



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM CHAMBER**

Case No.: UI-2023-000232

First-tier Tribunal Nos: PA/54674/2021  
IA/14102/2021  
HU/50402/2021

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**  
**On 9 July 2023**

**Before**

**UPPER TRIBUNAL JUDGE LANE**  
**DEPUTY UPPER TRIBUNAL JUDGE MONSON**

**Between**

**MSIB**  
**(ANONYMITY ORDER MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr Patrick Lewis, Counsel instructed by Waterstone Legal  
For the Respondent: Mr Nicholas Wain, Senior Home Office Presenting Officer

**Heard at Field House on 8 June 2023**

**Order Regarding Anonymity**

**Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.**

**No-one shall publish or reveal any information, including the name or address of the appellants, likely to lead members of the public to identify the appellant or his close family members. Failure to comply with this order could amount to a contempt of court.**

## **DECISION AND REASONS**

1. The appellant appeals from the decision of First-tier Tribunal Judge Latta promulgated on 30 December 2022 (“the Decision”). By the Decision, Judge Latta dismissed the appellant’s human rights appeal against the decision of the Secretary of State dated 1 February 2021 to refuse grant him leave to remain because she was satisfied that he had used a proxy to take his English Language test; and dismissed the appellant’s asylum appeal against a separate decision made by the respondent on 15 September 2021 to refuse to recognise him as a political refugee.

### **Relevant Background**

2. The appellant is a national of Bangladesh, whose date of birth is 20 December 1983. The appellant entered the United Kingdom as a student in 2011, and on 30 January 2013 he applied for further leave to remain as a student. He submitted a TOEIC certificate from ETS in respect of a test taken on 9 January 2013 at Eden College International. The scores from the test taken on that day were subsequently cancelled by ETS, and on the basis of information provided by ETS, the Secretary of State was satisfied that the appellant’s TOEIC certificate was fraudulently obtained through the appellant using a proxy test-taker to take his Speaking test. As a result, the Secretary of State was satisfied that the appellant had used deception in his application for further leave to remain. The outcome was that the appellant was refused further leave to remain on 10 September 2015 in respect of an application made on 8 August 2014. On 22 September 2015 the appellant lodged an appeal against the refusal, but on 4 November 2015 the appeal was struck out.
3. On 20 July 2020 the appellant applied for leave to remain on the basis of private life he had established in the UK. In addition, he stated that he wished to challenge the grounds of refusal of his previous Tier 4 application.
4. In the meantime, the appellant is recorded as claiming asylum on 16 January 2019. In a decision letter dated 15 September 2021, the respondent gave her reasons for refusing the appellant’s claim for asylum or humanitarian protection.

### **The Hearing Before, and the Decision of, the First-tier Tribunal**

5. The appellant’s linked appeals came before Judge Latta for a remote hearing on the Cloud Video Platform, which took place on 28 November 2022. Both parties were legally represented, with Mr Lewis of Counsel appearing on behalf of the appellant. The appellant attended the hearing via Video Link from the offices of his Legal Representative. Mr Lewis and the Presenting Officer appeared separately via Video Link.
6. The appellant adopted his statement of evidence before being asked some additional questions by Mr Lewis. He was thereafter cross-examined by the Presenting Officer. The Bengali Interpreter was used for this part of

the hearing. At the end of cross-examination, there was no re-examination. However, the Judge asked a few questions of the appellant for clarification.

7. In the Decision at [27] and [28], the Judge summarised Mr Lewis's submissions on the human rights appeal. Reliance was placed upon the contents of ASA 3. It was noted that the reported case of *DK and RK (ETS: SSHD Evidence; proof) India* [2022] UKUT 00112 - also known by the shorthand of *DK and RK (2)* - was relevant to the appeal. Mr Lewis submitted that the First-tier Tribunal was not bound to follow the factual findings of that case as a matter of judicial precedent. He asked the Judge to find that, in the appellant's case, the evidence differed from that which was the before the Panel in *DK and RK (2)*. He submitted that the personal circumstances of the appellant meant that it would not make sense for him to employ a proxy to take his test. These included his educational background, work experience, and the prohibitive cost of employing someone else to take the test.
8. The Judge's findings and conclusions on the human rights appeal were set out in paragraphs [31] to [44] of the Decision. His conclusion at [44] was that, on the balance of probabilities, it was more likely than not that the appellant used a proxy for his English Language test, and that therefore his human rights appeal was dismissed.
9. The Judge's findings and conclusions on the protection appeal were set out at paragraphs [45] to [71]. The Judge concluded at [71] that, when considering the current evidence before the Tribunal, the appellant had not established to the lower standard of proof that he had a well-founded fear of persecution if returned to Bangladesh under the 1951 Refugee Convention due to his political opinion. The Judge also dismissed the appeal on Article 3 ECHR grounds for the same reasons.

