



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-000715

First-tier Tribunal No: HU/51060/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 6 June 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE G BLACK

Between

MR NAYEEMUR RIAZ
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Rehman (counsel instructed by Wildan Legal Solicitors)
For the Respondent: Mr E Terrell (Home Office presenting officer)

Heard at Field House on 23 May 2023

DECISION AND REASONS

1. This is an error of law decision. The “appellant” is Mr Riaz and “the respondent” is the Secretary of State.
2. The appellant is a citizen of Bangladesh, who entered the UK on 4th January 2009 with entry clearance as a student and with leave that expired on 14.7.2015. He has been resident in the UK for 13 years. His application for further leave to remain was refused on Suitability grounds of deception/dishonesty that he obtained TOIEC by fraud. In a decision heard on 10th January 2023 FTJ Jepson (“FTT”) dismissed the appeal finding that the appellant had used deception and considered his private life under Article 8. The FTT applied the guidance in DK & RK [2022] UKUT 00111 as to the burden and standard of proof. It was accepted that the respondent had discharged the initial burden and the FTT went on to consider if the appellant’s evidence established and innocent explanation and

concluded that he had not. The FTT assessed the evidence as to private life and the appeal was dismissed on Human rights grounds.

Grounds of appeal

3. The appellant argued that the FTT failed to assess the issue of “dishonesty” and failed to consider if the respondent had discharged the legal burden or not (Shen (paper appeals; proving dishonesty) [2014] UKUT 236 (IAC). It was conceded before the FTT that the correct legal proposition was as per DK & RK [2022] UKUT 00111 in terms of each case is determined on its own facts. The appellant’s evidence satisfied the minimum level of plausibility. The FTT wrongly sought to require further evidence in support by way of corroboration [30-35]. The FTT was wrong to find that the appellant failed to establish an innocent explanation. But nevertheless the FTT was required to assess the legal burden on the respondent on the balance of probability other than discharging prima facie evidential burden.

Permission to appeal

4. Permission to appeal was granted by FTJ Evans who observed that Shen [25] required the respondent to answer the evidence if an innocent explanation is advanced. The burden is borne by the Secretary of State.
5. Permission was granted in terms that the FTT arguably “erred in law by finding, essentially because of a lack of corroborating evidence, that the Appellant’s explanation was not one that met a ‘minimum level of plausibility’. Consequently, it is arguable that they also erred by not considering whether the Respondent had discharged the burden of proof that was upon her.”

Rule 24 response

6. The respondent opposed the appeal. The FTT was correct to assess the appellant’s oral and written evidence together with the lack of any evidence readily available to the appellant. The respondent relied on MA [2016] UKUT 450 re the level of English language spoken as a reason for not cheating. The appellant adduced no evidence beyond his suspicions that the invalid test result was wrong. Any error would not be material in the face of the case presented by the respondent (DK & RK at paragraph 129)

The hearing

7. The appellant produced a Skeleton Argument (ASA) and the respondent produced a Rule 24 response. Both representatives made submissions.

Discussion and conclusion

8. This is a case in which the FTT and the representatives agreed that the correct legal approach was in DK & RK. The issue being whether or not the appellant had been dishonest in TOIEC as was alleged by the respondent. It was accepted that the initial burden on the respondent was discharged. The FTT went on to consider the evidence relied on by the appellant to establish an innocent explanation.
9. Mr Rehman argues that the appellant’s evidence was sufficient to show an innocent explanation, that it reached the minimum level of plausibility. The

appellant relied firstly, his academic background claiming that it was unnecessary or illogical that he would cheat and that his language ability showed he was well able to speak the English language. Secondly, that there was a mistake by ETS. Mr Rehman argued that in requiring further evidence from the appellant to corroborate his account amounted to an error in law. He argued that in any event the FTT ought to have considered the legal burden on the respondent.

10. Mr Terrell submits that the approach adopted by the FTT was overall correct having regard to (DK & RK [126-129]). *“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.”* [129].
11. Mr Terrell submits that the FTT’s focus throughout was that the burden ultimately was on the respondent. In essence the FTT found that the appellant’s evidence was no more than an assertion and that there was insufficient evidence to show that he had no need to cheat and no reliable evidence to show that the ETS was mistaken.
12. Taking into account all of the evidence that was before the FTT and the findings made, I am satisfied that the FTT’s approach did not amount to a requirement for corroboration by the appellant. I acknowledge that the focus in DK & RK was largely on the question of the initial burden on the respondent, but the UT set out the relevant caselaw including the approach in Shen [35] in which it is concluded that *“all the evidence must be taken into account in order to determine whether the Secretary of State has proved her case.”* Whilst looking at the evidence in terms of an innocent explanation, I am satisfied that the FTT considered the evidence as a whole in keeping with DK & RK [57-59] and as such any error is not material. The FTT considered the evidence in the round and firstly concluded that the initial burden on the respondent was made out (and which was conceded) and thereafter found that the appellant failed to make out an innocent explanation. The FTT found that to take into account the level of the appellant’s English language at the hearing, some years after the date of the test in 2013, carried little weight. Clearly this approach is entirely sensible and correct. The appellant relied on some documentary evidence to show his academic background from Bangladesh and from a college he attended in the UK. The FTT accepted this “might indicate some proficiency in English” [32] but not the level. The FTT reasonably found that there was a lack of documentation from Bangladesh to show that the course was taught in English or the standard required. The FTT found that the course at Docklands college was not completed and no certificate provided. In that context the FTT took the view that documentary evidence from the second college he attended in the UK [31-32], that would have been available to the appellant, “might have helped address this point”. This in my view does not amount to a requirement for corroboration. Throughout the decision it is clear that the FTT is fully aware that the burden falls on the respondent despite his summary of DK & RK at [25] of the decision. I am satisfied that the FTT looked at all the evidence in the round in reaching its findings and conclusions. The burden ultimately lies on the respondent and the requirement on the FTT is to consider all the available evidence as a whole. The headnote in DK & RK provides that

once the respondent has discharged the initial burden, a response is then required from the appellant and that is what the appellant presented in terms of an innocent explanation. The burden of proving fraud or dishonesty is on the Secretary of State and the standard of the balance of probabilities. The FTT found no innocent explanation was established and that without more a simple assertion was insufficient. The FTT took into account that the motivations for cheating were various. There was no evidence adduced to show that there was a mistake by the ETS. The FTT took into account the evidence of Professor French validating the methodology used to check each test [34]. I am satisfied that the FTT correctly concluded on the evidence that the burden of proof on the respondent was discharged to the correct standard and that considering the evidence as a whole the respondent had amply shown that the appellant used dishonesty.

13. The appellant's case under Article 8 was put entirely on the basis that as he had shown an innocent explanation he ought to be placed in the same position as if the fraud allegation had never been made. The FTT looked at all of the circumstances in assessing proportionality [42-46] taking care not to "double count" the fraud allegation in terms of meeting the Rules and the need for immigration control. The FTT took into account that the appellant is now able to speak English, his length of stay in the UK and concluded that there were no exceptional circumstances (and none were raised by the appellant). The appellant had family in Bangladesh and would be able to find employment; there was no evidence to suggest very significant obstacles to re integration.

Notice of Decision

14. The appeal is dismissed. There is no material error of law in the decision which shall stand.

GA Black

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

31.5.2023