



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2022-002936
[HU/53985/2021; IA/10340/2021]**

THE IMMIGRATION ACTS

**Heard at Field House
On Thursday 3 November 2022**

**Decision & Reasons Promulgated
On Monday 21 November 2022**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MD REZAUL KARIM

Respondent

Representation:

For the Appellant: Mrs A Nolan, Senior Home Office Presenting Officer
For the Respondent: Mr J Gajjar, Counsel instructed by Lawmatic Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State. For ease of reference, I refer to the parties as they were before the First-tier Tribunal. The Respondent appeals against the decision of First-tier Tribunal Judge Sweet dated 12 May 2022 (“the Decision”). By the Decision, Judge Sweet allowed the Appellant’s appeal against the Respondent’s decision dated 26 February 2020 refusing his human rights claim. That claim, based on the

Appellant's Article 8 ECHR rights, was made based on the Appellant's private life in turn founded on the time he had spent in the UK.

2. The Appellant came to the UK as a student on 28 January 2010 with leave to 30 April 2011. He was granted an extension of that leave to 31 December 2012 and then to 19 March 2016. On 23 October 2013, the Appellant was encountered working in breach of the conditions of his leave, his leave was curtailed and directions were set for his removal. On 6 November 2013, the Appellant sought leave to remain on Article 8 ECHR grounds. That application was refused. However, following judicial review of the decision to curtail his leave, the curtailment was withdrawn and his leave was reinstated to March 2016. However, on 15 October 2014, the Appellant's leave was again curtailed on the basis that he had cheated in his English language test. He made a further application for leave to remain on Article 8 ECHR grounds which was again refused on 10 November 2014. Thereafter, he absconded before making his human rights claim on 13 April 2021.
3. Although the Appellant has not had leave to remain since at the latest 10 November 2014, the Appellant contends that he was wrongly found to have exercised deception by using a proxy test-taker in an English language test. In effect, therefore, he says that his leave should not have been curtailed and, had it not been, he would have been able to remain lawfully in the UK and to satisfy the Immigration Rules to remain on grounds of long residence.
4. The Appellant asserts that he took the English language test himself and whether the Respondent had proved deception was therefore the principal issue in the appeal. This is therefore a so-called ETS case. The Respondent provided her general evidence in support of her case. She also provided evidence from the "look-up tool" and ETS source data in relation to the Appellant's individual case, a witness statement explaining the evidence, and a report entitled "Project Façade - criminal inquiry into abuse of the TOEIC - London College of Media and Technology" ("the Report") in relation to tests taken at London College of Media and Technology ("London College") (where the Appellant is said to have sat his test in August 2012).
5. Judge Sweet found that the deception allegation was not proved. I will come to his reasoning when considering the Respondent's challenge below. In consequence, he found that, although the Appellant was also undertaking work contrary to the conditions of his leave in 2014, but for the allegation made, the Appellant "would effectively have had an opportunity of being in the UK for over 10 years with continuous lawful leave (and therefore possibly able to satisfy the requirements of paragraph 276B of the Immigration Rules by 2020)". He concluded that in his view the Appellant "should be granted leave to remain". I note as an aside and although this conclusion is not challenged by the Respondent that the issue for the Judge was whether removal would be disproportionate as contrary to Article 8 ECHR and not whether the Judge thought that leave should be granted. The Judge went on to allow the

appeal (although somewhat bizarrely refused to make a fee award “because the decision made by the respondent on the information then before him [sic] was reasonable in all the circumstances”).

6. By a decision promulgated on 25 March 2022 reported as DK &RK (ETS: SSHD evidence; proof) India [2022] UKUT 00112 (IAC) (“DK&RK”), a panel of this Tribunal consisting of the then President and the Vice-President determined two ETS cases. The Tribunal did so with a view to providing reported guidance concerning the Respondent’s evidence and the way in which the burden of proof operates in ETS cases. The reported guidance in DK & RK reads as follows:

“1. The evidence currently being tendered on behalf of the Secretary of State in ETS cases is amply sufficient to discharge the burden of proof and so requires a response from any appellant whose test entry is attributed to a proxy.

2. The burden of proving the fraud or dishonesty is on the Secretary of State and the standard of proof is the balance of probabilities.

