IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006660

First-tier Tribunal No: HU/51157/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:

20th February 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE ZUCKER

Between

Sumbul Fayyaz
(NO ANONYMITY ORDER MADE)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr P Haywood of Counsel, instructed by Sky Solicitors
For the Respondent: Ms A Ahmed, Senior Home Office Presenting Officer

Heard at Field House on 19 January 2024

DECISION AND REASONS

1. The Appellant is a citizen of Pakistan whose date of birth is recorded as 28th September 1985. On 18th September 2020, the Appellant made application to the Respondent for leave to remain outside of the Immigration Rules "because of compassionate and compelling circumstances" (a human rights claim).

2. On 14th December 2020, a decision was made to refuse the Appellant leave to remain in the United Kingdom. In refusing the application, the Respondent contended that paragraph S-LRT applied on the basis that the Appellant had made false representations for the purpose of obtaining leave to remain or in order to obtain documents from the Respondent or a third party in support of the application for leave to remain, specifically, it was asserted, that in applications for leave to remain dated 25th October 2012 and 11th December 2013, the Appellant had used an Educational Testing Service certificate dated 18th September 2012, fraudulently obtained.

3. She appealed. Her appeal was heard on 8th April 2022 by First-tier Tribunal Judge Lawrence sitting at Taylor House, London. In a decision dated 25th May 2022 Judge Lawrence dismissed the appeal. Not content with that decision, by application supported by grounds dated 6th June 2022, the Appellant sought permission to appeal to the Upper Tribunal. There were four grounds:

   (i) The First-tier Tribunal Judge had wholly failed to engage with the Appellant's innocent explanation as per the guidance in **Shen (Paper appeals; proving dishonesty) [2014] UKUT 236**.

   (ii) The First-tier Tribunal Judge had irrationally placed weight upon the case of **MA (ETS – TOEIC testing) Nigeria [2016] UKUT 450 (IAC)**.

   (iii) The First-tier Tribunal Judge failed to consider whether the allegation was an abuse of process as the allegation of deception was not raised in her EEA appeals.

   (iv) It was irrational to suggest that following being raised and spending the entirety of her formative years in Saudi Arabia, living in Pakistan for a mere four years, and then residing in the United Kingdom for a period in excess of thirteen years, she would be familiar with the culture and society of Pakistan.

4. On 6th July 2022, First-tier Tribunal Dempster granted permission. Thus the matter came before me. In granting permission, without denying the Appellant the opportunity to argue all grounds, Judge Dempster stated as follows:

> *"The in time grounds assert that the judge erred in a number of ways. In particular, it is asserted that the judge failed to engage with the Appellant's explanation in rebutting the evidence that she had cheated in her English language test and placed undue reliance on the decision in **DK and RK (ETS: SSHD evidence, proof) India [2022] UKUT 112**. Although the judge identified the evidence of the Appellant relevant to the issue of whether the Appellant had used a proxy to take the examination (at paragraphs 17 to 19), the judge did not provide an explanation why that evidence was not sufficient to discharge the evidential burden. It is arguable that the judge failed to provide reasons for their finding on a material matter and there is thus an arguable error of law".*

5. On the morning of the hearing, I received a written application for permission to be granted for an additional ground to be argued. That further ground was that the Immigration Judge, when considering the appeal under Article 8 ECHR (private life), failed to consider paragraph 276ADE(vi) of the Immigration Rules, so as to determine whether the Appellant would face "very significant obstacles" to her integration were she to be required to go to live in Pakistan.

6. There being no objection from Ms Ahmed to the additional ground being placed before the Upper Tribunal, permission was granted though for the avoidance of doubt, in not objecting to permission to be granted at this late stage, no concession was made by Ms Ahmed on the merits.

7. In resisting the appeal, and I refer here to Ground 1, on the basis that Mr Haywood made plain that in the event of the Appellant being successful on Ground 1, he no longer pursued the other grounds, Ms Ahmed argued that the ground itself amounted to an irrationality point and that as such, there was a

very high threshold for the Appellant to meet if she was to be successful on it. However, in my view, when one reads all of that which appears in the further and best particulars of the ground, what is essential challenged is a failure on the part of the judge to give sufficient reasons for finding that the Secretary of State, upon whom the burden lay, had proved the case.

8. Of note, though the grounds made reference to the case of **Shen**, that guidance had largely been overtaken by the guidance in the case of **DK and RK (ETS: SSHD Evidence; Proof) India [2022] UKUT 00112 (IAC)** in that in the case of **Shen** it was suggested that there was in the first instance, a legal burden on the Secretary of State but that that then shifted by way of evidential burden to the Appellant to offer, if there was one, an innocent explanation, and it was then for the Respondent to assume again the legal burden.

9. It was explained in the case of **DK** that the legal burden remained with the Respondent throughout and that in the case of **Shen**, essentially there was a misunderstanding as to what was meant by the evidential burden in that it assumed an element of a legal burden which did not exist. Be that as it may, I take the view that the ground is clear and the simple point that was being taken was that there was insufficient reasoning in the determination.