### **The Grounds of Appeal to the Upper Tribunal**

10. The grounds of appeal dated 12 January 2023 were settled by Mr Lewis. He advanced three grounds of appeal.
11. Ground 1 was that the Judge had failed to have regard to the legal submission made in his skeleton argument dated 27 November 2022 that the decision in *DK and RK (2)* had to be considered in the context of the relevant evidence that the panel had excluded due to their earlier finding (in *DK and RK (1)* - see below) that "the reports" (the APPG report and the National Audit Office Report - see below) were subject to Parliamentary privilege. The submission had been made at paragraphs [21] to [34] of the skeleton argument. It was incumbent upon the Judge to consider the submission, and if he rejected it, to give reasons for doing so. The failure to have regard to the submission amounted to a material error of law, given the Judge's unqualified reliance upon the decision in *DK and RK (2)*.

12. Ground 2 was that the Judge had failed adequately to consider relevant evidence from the appellant which was more than a mere assertion of ignorance or honesty. The Judge's failure to give any or any adequate weight to this evidence when determining the appeal was a material error of law.
13. Ground 3 related to the asylum appeal. Mr Lewis submitted that the Judge had failed to properly consider the objective evidence when assessing the risk to the appellant on return to Bangladesh.

### **The Reasons for the Grant of Permission to Appeal**

14. On 8 February 2023, First-tier Tribunal Judge Monaghan gave reasons for granting the appellant permission to appeal. The Judge said:
  - "2. The Judge has arguably made a material error of law in failing to have regard to the detailed submissions in relation to whether he was entitled to take into account evidence in the National Audit Office and if so making findings in relation to the same or whether he is entitled to rely on the decision in *DK and RK (ETS: SSHD evidence; proof) India* [2022] UKUT 000112 (IAC).
  3. In failing to address this submission and make findings in relation to it, the Judge may have arguably erred in law.
  4. The other grounds whilst less cogent are arguable."

### **The Hearing in the Upper Tribunal**

15. At the hearing before us to determine whether an error of law was made out, Mr Lewis said at the outset that he was not conceding the asylum ground of appeal, but he was not proposing to elaborate on it. Mr Lewis proceeded to develop Ground 1, with reference to the argument that he had put forward in his skeleton argument before the First-tier Tribunal. We asked Mr Lewis to explain how his argument could be reconciled with the decision of the Court of Appeal in *SSHD -v- Halima Akter & Others* [2022] EWCA Civ 714, published on 24 May 2022. Mr Lewis said that he fully accepted the decision in *Akter*, but the Judge was at fault in the respect identified in Ground 2. The Judge had not actually followed *DK & RK (2)* in which, unlike the approach taken by Judge Latta, the Presidential Panel had conducted a detailed analysis of the explanations given by the claimants.
16. On behalf of the respondent, Mr Wain submitted that the Judge had directed himself appropriately. The Judge could not go behind *DK and RK (1)* or *DK and RK (2)*. The Judge had adequately considered the submission that *DK and RK (2)* could be distinguished on the facts, and had given adequate reasons for his overall conclusion. As to Ground 2, the Judge had given adequate reasons for rejecting the appellant's innocent explanation. The Judge was not required to make explicit reference to every single point

that was relied upon as buttressing the appellant's asserted lack of motive for cheating.

