



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003018

First-tier Tribunal Nos: HU/55333/2021
IA/13422/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 31st October 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR KAWSAR HUSSAIN
(NO ANONYMITY ORDER MADE)

Claimant

Representation:

For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer
For the Respondent: Mr S Karim, counsel instructed by Legit Solicitors

Heard at Field House on 29 September 2023

DECISION AND REASONS

1. The Respondent, to whom I shall refer as the Claimant, is a national of Bangladesh born on 4 April 1987. He arrived in the United Kingdom on 5 June 2010 pursuant to the grant of entry clearance as a student. On 18 May 2012 the Claimant sat his ETS TOEIC English language test in listening and reading, and on 20 June 2012, he sat his ETS test in speaking and writing. On 30 July 2012 the Claimant made an in time application for further leave to remain as a student which was subsequently cancelled, albeit the Claimant says he did not receive the ISI51 notice which was sent on 28 October 2014. On 26 June 2015 he applied for leave to remain on the family

and private life route. This application was refused and certified on 14 October 2015. The Claimant attended Lunar House on 26 November 2015 where he was served with another ISI51 and detained for three weeks. He made an application for judicial review in relation to the refusal and certification of his private life application but this was unsuccessful.

2. On 2 December 2020 the Claimant applied for leave to remain on the basis of his private life. In a decision dated 9 September 2021, the Secretary of State refused that application with reference to S-LTR.4.2., the discretionary suitability requirements of Appendix FM of the Immigration Rules, on the basis that the Claimant had made false representations with regard to his English language test. The Claimant lodged an appeal against that decision on 10 September 2021 and his appeal came before First-tier Tribunal Judge Hanley for hearing on 7 March 2023.
3. In a decision and reasons promulgated on 15 March 2023 the Claimant's appeal was allowed on the basis that the Judge found he had provided a credible and innocent explanation and that the Secretary of State had failed to discharge the legal burden which lies upon her to prove that the Claimant's TOEIC certificate was obtained by dishonesty.
4. The Secretary of State sought permission to appeal against that decision on 21 March 2023 on the basis that the judge had materially misdirected himself in law in that he had made an unjustified departure from the country guidance decision in DK and RK [2022] UKUT 00112 (IAC).
5. Permission to appeal was granted on 26 July 2023 by First-tier Tribunal Judge Boyes in the following terms:
 2. *The grounds assert that the Judge erred in respect of the applicable law. It is argued that the Judge did not properly apply DK and RK (ETS: SSHD evidence; proof) India [2022] UKUT 112 (IAC).*
 3. *The grounds are arguable. The Judge has arguably not dealt sufficiently or sufficiently clearly with the requirements of the case law and has instead chosen a different path which has caused him to err in the assessment of the factual matrix.*
 4. *Permission to appeal is granted".*

Hearing

6. At the hearing before the Upper Tribunal, Mr Tufan on behalf of the Secretary of State stated that the Secretary of State's position was that *DK and RK* had not been applied properly. There was before the First-tier Tribunal Judge a spreadsheet contained at pages 31 to 32 of the Secretary of State's bundle and 37% of the test results were questionable and invalid. *DK and RK* clearly suggests that invalid results have to be given consideration and the Secretary of State's position is that the judge had not applied the salient and applicable test.

7. At [100] the Judge seemed to direct himself correctly and at [101] he gives reasons as to why the Secretary of State has not discharged the burden of proof, but in so doing he erred in asserting that it was relevant that the Claimant was a fluent English speaker because it is clear from the judgment in MA (ETS – TOEIC testing) [2016] UKUT 00450(IAC) at [57] which was repeated in *DK and RK* that this is not a relevant consideration.
8. In his submissions, Mr Karim submitted that the Secretary of State's grounds of appeal are simply a disagreement with the judge's detailed and thorough determination, that the submissions advanced are an attempt to re-argue the Secretary of State's case and that it would not be appropriate for the Upper Tribunal to entertain a re-argument of the case at this stage absent irrationality on the part of the First-tier Tribunal Judge.
9. Mr Karim drew attention to [129] of *DK and RK*. He submitted that when recording the summary of the Secretary of State's submissions at [71] the judge accepted that the evidential burden had been discharged by the Secretary of State. At [76] and [77] the judge directed himself with regard to the findings in *DK and RK* and also at [88] and [92]. Mr Karim submitted that the common misconception about *DK and RK* is that it does not mandate that the Secretary of State has discharged the legal burden but rather only the evidential burden, and what the judge in this case found at [96] is that the look-up tool established that the Claimant had a case to answer. The judge then cited directly from [127] to [129] of *DK and RK*, which the Secretary of State relies on in the grounds of appeal, that there was scope for cases to be allowed. Mr Karim drew attention to the Cambridge College of Learning cases where the Upper Tribunal found categorically that there were no courses being offered by those institutions and therefore it was simply not possible to win an appeal on that basis at all. Mr Karim submitted that the judge has clearly quoted from the relevant findings in *DK and RK* at [129].
10. Mr Karim further submitted that [108] of the judge's findings is crucial where the judge directed himself correctly that mere assertions of ignorance are not enough; at [109] that the absence of any motive to cheat does not mean that the Claimant did not cheat, and that he was entitled to reach the finding at [110] that the Secretary of State had not discharged the legal burden. Mr Karim submitted in summary that the judge had directed himself properly, he had referred to *DK and RK* extensively, he identified no particular motive and made a plethora of positive credibility findings in respect of the Claimant, none of which have been challenged and the Judge accepted that the Claimant is doing far more than just denying he was cheating. Mr Karim submitted the determination was safe and should be upheld.
11. In response, Mr Tufan sought to challenge the specific findings made by the judge on the basis that he had not correctly applied *DK and RK* and queried whether it was relevant as the judge found at [108] that the Claimant was a genuine and serious student or at [109] that he had a good previous immigration history.