3. The burdens of proof do not switch between parties but are those assigned by law.”

7. The Respondent appeals the Decision on the basis that Judge Sweet misdirected himself in law. She asserts that [15] and [16] of the Decision “run contrary to the UT’s findings in DK & RK. Which [sic] found that the evidence we served is reliable and accurate”. The Respondent also submits that the Appellant’s “attempts to overturn this should be given little weight”.

8. Permission to appeal was granted by First-tier Tribunal Judge Komorowski on 23 June 2022 in the following terms so far as relevant:

“... 2. The judge’s decision does not set out why, notwithstanding what was said by the Upper Tribunal in [DK &RK] the respondent had not ‘met the initial burden of proof’ (judge’s decision, para 16). Arguably the judge’s approach is inconsistent with that of the Upper Tribunal in DK, and accordingly, it is arguable that the judge has erred in law.”

9. The matter comes before me to determine whether the Decision contains an error of law and, if I so conclude, to consider whether to set it aside. If the Decision is set aside, it is then necessary for the decision to be re-made either in this Tribunal or on remittal to the First-tier Tribunal.

10. I had before me a core bundle of documents relating to the appeal, the Respondent’s bundle and supplementary bundle and the Appellant’s bundle which were before the First-tier Tribunal. I need to refer to only limited documents as identified below.

DISCUSSION AND CONCLUSIONS

11. Since the nub of the Respondent’s challenge to the Decision focusses on only two paragraphs, it is appropriate to set those out in full:

“15. It seems to me that there is considerable doubt about the respondent’s assertion that the appellant took a proxy test on 22 August 2012. The

appellant gave consistent evidence regarding his taking that test, including the travel to the venue, the venue itself (and other applicants there) and the administrative arrangements. He also could not be expected to remember in detail, some nine years after the event, what the content of the speaking test was. It is quite understandable that he would have more recollection of the contents of the writing test, being the written word. There was no urgency in taking the test in August 2012 as his current leave did not expire till 31 December 2012. I was also persuaded by the emails with the college in December 2012 on the subject of the alleged false TOEIC certificate, and the appellant's assertion that the voice recordings were not his.

16. The respondent has not provided any detail about the status of the allegedly invalid tests which were taken at the test centre on 22 August 2012, and may have been overturned by subsequent decisions by the respondent and/or Tribunal decisions. I also take into account the casework instructions that an application should not necessarily be refused on the grounds of an invalid English test certificate, because it must be balanced against all relevant aspects of the application. I am persuaded that the respondent did not have grounds to treat the ETS test as fraudulent, and therefore they have not met the initial burden of proof. In the circumstances, the appellant should be placed back in the position that he would have been if the false allegations had not been made (**Khan [2018] EWCA Civ 1684**). In these circumstances, I consider that the respondent should take steps to put the appellant back in the position which he would have been but for the false allegation."

12. Mrs Nolan adopted the grounds of appeal but also submitted that the Judge failed to give reasons for rejecting the Respondent's evidence. She pointed out that the Judge failed entirely to refer to the detail of the evidence in relation to the Appellant's individual case or the Report regarding the investigation into London College.
13. Mr Gajjar accepted that DK & RK was promulgated prior to the Decision and indeed prior to the hearing before Judge Sweet. He submitted however that the Judge was not bound to refer to every case, particularly in relation to ETS cases since there had been many such cases. He said that the Judge was experienced and his failure to refer specifically to DK & RK did not mean that he was unaware of it and had not taken it into account. The findings were open to the Judge even after DK & RK. The Respondent could not show that the findings were irrational.
14. Mr Gajjar also submitted that any error was not material. Although the Judge should perhaps have considered the Respondent's evidence before considering the Appellant's "innocent explanation", he said that, even if the Judge had not dealt properly with the Respondent's evidence, the Judge's findings in relation to the Appellant's evidence still stand and would therefore meet the Respondent's case.
15. In relation to the Respondent's evidence, Mr Gajjar submitted that the Judge was entitled to find that there were gaps in that evidence, particularly in relation to the Report. When I asked whether the Appellant had challenged what was said in the Report or provided any evidence to counter the statistics there given, Mr Gajjar said that he raised in his

submissions that the Respondent had not provided any updated evidence about the outcomes for those whose tests had been found to be invalid. The Judge was entitled to accept that submission.