10. The judge set out at paragraphs 17 to 19 the Appellant's case. It was set out as follows:

> *"17. The Appellant claims that she took the test herself and did not cheat, and she relies on what she asserts are deficiencies in the Respondent's evidence, including that that evidence is reliant on the trustworthiness of the test centre where she claims to have taken her test.*
>
> *18. The Appellant provided a reasonably detailed account of taking an English language test that resulted in the issuing of the impugned certificate in her written statement and her oral evidence was consistent with that account.*
>
> *19. The Appellant also referred to and provided documentary evidence of her history of education and test result in the English language before and after the impugned test to support her case that she had no reason to cheat and again her oral evidence was consistent with that."*

11. The witness statement which the Appellant relied upon was indeed quite detailed. It ran to 41 paragraphs. In it, she explained the context in which she took the test, how she booked it, that she searched for the nearest centre to where the test might be taken, denied using any deception and explained that the test was relatively short (lasting only twenty minutes) and confirmed that her legal representatives had made a request for her audio recordings, which had been provided, which she had listened to but none of them belonged to her because there were six separate voice recording notes, whereas on the actual test that she took, there was only one session of speaking and she had to speak for more than twenty minutes.

12. The judge then at paragraph 20 of his decision noted, following the guidance in **MA (ETS – TOEIC testing) Nigeria [2016] UKUT 450 (IAC)** at paragraph 57 that there were numerous reasons why a person who could pass a test might nevertheless decide to cheat. The judge went on to consider the evidence submitted by the Secretary of State and the guidance in the case of **DK and RK**,

in which a very senior panel of the Upper Tribunal, being the then President, Lane J and Vice President, Mr C M G Ockelton, examined in great detail the evidence relied upon by the Respondent in cases such as this. Judge Lawrence, having highlighted what he considered to be relevant parts of the decision in **DK and RK**, wrote at paragraph 25:

> *"25. Considering the evidence in the round, I find that the Respondent has discharged the burden of proving that the Appellant employed dishonesty in achieving the test results on which she relied in order to seek further leave to remain in the UK in 2012 and 2013."*

13. Ms Ahmed relied on the fact that when one reads the case of **DK and RK**, the context was that there was widespread fraud, that the judge acknowledged the explanation given by the Appellant in those paragraphs, to which I have already referred and properly directed herself to the case of **MA**. Ms Ahmed invited me to uphold the decision.

14. Mr Haywood however, in his submissions to me, invited me to find that there was an absence of reasoning. It was one thing, he submitted, to acknowledge the Appellant's case, but that is very different, he submitted, from making any findings of credibility.

15. Standing back from the decision as a whole Mr Haywood submitted that it was not possible to know what view the judge took of the Appellant's account. The judge had reminded herself that there were many reasons why a person might lie without actually finding or stating that she found that the Appellant had lied. Set against an observation that the Appellant's account, given in oral evidence, was consistent with her witness statement. The Appellant had provided evidence of her proficiency in English, including there having subsequently obtained a master's degree in 2017, though acknowledging that the test was in 2012, but she had also taken some qualifications in English when in Pakistan, yet, the judge did not appear to have discussed the impact of that evidence in her reasoning but rather appeared simply to have accepted the Respondent's case and adopted it as her own.

16. What was to be made of the observations made by the Appellant as to what actually occurred at the test centre? Was the judge saying that the Appellant did not attend the test centre? The answer to those types of questions would have provided the Appellant with some understanding as to why she was unsuccessful in this appeal.

17. I considered whether one might stand back from this case and say that the judge had looked carefully at what the Appellant was saying, but nevertheless find that the Respondent had met each of the points raised by the Appellant. The difficulty with such an approach is that it would be very difficult for any Appellant who had not cheated to advance their case. In the case of **DK and RK**, whilst it was recognised that it would only be a few instances in which it was likely that those whose names were brought to the attention of the Respondents as having cheated, had not in fact cheated, there still were those cases where there would be innocent persons.

18. In my judgment, the points made by Mr Haywood are well-made. There is no sufficient analysis of why the Appellant was unsuccessful. It is not clear at all whether Judge Dempster accepted any of what the Appellant had to say or if she

rejected only parts of the evidence, which parts and why. The word “because” in answer to the question “why” are helpful, but do not sufficiently appear.

19. As I said above, in the circumstances, Mr Haywood did not invite me to go on to consider the further grounds though, as it happened, Ground 2 was, he accepted, parasitic on the first; he acknowledged that Ground 3 had no merit; and his fourth ground really aligned with the additional ground in which the judge had not apparently considered paragraph 276ADE in response to which Ms Ahmed pointed out that it did not appear from the appeal skeleton argument that that was a point that was set out to be argued before the judge and she relied on the case of **Latter**. I agree with her on that point but fundamentally this decision is flawed. The circumstances of the case will need to be looked at again. The decision is set aside to be remitted to the First-tier Tribunal to be remade.

DECISION

The appeal to the Upper Tribunal is allowed. The decision of the First-tier Tribunal is set aside to be remade in the First-tier Tribunal.

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

19 February 2024