17. In reply, Mr Lewis said that it was not the appellant's case that *DK and RK (2)* was wrongly decided. Nonetheless, he submitted that it was open to Judge Latta to have regard to the statistics from the National Audit Office report that he had cited in his skeleton argument, and to factor these into his decision-making, and the Judge had not given adequate reasons for not doing so.
18. We invited Mr Lewis to state the appellant's case with regard to Ground 3. Mr Lewis submitted that the key point was set out in paragraph [11] of the grounds. The Judge was wrong to assess the risk on return on the basis of a distinction between low-level members and those who were prominent Party activists. On a proper consideration of the appellant's actual activities, as accepted by the Home Office and the Judge, there would be a real risk that the appellant would be identified as an opposition party activist on return to Bangladesh, and accordingly, on the Home Office's own assessment, he would be at risk.
19. In reply, Mr Wain submitted that the Judge had directed himself appropriately. He had cited in the Decision paragraph 2.4.7 of the CPIN on Political Parties and Affiliation, Version 3.0, dated September 2020, which drew a distinction between the activities of low-level members and those with a raised profile.
20. We reserved our decision.

### **Discussion and Conclusions**

21. The necessary starting point is the decision of the Court of Appeal in *Akter*. Given the leading judgment of the Court, with which the other Judges agreed, Lady Justice Macur said at [29]:

"I do not accept Mr Wilcox's initial submission that *DK and RK (2)* has not precedential authority in establishing that the "generic" evidence relied upon by SSHD in the 'fraud factory' cases is sufficient to satisfy the evidential burden, because it is neither a 'starred' nor a Country Guidance case. The cases arise from the same factual matrix, "such as the same relationship or the same event or series of events'. (See AA (Somalia) -v- SSHD [2007] EWCA Civ 1040, [69]). The judgment in *DK and RK (2)* includes a comprehensive account of the evidence which the UT heard in its analysis of the same and upon which it based its decision. That is, the UT in *DK and RK (2)* demonstrably undertook the forensic examination and reached the definitive conclusions that were not open to Dove J upon the evidence before him in *Alam*. There would need to be good reason, which would inevitably mean substantial fresh evidence, for another UT to re-visit and overturn the determination. This is not a situation (as Mr Wilcox suggested on behalf of HA), in which different tribunals could reasonably reach different conclusions upon the same factual matrix."

22. Macur LJ went on, at [30] to hold that *DK and RK (2)* was not inconsistent with the Court of Appeal decision in *Alam* [2021] EWCA Civ 61 on the issue of admissibility, and that *Alam* is not in conflict with *DK and RK (1)* on the issue of Parliamentary privilege.
23. The significance of the ruling by the Court of Appeal at [30] is that it lays to rest an argument that *DK and RK (1)* is not good law.
24. In *DK and RK (Parliamentary privilege: evidence)* [2021] UKUT 00061 ("*DK and RK (1)*") a presidential panel of the Upper Tribunal ruled on the admissibility of the report of the APPG on TOEIC dated 18 July 2019. The APPG, which comprised 18 MPs, heard evidence, including from Professor French, Dr Philip Harrison and Professor Peter Sommer, who had previously given evidence before the Tribunals upon the reliability of statistical evidence of data supplied by ETS.
25. Aside from the transcript of the evidence given by the experts to the APPG, the Upper Tribunal ruled that the APPG report *per se* was not admissible, as admitting it into evidence would draw the Tribunal into the forbidden area of violating parliamentary privilege.
26. The Presidential Panel also addressed the question of the admissibility of the National Audit Office report ("the NAO report") on TOEIC. At [17] the Panel said:

"The APPG report also makes reference to the National Audit Office report on TOEIC. The reports of the National Audit Office are documents that attract the protection of the Parliamentary Papers Act 1840. This protects the publisher of any document audited to be printed by either House of Parliament from any legal action that may result from it."
27. In his consolidated skeleton argument dated 27 November 2022 (referred to in the Decision as ASA 3) Mr Lewis submitted that the First-tier Tribunal was not bound to follow the factual findings in *DK and RK (2)* as a matter of judicial precedent. He submitted that the Upper Tribunal in that case did not consider an important piece of the jigsaw, which was the statistical information set out in the NAO report. He said that the appellant did not dispute that in principle the NAO report was privileged. But, he submitted, some of the NAO report was simply a statistical breakdown of data provided by the Home Office. The Home Office was therefore in a position to know if the information was correct. It had never suggested that it was not. It should, therefore, be admitted as a set of agreed facts. In such circumstances, Parliamentary privilege would not be infringed.
28. Mr Lewis went on to set out the statistics upon which the appellant relied as casting significant doubt on the accuracy of the "*chain of custody*" information, contrary to the Upper Tribunal's analysis in *DK and RK (2)*. He submitted the Upper Tribunal's overall conclusion could not survive contact with the statistical evidence upon which the appellant relied. He submitted that the First-tier Tribunal should not follow the conclusions in

*DK and RK (2)*, and should instead conclude that the Lookup Tool is not a reliable guide as to whether or not a student cheated.

