



IAC-FH-CK-V1

**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/14072/2019**

THE IMMIGRATION ACTS

**Heard at Field House
On the 24 June 2022
Extempore**

**Decision & Reasons Promulgated
On the 19 July 2022**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

**MR SANJOY MAZUMDAR
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Biggs, Counsel instructed by ZYBA Law

For the Respondent: Ms A Everett, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Talbot promulgated on 29 January 2020 dismissing his appeal against a decision of the Secretary of State to refuse his human rights claim. The appellant's human rights claim is in essence founded on a challenge that he should be allowed to remain in the United Kingdom and that the Secretary of State's decision that he had used a proxy test taker in his TOEIC test and had thus been dishonest is incorrect.

2. The background to ETS and TOEIC tests is well-known and there is no purpose served in rehearsing it here. The chronology is set out at paragraph 7 of Judge Talbot's decision and is not in dispute. In summary, the appellant entered the United Kingdom on 24 November 2009 and has remained here since as a student and latterly without leave. The impugned TOEIC test was taken on 9 and 14 December 2011.
3. At the hearing before the First-tier Tribunal the Secretary of State was represented by Counsel and Mr Biggs appeared for the appellant as he does today. The judge did not accept that the appellant had provided an innocent explanation and that the Secretary of State had made out her case that the appellant had cheated in the TOEIC test and thus went on to dismiss the appeal on a human rights basis, saying that he was now outside the Immigration Rules on the basis of the suitability requirements, having used deception.
4. The judge in his decision notes where the burden of proof lies at paragraph 15, refers to the relevant case law relating to TOEIC at paragraphs 16 and at 17 goes on to deal with other matters of law and refers to the All-Party Parliamentary Group Report. I note at this point that the judge does at paragraph 16 spend some time directing himself as to how SSH D v Shehzad & Chowdhury [2016] EWCA Civ 615 to be applied and refers to the shifting of a burden. The judge's conclusions are set out primarily at paragraphs 20 to 22 and I will return to those later.
5. The appellant challenged the First-tier Tribunal's decision on several grounds, not all of which are now pursued with the same vigour in light of the legal developments since permission was granted. These grounds are in summary that the judge:
 - (i) failed to give adequate reasons in not explaining properly why he accepts the respondent's case and rejects the appellant's case and failed to make proper findings as to credibility, this being a case where fact-finding is essential, all decisions of this nature being fact-sensitive;
 - (ii) misapplied and misunderstood the evidential burden and legal burden of proof;
 - (iii) erred in his assessment of the evidence, particularly with the difference between questionable and invalid results, and did not properly engage with how that affected the evidence,;
 - (iv) failed properly to explain why he admitted the evidence submitted by the Secretary of State provided late on the day; and
 - (v) in that the reasoning set out at paragraph 21 was perverse and unreasonable.
6. In light of how this case has developed I consider it is proper to focus on the self-direction as to law and how that was applied. That is because, as Ms Everett very properly conceded, it is difficult to see how the judge had adequately given reasons at paragraph 22 of his decision for the findings

made. She also conceded that it was difficult to identify how the judge had properly applied the law.

7. Having heard the submissions from both parties, it appears to me that where the judge appears to have become confused is in not differentiating between an evidential burden and a legal burden of proof. The confusion appear to star in his summary of Shehzad, to which I have already referred. When the judge then assessed the evidence at paragraph 21, although stating correctly and uncontroversially that each case is fact-sensitive there are then several passages in which it appears that the judge considered that there was a *legal* burden on the appellant.
8. The use of phrases such as “establishing his innocence” at paragraph 22 and the concentration on what the appellant would have to show focussing on generic evidence rather than the specific evidence of this case is indicative first, that he has not applied the law correctly; and, second that the conclusions he has then reached with regards to the evidence are defective in that they are not properly reasoned despite the references to evidential burden of proof. It is also evident that he has misunderstood the import of tests being questionable.
9. Taking all these points together, I am satisfied that for these reasons the decision of the First-tier Tribunal involved the making of an error of law affecting the outcome, that the findings of fact are therefore unsustainable and that accordingly the decision should be set aside.
10. As to how the matter should then be remade, I bear in mind that as a result of the errors identified there are significant problems with all of the findings of fact. It is now nearly two and a half years since the decision. There has been extensive new case law in DK and RK (Parliamentary privilege; evidence) [2021] UKUT 61 (IAC) and DK & RK (ETS: SSHD evidence; proof) India [2022] UKUT 112 and on any view effectively the whole case would need to be remade.
11. I am in the circumstances therefore satisfied that this is a case which should be remitted to the First-tier Tribunal for a fresh hearing on all matters and on the basis that none of the findings of fact made by Judge Talbot are retained and that concludes my decision.

Notice of Decision

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.
2. I remit the appeal to the First-tier Tribunal for it to make a fresh decision on all matters; none of the findings of fact are preserved.
3. No anonymity direction is made.

Signed

Date 29 June 2022

Jeremy K H Rintoul
Upper Tribunal Judge Rintoul