCA Civ 464 (05 April 2022) at [65]-[66] in the judgment of Lord Justice Lewison, with whom Lord Justices Males and Snowden agreed. The reviewing Tribunal may interfere only where such a finding is "rationally insupportable". That is not the case here: the First-tier Judge explained adequately why he reached the conclusions he did. The conclusions reached may be generous, but they are properly, intelligibly and adequately reasoned.

12. For all the above reasons we find that there is no error of law in the First-tier Tribunal judgment and the Secretary of State's appeal must fail.

Notice of Decision

13. For the foregoing reasons, our decision is as follows:

The making of the previous decision involved the making of no error on a point of law

We do not set aside the decision but order that it shall stand.

E M Davidge
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
31 October 2023