



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-000187
First-tier Tribunal No:
HU/51354/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 28 September 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR SYED MUHAMMAD SAQIB BUKHARI
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr T Lindsay, Senior Home Office Presenting Officer
For the Respondent: Mr S Ahmed

Heard at Field House on 5 September 2023

DECISION AND REASONS

1. Although the Secretary of State is the Appellant in the proceedings in this chamber I refer to the parties as they were in the First-tier Tribunal.
2. The Secretary of State appeals to this Tribunal against the decision of First-tier Tribunal Judge Andrew made on 16 January 2023 allowing the Appellant's appeal against the Respondent's decision of 22 February 2022 to refuse the Appellant's application for leave to remain in the UK made on 28 April 2021 on the basis of his long residency in the UK.
3. The Respondent refused the application on suitability grounds, concluding that the Appellant's presence in the UK is not conducive to the public good, because the Secretary of State considers that the Appellant used deception in an application made on 28 February 2013 when he submitted a TOEIC certificate from Educational Testing Service (ETS) which the Secretary of State considers was fraudulently obtained.

4. First-tier Tribunal Judge Andrew accepted the Appellant's explanation in relation to the English language test he took at Premier Language Training centre and decided that the Secretary of State had failed to discharge the legal burden on her of proving dishonesty on the part of the Appellant. She decided that the Appellant meets the suitability provisions of the Immigration Rules and allowed the appeal.
5. The Respondent appealed to the Upper Tribunal on the basis that the judge erred in that she failed to apply the guidance in the case of **DK and RK (ETS: SSHD evidence; proof) India [2022] UKUT 112 (IAC)**.
6. Permission to appeal was granted by First-tier Tribunal Judge Hatton on the basis that it is arguable that the judge erred in applying the ratio of **SM and Qadir (ETS - evidence - burden of proof) [2016] UKUT 229** which arguably conflicts with the subsequent ratio in **DK and RK** in which the Upper Tribunal concluded that the burden of proof does not switch between the parties and it is arguable that the judge erred in concluding that the Respondent failed to discharge the legal burden of proving dishonesty.
7. At the hearing before me Mr Lindsay relied on paragraphs 128 and 129 of **DK and RK** in particular where the Upper Tribunal held:

“128. In using the phrase “amply sufficient” we differ from the conclusion of this Tribunal on different evidence, explored in a less detailed way, in **SM and Qadir v SSHD**. 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.

129. In these circumstances the real position is that mere assertions of ignorance or honesty by those whose results are identified as obtained by a proxy are very unlikely to prevent the Secretary of State from showing that, on the balance of probabilities, the story shown by the documents is the true one. It will be and remain not merely the probable fact, but the highly probable fact. Any determination of an appeal of this sort must take that into account in assessing whether the respondent has proved the dishonesty on the balance of probabilities.”
8. Mr Lindsay submitted that the evidence relied on by the Secretary of State is amply sufficient to discharge the burden and that, if the judge had considered the guidance in **DK and RK**, she would have had to take all of this evidence into account. He referred to paragraph 129 highlighting that the Secretary of State's documents demonstrate not merely a 'probable fact' but a 'highly probable fact'. In his submission the judge's glaring error is the failure to take account of all of the Respondent's evidence. He highlighted that the judge in this case based the decision on the guidance in **SM and Qadir** which was made in 2016. In his submission the evidence since then has substantially moved on as acknowledged by paragraph 128 of **RK and DK**. Mr Lindsay referred to pages 268 and 269 of the stitched hearing bundle which was before the First-tier Tribunal noting that this is evidence in relation to the English language test which is specific to this Appellant. He contended that the judge did not take this evidence into account. He therefore submitted that it is difficult to reconcile the judge's conclusion at paragraph 18 that the Respondent had provided no credible reason other than the generic evidence. In his submission there is a significant difference between the test in **SM and Qadir** and that in **DK and RK** because in **SM and Qadir** all the Appellant had to do was produce an innocent explanation reaching the minimum level of plausibility in circumstances where the Tribunal found that the Secretary of State's evidence only just reached the level necessary to discharge the initial burden, whereas in **DK and RK** the evidence reached a higher level beyond the narrow margin indicating that it was highly probable that the

Appellant exercised dishonesty. In his submission the innocent explanation was not adequate. In his submission it is inevitably an error for the judge not to have engaged with the leading authority on this matter.