12. Mr Karim politely intervened to submit that none of these points were contained in the Secretary of State's grounds of appeal and in response pointed out that the judgment in SM and Qadir (ETS – Evidence – Burden of Proof) [2016] UKUT 00229 (IAC) set out the factors that one is supposed to look at which does include a claimant's academic history, and therefore, the judge was doing exactly what he was supposed to do and these were relevant considerations in light of the Court of Appeal's judgment in that case.

13. I reserved my decision which I now give with my reasons.

Decision and reasons

14. The material issue in this appeal is whether the First tier Tribunal Judge properly applied the most recent guidance from the Upper Tribunal in ETS cases *viz* DK and RK [2022] UKUT 00112 (IAC).

15. Paragraph 4 of the headnote in DK and RK provides:

“4. In this decision we examine the evidence on which the Secretary of State relies to establish the frauds in individual cases. We conclude that despite the general challenges made, both in judicial proceedings and elsewhere, there is no good reason to conclude that the evidence does not accurately 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 inaccurate”.

16. It is clear from this paragraph that, whilst the evidence relied upon by the SSHD in most cases is “amply sufficient” to prove on a balance of probabilities that a fraud took place each case falls to be determined on its own individual facts and evidence.

17. The general conclusions in *DK & RK* are set out at [126] to [129] which provide:

“GENERAL CONCLUSIONS

126. The two strands, therefore, amount respectively to the virtual exclusion of suspicion of relevant error by ETS, and the virtual exclusion of motive or opportunity for anybody to arrange for proxy entries to be submitted except the test centres and the candidates working in collusion.

127. Where the evidence derived from ETS points to a particular test result having been obtained by the input of a person who had undertaken other tests, and if that evidence is uncontradicted by credible evidence, unexplained, and not the subject of any material undermining its effect in the individual case, it is in our judgment amply sufficient to prove that fact on the balance of probabilities.

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”.*

18. The First tier Tribunal Judge expressly directed himself with regard to DK and RK [2022] UKUT 00112 (IAC) at [92] where he set out the headnote and cited [127]-[129] at [96] of his decision and reasons. He went on to make the following findings:

“100. As explained in DK & RK it is highly probable that a proxy was used in the invalid test.

101. In response the appellant, either in evidence or in submissions through his counsel, makes the following points.

a) He was a confident and fluent English speaker (sic) people coming to the UK.

b) His evidence of other English-language qualifications both predating the disputed test and postdating it are corroborated by certificates.

c) He was a genuine student.

d) He had no motive to cheat.

e) His standard of English was better than the marginal pass allocated to him.

f) He has provided a credible, consistent and detailed description of the examination he sat and the college he attended.

g) Objective material confirms that he was only required to present his passport by way of identification.

h) The ETS records are odd because they allocate two record numbers and duplicate the data lines.

i) He has endeavoured to obtain the voice files.

j) The appellant’s overall character suggests that he is unlikely to have cheated.

k) The average scores revealed on the Look up Tool are suspiciously low and not indicative of a proxy (or number of proxies) being engaged. For example, in SM and Qadir, the speaking scores of the appellants were 200 out of 200."

19. In his submissions, Mr Karim drew attention to the Judge's summary of the submissions made by the Presenting Officer at the appeal hearing, in particular:

"76. He favourably contrasted the appellant's evidence with the poor evidence provided by the appellants in DK & RK.

77. He highlighted the absence of a façade report in connection with this appellant's college. The colleges in DK & RK were acknowledged fraud factories."

20. At [91] the First tier Tribunal Judge referred to the extensive litigation relating to the ETS test which has established there is a burden on the Respondent to establish deception, to the balance of probabilities and that the generic evidence and look-up tool are amply capable of discharging that initial evidential burden.

21. The Judge then proceed to make the following conclusions:

"108. In my judgement this appellant is doing far more than simply denying the allegation of cheating. He came across as a serious and genuine student. His account of his preparation for this particular test was entirely credible. There was no requirement to obtain manuals in a particular way nor attend any courses. The appellant's approach to preparation as he described in his evidence was entirely consistent in my judgement with his English-language ability and his confidence in his ability to pass the test.

109. I accept that the absence of any obvious motive to cheat does not mean in itself that the appellant did not cheat. But the absence of any obvious motive is a factor to be considered in the round. The appellant also has a good previous immigration history, having obtained entry clearance and made an in time application for renewal.

110. I accept that the appellant has provided a credible and innocent explanation. My overall conclusion is therefore that the respondent has failed to discharge the legal burden which lies on her to prove that the appellant's 2012 TOIEC certificate was obtained by dishonesty."

22. I have given careful consideration to the grounds of appeal and Mr Tufan's submissions. I have concluded that the First tier Tribunal Judge correctly directed himself with regard to the current law on ETS case, as set out in the decision in DK & RK and reached a clearly and adequately reasoned conclusion that, whilst the SSHD had discharged the evidential burden, the Claimant had provided a credible and innocent explanation. It is clear from the reasoning provided that it was not predicated solely on the Claimant's English language ability. The grounds of appeal are essentially a disagreement with the Judge's findings of fact, which were open to

him on the evidence before him. The decision of the First tier Tribunal discloses no error of law and is upheld.

Notice of Decision

22. The SSHD's appeal is dismissed with the effect that the decision of the First tier Tribunal Judge allowing the Claimant's appeal is upheld.

Rebecca Chapman

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

19 October 2023