



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

**Case No: UI-2022-004328
First-tier Tribunal No: HU/07389/2019**

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On the 29 March 2023**

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

Secretary of State for the Home Department

Appellant

and

**Waqar Husain Syed
(NO ANONYMITY ORDER MADE)**

Respondent

Representation:

For the Appellant: Ms Everett, Senior Home Office Presenting Officer
For the Respondent: Mr Raza, Counsel instructed by Marks & Marks Solicitors

Heard at Field House on 30 January 2023

DECISION AND REASONS

1. This is an appeal by the Secretary of State. However, for convenience, I will refer to the parties as they were designated in the First-tier Tribunal.
2. The respondent is appealing against a decision of Judge of the First-tier Tribunal Khurram (“the judge”) promulgated on 31 March 2021.

The challenged First-tier Tribunal decision

3. The central issue in contention before the judge was whether the appellant cheated on an English language test taken on 18 April 2012. In a thorough and comprehensive decision the judge found that the respondent had not discharged

the burden of establishing that the appellant had engaged in fraud and cheated. The judge noted that the evidence adduced by the respondent showed widespread cheating at the test centre the appellant used as well as that the appellant acknowledged that the voice recording he obtained from ETS was not of him. However, the judge was persuaded by the evidence given by the appellant. In paragraph 66 the judge stated:

“The quality of the Respondent’s evidence is far from satisfactory. The innocent explanation provided by the Appellant, by contrast, is persuasive. When asking whether the fraud is established by the Respondent, on balance, I am not persuaded that it is more likely than not that this Appellant cheated in the passing of this TOEIC test. The allegation of cheating is not made out by the Respondent in this case.”

4. Having found that the appellant had not cheated, the judge went on to consider whether the appellant had accrued ten years’ continuous lawful residence. This was a new matter that the respondent expressly consented to the judge determining. After a detailed and careful consideration of the appellant’s immigration history, the judge concluded that the appellant had lawfully resided in the UK for over ten years. The judge found that this was positively determinative of the Article 8 ECHR appeal.

Grounds of appeal

5. There are four grounds of appeal. The first three grounds concern the judge’s evaluation of whether the appellant cheated. In short, these grounds submit that the judge failed to approach the evidence consistently with a case that was not published until after his decision: *DK and RK (ETS: SSH evidence; proof) India* [2022] UKUT 00112 IAC.
6. The fourth ground of appeal argues that the judge erred in his assessment of whether the appellant had established ten years of continuous leave.

Submissions

7. Mr Raza, on behalf of the appellant, submitted a helpful Rule 24 response. His argument, in summary, was that although the judge did not have the benefit of *DK and RK*, the approach he took was not inconsistent with it. He highlighted that *DK and RK* does not close down the possibility of an appellant prevailing on the basis of a persuasive innocent explanation and he observed that in this case the judge made a clear finding that the evidence of the appellant was persuasive.
8. Ms Everett argued that the approach taken by the judge was not consistent with *DK and RK*, which had changed the legal landscape. She submitted that in the light of *DK and RK* the judge had attached too little weight to the respondent’s evidence indicating the appellant cheated.
9. With respect to ground 4, after considerable discussion at the hearing, Ms Everett stated that she no longer intended to pursue it.

Analysis

10. I agree with Ms Everett that the legal landscape has changed. At the time the judge wrote his decision (prior to *DK and RK*) the relevant authorities stated that the quality of the respondent’s evidence establishing a prima facie case of fraud

was problematic and was only just sufficient to meet the initial evidential burden. This is accurately reflected in the decision where the judge stated in paragraph 51 that the respondent had “narrowly met” her initial evidential burden and at paragraph 66 where the judge characterised the respondent’s evidence as being “far from satisfactory”.

11. In *DK and RK* the Upper Tribunal carefully considered the evidence the respondent has been relying on in cases of this type and concluded that:

“We do not consider that the evidential burden on the respondent in these cases was discharged by only a narrow margin. It is clear beyond a peradventure that the appellants had a case to answer.”

12. The judge’s finding that the respondent only “narrowly met” the initial evidential burden, whilst consistent with authorities binding on the judge at the time it was promulgated, is plainly inconsistent with *DK and RK*. For this reason, the decision cannot stand.
13. The judge wrote an impressive decision and the only reason I have set it aside is because of a subsequent case which changed the legal landscape. In these circumstances, I have decided that the best course of action is to remit the appeal to the judge in order for him to reconsider the matter in the light of *DK and RK*. For the avoidance of doubt, all of the judge’s findings of fact are preserved and the conclusion in respect of continuous lawful residence stands (Ms Everett having decided to not pursue ground 4). The only issue for the judge to determine will be whether, in the light of *DK and RK*, and based on the preserved findings of fact (which include that the appellant’s innocent explanation was persuasive) he reaches the same conclusion as to whether the respondent has discharged the burden of establishing fraud.

Notice of Decision

14. The decision of the First-tier Tribunal involved the making of an error of law and is set aside.
15. The appeal is remitted to the First-tier Tribunal for the matter to be heard by Judge of the First-tier Tribunal Khurram.
16. No anonymity order is made.

D. Sheridan

Judge of the Upper Tribunal
Immigration and Asylum Chamber

2.3.2023