9. In his submission Mr Ahmed acknowledged that the decision of the Upper Tribunal in **DK and RK** gives more value to the generic evidence submitted by the Secretary of State. He acknowledged that the treatment of the Secretary of State's evidence by the Upper Tribunal changed following the decision in **DK and RK**, but submitted that the cases still remain fact sensitive and the Appellant is still required to produce an innocent explanation. In his submission the Tribunal in **DK and RK** said that the generic material resolves the issue of the initial burden. He highlighted that at paragraph 10 the judge recorded that the Appellant's representative acknowledged that the Respondent had produced the appropriate evidence sufficient to discharge the first part of the test and that the judge was therefore required to seek an explanation from the Appellant and that is what the judge did. The judge found that the Appellant had given a credible explanation for his taking of the English language test and in doing so considered all of the evidence. He highlighted that at paragraph 16 the judge noted that the Respondent's representative did not challenge any of the Appellant's responses to her questions instead focussing in on the evidence that had to be produced by the Respondent to meet the first limb of the burden. He highlighted that paragraph 18 makes clear that the judge took into account the generic documentation and the documentation relating to the Appellant. Mr Ahmed's submissions concentrated on materiality submitting that the judge's outcome would not have been any different had she specifically applied the decision in **DK and RK** and highlighting that the Appellant's representative conceded that the Respondent's evidence met the initial burden and it was for the judge then to assess the Appellant's evidence. The Appellant was able to satisfy the judge on the balance of probabilities that he had an answer and the judge was entitled to make findings on that basis. In his submission the judge did not make a material error.
10. In response Mr Lindsay highlighted that in **SM and Qadir** the Tribunal concluded at paragraph 2 of the headnote that there are multiple frailties in the evidence of the Secretary of State and the Secretary of State had failed to discharge the legal burden whereas in **DK and RK** the Tribunal concluded that the evidence of the Secretary of State manifestly discharges the burden. He relied on paragraph 3 of the headnote of **DK and RK**. I asked Mr Lindsay why it appeared from the decision that the Presenting Officer had not referred to **DK and RK**. He indicated that when the Respondent's review was carried out before the First-tier Tribunal hearing the Appellant had not submitted the appeal skeleton argument in the bundle therefore the Respondent's review was carried out without any additional evidence. He indicated that the Presenting Officer's note from the hearing indicates that she relied upon **DK and RK** in oral submissions.

Discussion

11. It is clear from reading the decision of the First-tier Tribunal Judge that she did not specifically consider the decision in **DK and RK**. The issue before me therefore is whether this was a material error in light of the approach taken by the judge in line with the guidance in **SM and Qadir**.
12. In **DK and RK** the Tribunal held, as summarised in the head note, that 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. It states that the burden of proving the fraud or dishonesty is on the Secretary of State

and the standard of proof is the balance of probabilities and that the burden of proof does not switch between parties but are those assigned by law. The Upper Tribunal considered this in detail in the decision, I note in particular the following:

“ 49. We must consider the burdens in the present case. In an immigration appeal, the burden of proof is placed by law on the appellant, save in respect of a small number of issues where it is placed on the Secretary of State. Dishonesty by the appellant is one such issue. It is not for the appellant to disprove it but for the Secretary of State to prove it.

50. Difficulties arise because the phrase “the evidential burden” appears to be used in two different senses. Where it is used of a burden on a party who does not have the (legal) burden of proof, it means that a matter that might otherwise come into consideration in discharging that burden does not fall for consideration at all unless the party with the evidential burden adduces sufficient evidence to raise the matter. To take an example from the criminal law (it is not easy to identify examples in the field with which this Tribunal usually deals) provocation as a defence to a charge of murder has to be disproved by the Crown in order to secure a conviction: but no disproof of it is necessary unless there is sufficient evidence to raise the defence as an issue: Mancini v DPP [1942] AC 1.

51. When, however, an evidential burden is said to lie on the party that has the (legal) burden of proof on an issue, it cannot be a matter of making the matter an issue: *ex hypothesi* it already is an issue.