## Ground 1

29. In the light of the case law to which we have referred to at the beginning of this discussion, we are in no doubt that Ground 1 is unsustainable. On the law as it stands, it was not open to the First-tier Tribunal Judge to treat *DK and RK (2)* as being undermined by the Panel's failure to take into account the statistical data drawn from the NAO report. Since it would have been an error of law on the part of Judge Latta to have attached any weight to Mr Lewis's line of argument, it cannot be an error of law for the Judge to have treated the argument as being irrelevant and not worthy of specific comment.
30. The argument was put forward on the mistaken basis that *DK and RK (2)* was not a precedential authority, and therefore Judge Latta was free to depart from it, simply because there was evidence before him that had not been specifically considered by the Presidential Panel (but which had been deliberately excluded by them at an earlier hearing on the grounds that its admission in evidence would violate Parliamentary privilege). As this premise was false, the entire edifice upon which the argument was constructed falls away.
31. As was held by the Court of Appeal in *Akter*, only the Upper Tribunal can re-visit the conclusions of the Presidential Panel in *DK and RK (2)* and, even then, there would need to be good reason, "*which would inevitably mean substantial fresh evidence*" for another Upper Tribunal to re-visit and overturn the determination: see [29].
32. *A fortiori*, Judge Latta could not reach a different conclusion from *DK and RK (2)* on the inherent reliability of ETS data, including the reliability of the Lookup Tool showing that the appellant's result had been found to be invalid. It was not open to him to find that the conclusions of *DK and RK (2)* were undermined by the statistical data drawn from the NAO report.
33. We consider that the Judge gave adequate reasons for rejecting the appellant's collateral attack on *DK and RK (2)* at [33] of the Decision, where he quoted paragraph [4] of *DK and RK (2)* as follows:

"... We conclude that *despite the general challenges made* (our emphasis), both in judicial proceedings and elsewhere, there is no good reason to conclude that the evidence does not actually identify those who cheated. It is amply sufficient to prove the matter on the balance of probabilities, which is the correct legal standard. Although each case falls to be determined on its own individual facts and evidence, the context for any such determination is that there were thousands of fraudsters and that the

appellant has been identified as one of them by a process not shown to have been generally inadequate.”

34. The argument based on the statistical data from the NAO report clearly fell into the category of a general challenge to the reliability of the respondent’s evidence derived from ETS. In citing the above paragraph, the Judge was rightly directing himself that he was required to ignore any such general challenge, and that he must apply *DK and RK (2)* in an unqualified way.
35. The Judge did not express a view on the subsidiary argument that, while the NAO report itself was privileged, the statistics drawn from it were not. But he did not need to, as the question of whether the admission into evidence of the statistics would or would not violate Parliamentary privilege had no bearing on the question whether the statistics were relevant to the application of *DK and RK (2)*. As they were irrelevant, for the reasons given in the Decision at [33], the anterior question of their admissibility was a matter of academic interest only.
36. For the avoidance of doubt, we consider that Mr Lewis’ argument on admissibility contained the seeds of its own destruction. Having rightly acknowledged that the NAO report is privileged, and having postulated that the statistics in it would cease to be caught by Parliamentary privilege if the parties agreed to treat them as a set of agreed facts, there was an unbridgeable gulf in his line of reasoning between the actual facts and the facts as the appellant would wish them to be. Silence is not consent. The respondent had not given the consent necessary to enable the Tribunal to disapply the ruling on privilege made in *DK and RK (1)*.

## **Ground 2**

37. As to Ground 2, we accept that the appellant did not rely on a mere assertion of ignorance or honesty, but gave a detailed account of taking the test, which, on his account, did not involve him using a proxy for his Speaking test. The appellant also relied on his personal circumstances at the time of taking the test as fortifying his innocent explanation.
38. At [34], the Judge noted that the appellant had obtained his test recording from ETS, and that it did not contain his voice. He noted that the appellant had provided a description of the process he followed for completing his test in his witness statement. At [35], he said that the issue for the appellant was that this was his own account of events, and that there was no additional objective evidence provided by him which established that he was not one of the many who had employed a proxy to assist with his test. At [36], the Judge said that at the end of his cross-examination, he had asked the appellant whether, when he was at the Test Centre, he had noticed any problems or anything that was suspicious. His response to this question was “no”. At [37] and [38], the Judge referred to various paragraphs in the Project Facade report on Eden College International. At [39], the Judge said:



“When I considered the evidence presented in relation to this test centre, where it has been identified that there was widespread cheating, then I do not accept the appellant’s answer that he saw nothing suspicious taking place as being credible.”