16. I begin with the Judge's failure to refer to DK & RK. This had been promulgated some six weeks before the hearing. The only skeleton argument which I have is one dated 5 January 2021 (which must have been January 2022 in context). There is nothing to indicate whether the Judge was referred by Counsel for the Appellant (also Mr Gajjar in the First-tier Tribunal) or by the Respondent's representative to DK & RK.
17. Nonetheless, as Mr Gajjar pointed out, Judge Sweet is an experienced Judge. I would therefore have expected him to be aware of a reported decision of this Tribunal, particularly one of a Presidential panel.
18. Although I accept that a Judge does not have to make reference to every case which might have some relevance to an appeal, DK & RK was a reported decision which related to the issue which lay at the heart of this appeal. Further, a First-tier Tribunal Judge is bound to follow guidance given in a reported decision of the Upper Tribunal unless there is reason to depart from it (see in that regard Berdica (Deprivation of citizenship: consideration) [2022] UKUT 00276 (IAC)). Mr Gajjar may be correct to say that a judge is entitled to reject the Respondent's evidence in any individual appeal notwithstanding the guidance given in DK & RK, but if he or she is going to do so, then he or she must at least reference that guidance and explain why it does not apply to the instant case.
19. For those reasons, I accept that Judge Sweet erred by failing to have regard to the guidance given in DK & RK.
20. That though is not the end of the matter. Mr Gajjar submits that the error is not material given the findings which the Judge made about the Appellant's evidence which are not challenged by the Respondent. However, as Mrs Nolan pointed out, by failing to have regard to or provide reasons for disregarding the Respondent's evidence, the Judge has erred by not assessing the case based on the complete picture.
21. A few examples serve to illustrate this point. I have already referred to the Report and Mr Gajjar's submission that it was evidentially deficient because it does not identify what has happened to the cases identified as invalid. However, the content of the Report setting out the (criminal) investigation bears reading in full as follows:

"Invalid and questionable results

5. Invalid and questionable TOEIC results are defined as follows:

- Invalid - where evidence exists of proxy test taking and/or impersonation
- Questionable - test takers who should re-test due to administrative irregularities

6. The secure public test centres overseen by ETS Global employees, recorded the following test figures; between 11/4/2011 and 09/02/2014

public test centres (Bloomsbury and Westminster) undertook 1039 TOEIC speaking & writing tests of which ETS identified the following:

- Invalid: 3
- Questionable: 0
- Not withdrawn (No evidence of invalidity) 1036
- Percentage invalid: 0.28%

7. In comparison the level of cheating found at the majority of private test centres was significant; in one case 88% of the tests taken were found to be invalid. In some of the private test centres the number of tests invalidated was in the thousands.

8. Over the duration of the contract, ETS conducted both planned and unannounced audit visits to their approved private test centres to assess the standards of the testing. A number of these highlighted evidence of cheating, details of which have been provided to the Home Office since Panorama was aired.

Criminal investigation – Operation Façade

9. Project Façade is a nationwide Home Office criminal inquiry into the abuse of the TOEIC exam. As part of this inquiry, 21 separate criminal investigations are taking place into specific test centres which have been prioritised according to a number of factors including high test volumes, audits that highlighted cheating and other intelligence and information that indicated widespread abuse of the exam.

London College of Media and Technology

10. The criminal inquiry at London College of Media and Technology has revealed the following.

11. Between 15/05/2012 and 20/03/2013, London College of Media and Technology undertook 2389 TOEIC speaking & writing tests of which ETS identified the following:

- Invalid 1033
- Questionable 1356
- Not withdrawn (No evidence of invalidity) 0
- Percentage Invalid 43%

12. The following information, although not covering the entire testing period, is provided in support of and to corroborate the analysis completed by ETS and to show the "organised and widespread" abuse of the TOEIC that took place at this test centre.

13. Four ETS audits were conducted; on 16/05/2013, 47 candidates were taking a test although none were able to provide identification to the ETS auditor which is in breach of ETS rules and indicates 'pilots' were being used. As a result they were all cancelled.

14. One 'invalid' candidate was interviewed under caution and admitted that a 'pilot' took the test on his behalf. He was issued with a criminal caution and a statement was provided.

15. Voice analysis showed evidence of widespread cheating; voice samples relating to repeat test takers have been listened to and in 33 cases the

voices between the first and second tests are different. This indicates that a 'pilot' has been used to take the test on behalf of the candidate on the second occasion.