52. What is identified here is a test of whether the party with the burden of proof has adduced sufficient evidence to enable a finding of fact in that party’s favour. To put that another way, might the trier of fact find the matter proved on the basis of the evidence if that evidence were uncontroverted? Looking again at a criminal trial, this is the test applied at “half time”, when the prosecution case is closed. If at that point the evidence adduced is insufficient to found a conviction, the defendant is entitled to a verdict of not guilty and, more relevantly for the purpose of the present proceedings, is not put to the trouble of having to put a case to counter the accusation.”

13. I further note the approach taken by the Upper Tribunal in deciding the appeal:

“60. We therefore ask first whether the Secretary of State’s evidence would enable a properly-instructed trier of fact to determine that the burden of proof had been discharged on the balance of probabilities. If the evidence at this point would not support a finding that the matter was proved on the balance of probabilities, the appellants would be entitled to succeed in their appeals. If, however, it would support such a finding, the evidence as a whole falls for consideration in order to decide whether the appeals succeed or fail. With that in mind, we turn to the evidence before us.”

14. I take account of the approach at paragraph 69 and 70 as follows:

“69. An individual allegation always has to be assessed in the context of the whole of the background evidence. The more plausible the alleged fact is, the more the allegation is likely to be accepted on the basis of such individual evidence as is available. That individual evidence will have different effect according to the background against which it is assessed.

70. That is not to say that the need for individual evidence is reduced. The individual case can never be proved by evidence of generality, unless the general is universal. But the general evidence changes the starting point. The possible response to the assertion of fact moves from disbelief that such

a thing could ever – or could regularly - happen, to a specific enquiry about whether one of the events that certainly did happen was associated with the individual under investigation. This feature of the interaction of general and individual evidence is a matter of common experience and is not unrelated to the discussion of cogency. “

15. As highlighted above, at paragraph 10 of the decision the First-tier Tribunal Judge recorded that the Appellant’s representative acknowledged that the Respondent had produced the appropriate evidence and the first stage of the test had been met. In these circumstances it is clear in my view that the judge accepted that the initial evidential threshold had been met and properly went on to consider the Appellant’s evidence and assessed that evidence in the context of the evidence as a whole.
16. The judge set out at paragraph 11 that the burden fell upon the Appellant to provide an innocent explanation. The judge went on to consider the Appellant’s oral evidence, including his evidence as to taking the test at Premier Language Training Centre. The judge noted that the Respondent’s representative did not challenge any of the Appellant’s responses in her submissions, focussing instead on the evidence to be produced by the Respondent to meet the first limb of the burden [16]. The judge considered a number of matters including the Appellant’s education history and the Appellant’s explanation. Contrary to Mr Lindsay’s submission, the judge considered not only the generic evidence but also the documentation relating to the Appellant [18]. The judge considered that the Appellant’s oral evidence was credible.
17. Whilst I acknowledge that the judge did not refer to **DK and RK** specifically, it appears from Mr Lindsay’s submission that the case was mentioned before her in submissions by the Presenting Officer. In any event, looking at paragraphs 128 and 129 of the decision in **DK and RK** the judge, on the basis of the concession by the Appellant’s representative, the judge found that the Respondent discharged the evidential burden and acknowledged that the Appellant had a case to answer. The judge assessed the Appellant’s evidence and clearly concluded that the Appellant’s evidence was credible. This clearly goes beyond “mere assertions of ignorance or honesty” by the Appellant [paragraph 129 **DK and RK**].
18. I note paragraphs 49 to 52 of **DK and RK**. It is clear that the judge considered that the Respondent had discharged the evidential burden by adducing sufficient evidence to raise the matter of dishonesty on the part of the Appellant. In these circumstances the judge went on to consider the evidence as a whole in order to determine whether the appeal succeeded or failed [paragraph 60 **DK and RK**]. The judge assessed the individual allegation in the context of the whole of the background evidence [paragraph 69 **DK and RK**].
19. In my view the findings made by the judge were open to her on the evidence. I therefore conclude that there is no material error in the decision of the First-tier Tribunal.

Notice of Decision

For the foregoing reasons my decision is as follows:

- (0) **The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law and I do not set aside the decision but order that it shall stand.**

A G Grimes

Appeal Number: UI-2023-000187
[HU/51354/2022]
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

18 September 2023