39. At [40], the Judge noted that, in *DK and RK (2)* at [132], the Panel had reached a similar conclusion in respect of one of the appellants, where the Panel expressed disbelief in his claim that he had observed nothing wrong at those sessions, at which a large number of tests by proxy were taken.
40. Accordingly, we find that there is no merit in Mr Lewis’s argument that the Judge failed to give the appellant’s innocent explanation anxious scrutiny. We consider that it was open to the Judge to make an adverse credibility finding against the appellant for the reason which he gave.
41. At [41] the Judge expressly took into account all the other matters relied upon by the appellant as buttressing his innocent explanation, including the fact that he had provided evidence to the Tribunal in English during his initial examination in chief. At [42], the Judge directed himself that *DK and RK (2)* had considered similar arguments at paragraph [108] where it was stated that:

“... A further possible source of corroboration may be incompetence in English (i.e. English to the lower level than that required for the test); but it must not be thought that the converse applies; as the then President pointed out in *SSHD -v- MA* [2016] UKUT 450 IAC at [57], there are numerous reasons why a person who could pass a test might nevertheless decide to cheat. This is a point that seems to have escaped Professor Sommer in his comments to the APPG.”

42. We consider that the Judge gave adequate reasons for finding that the respondent had discharged the burden of proof, notwithstanding the fact that the appellant had done considerably more than simply rely on a mere assertion of ignorance or honesty.

### **Ground 3**

43. As to Ground 3, at [56] the Judge referred to the fact that in the RFRL (Reasons for refusal letter) the respondent had concluded that the appellant had been politically active within the UK, albeit at a low level. At [59], the Judge referred to the respondent’s conclusion on the application of *Hj (Iran)* [2010] UKSC 31. The respondent had concluded at [76] of the RFRL as follows:

“... It is not considered that as a general supporter of the party, he would face any difficulties as a result of supporting them. If he is returned to Bangladesh as a supporter or member of the party, or a ranking member with no specific profile, he would not be at risk solely as a result of his political leanings.”

44. At [60], the Judge said that following the *HJ (Iran)* guidance, and the findings made by the respondent in their decision letter that the appellant was politically active in Bangladesh, he was willing to find that the appellant was politically opposed to the Awami League. He found that the appellant had been consistent about his opposition to the Awami League throughout his evidence. At [61], the Judge said that the next question was, therefore “How were those who were politically opposed to the Awami League treated in Bangladesh?” In his submissions, Counsel had made reference to the CPIN on Bangladesh: Political Parties and Affiliation, version 3.0, dated September 2020. At [62], the Judge cited paragraph 2.4.7 of the report as follows:

“In general, low- level members of opposition groups are unlikely to be of ongoing interest to the authorities and they are unlikely to be subject to treatment that is sufficiently serious, by its nature or repetition, to amount to persecution. Opposition party activists, particularly those whose position and activities challenge and threaten the Government and raise their profile, may be subject to treatment, including harassment, arrest, and politically motivated criminal charges by the police or non-state actors, which amounts to persecution.”

45. At [64], the Judge directed himself that there was therefore a clear distinction between those who were “*low-level*”, and those who were prominent party activists. At paragraphs [65] to [70], the Judge gave his reasons for finding that the appellant had not shown that he was anything more than a low-level supporter.

46. We consider that there is no arguable error of law in the Judge’s reasoning. The argument that the Judge ought to have found that the appellant would be an opposition party activist on return to Bangladesh, rather than a low-level member of an opposition group, amounts to no more than an expression of disagreement with a finding that was clearly open to the Judge for the reasons which he gave.

47. In conclusion, we are fully satisfied that there was no error law in either the decision on the human rights’ appeal or in the decision on the protection appeal.

### **Notice of Decision**

The decision of the First-tier Tribunal does not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

Andrew Monson  
Deputy Judge of the Upper Tribunal  
Immigration and Asylum Chamber  
14 June 2023