To note: This is an ongoing criminal investigation and to reveal further information regarding it may prejudice future prosecutions.
“

22. Whilst I accept that it was open to Judge Sweet to criticise the general statistics on the basis that there was no detail about the outcome of the individual cases found to be invalid, that fails to recognise that the statistics were given in comparison to a test centre overseen by ETS staff where very little evidence of cheating was found. I accept also that the Report is dated in 2015 and there is no updated evidence. This was a criminal investigation and there is no evidence that London College or those working there have been prosecuted. There are however specific examples given of proxy test taking having been discovered at this institution. The Judge's failure to have regard to the detail of the Report or provide reasons for rejecting it other than the one sentence which I have cited above means that the Judge may have failed to give appropriate weight to what is after all the report of a criminal investigation undertaken by a "T/Detective Inspector" albeit one working for the Respondent.
23. Second, again because Judge Sweet has failed to have regard to the content of the Respondent's evidence and what is said in DK & RK about the general evidence, he has failed to consider the way in which the deception in ETS cases was practised. The Judge for example places weight on the Appellant's recollection of how he travelled to the venue. However, whether or not he exercised deception, it remains the case that the Appellant would have travelled to the test centre. The deception was exercised within the centre either with a proxy sitting the test and the candidate sitting elsewhere or by the invigilator reading out the answers (see for example [62] onwards of DK & RK).
24. Third, even if the Judge was entitled to give no weight to the Report which is in the form of general evidence about the test centre in question or to the evidence about how the deception was practised, the Judge has failed to take into account the individual evidence. The Judge's failure to have regard to DK & RK means that he has paid no attention at all to what is said at [84] to [86] of that decision about the value of the "look-up tool". There is a suggestion of a factual discrepancy as to the dates of the test identified at [6] of the Decision but that is not a reason relied upon to disregard the Respondent's evidence about the Appellant's individual case and in any event the evidence produced by the Respondent is consistent with the Appellant's evidence as to dates. It is the Respondent's refusal letter which is inaccurate. Moreover, the Judge observed at [12] that the Appellant's "command of the English language may not be as good now as it might have been when he took the test in 2012". This was however an individual who according to the individual scores recorded obtained 200 out of 200 in a speaking test and 190 out of 200 in a writing test. Although the Judge notes that evidence at [11]

of the Decision, he does not explain why that evidence did not discharge the Respondent's burden or why there was "considerable doubt" about it.

25. Whilst the Judge has paid lip service to the content of the Respondent's evidence (at least in relation to the individual evidence), he has failed to factor that into account in his findings at [16] of the Decision and has not provided adequate reasons for discounting the Respondent's evidence. The error is compounded by a failure to have regard to what this Tribunal said in DK & RK about the Respondent's evidence. The assessment about whether the ETS deception is made out involves a consideration of the evidence of both parties. For that reason, I am persuaded that the errors are material. That is not to say that the outcome might not be the same following a re-hearing but I cannot say that it is bound to be or even may well be the same.
26. In light of that conclusion, it is appropriate to set aside the Decision. I do not preserve any findings. The positive findings in relation to the Appellant's evidence are not challenged by the Respondent. However, those are tainted by the Judge's failure to take account of DK & RK and the Respondent's evidence when reaching the findings. It is for a second Judge to consider the credibility of the evidence and weight to be given to it on both sides.
27. Both parties agreed that if I were to find a material error of law in the Decision, it would be appropriate to remit the appeal to the First-tier Tribunal for re-hearing. I consider that course to be appropriate. The appeal needs to be heard entirely afresh. The appeal involves issues of credibility and in fairness to the Appellant, it would be wrong to deprive him of a layer of appeal, particularly in circumstances where his appeal was allowed on the first occasion.

CONCLUSION

28. The Decision contains errors of law which are material. I therefore set aside the Decision. I remit the appeal to the First-tier Tribunal for re-hearing before a Judge other than Judge Sweet. No findings are preserved.

DECISION

The Decision of First-tier Tribunal Judge Sweet involves the making of material errors on a point of law. I therefore set aside the Decision. I remit the appeal to the First-tier Tribunal for hearing before a Judge other than Judge Sweet.

Signed L K Smith
Upper Tribunal Judge Smith

Dated: 3 November 2022