IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024 -000081

First-Tier Tribunal No: HU/53990/2023
LH/05368/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 30th May 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE BOWLER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT **Appellant**

AND

MR YASINBHAI IDRISHBHAI PATEL **Respondent**
(NO ANONYMITY ORDER MADE)

Representation:
For the Appellant: Mr S. Walker, Senior Presenting Officer
For the Respondent: Mr J. Gajjar of Counsel, instructed by Axis Solicitors

Heard at Field House on 10 May 2024

DECISION AND REASONS

1. The appeal is brought by the Secretary of State but for ease of reference I continue to refer to the Secretary of State as the Respondent and Mr Patel as the Appellant in the remainder of this decision.

2. The Appellant appeals against a decision of the Respondent dated 10 March 2023 to refuse his application to remain in the UK relying upon his family and private life here. The Respondent had decided that the Appellant did not meet the eligibility criteria to rely upon his private life and long residence in the UK because it was alleged that the Appellant provided a false English speaking test when making his immigration application, having used a proxy test taker.

3. In a decision issued on 10 March 2024 I decided that the decision of the First-tier Tribunal involved a material error of law and directed that the appeal should be reheard. A copy of that decision is attached hereto.

The issue

4. The Respondent has provided amply sufficient evidence to mean that the Appellant has a case to answer as to the allegation that he used a proxy test taker. The issue is whether, in the light of all of the evidence, the Respondent has established that it is more likely than not that the Appellant acted dishonestly.

The hearing

5. The remaking hearing before me proceeded by way of submissions only, Mr Walker having indicated that he did not wish to cross examine the Appellant.

The parties' cases

6. Mr Gajjar recognised that the starting point was that the Respondent's evidence was amply sufficient to show that the Appellant had a case to answer, applying *DK & RK (ETS: SSHD evidence; proof) India* [2022] UKUT 00112 IAC and *SSHD v. Varkey & Joseph* [2024]. However, he submitted that when consideration of the circumstances of the Appellant were taken into account he had provided a sufficiently plausible explanation to discharge the burden of proof upon him. Mr Gajjar pointed, in particular, to the preserved findings regarding the Appellant's education in India, the fact that he had not failed other English language tests in the UK; the consistency of the challenged score to the other unchallenged scores from the same time; that he was not a person facing a time pressure to obtain a test, that he had not shown lack of commitment to studies in the UK; and that the Appellant had been fully compliant with the UK immigration system.

7. Having heard Mr Gajjar's submissions Mr Walker conceded on behalf of the Respondent that the Appellant had provided sufficient explanation and that therefore his appeal should be allowed.

My decision and reasons

8. Given the concession made on behalf of the Respondent, I must conclude that the Respondent has not discharged the burden of proof on him and the appeal should be allowed.

Notice of Decision

9. The appeal is allowed.

10. In the circumstances I have decided that a fee award is not appropriate.

T. Bowler

Judge of the Upper Tribunal
Immigration and Asylum Chamber
20/05/2024

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-000081

First-tier Tribunal No: HU/53990/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

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Before

DEPUTY UPPER TRIBUNAL JUDGE BOWLER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT **Appellant**
and

YASINBHAI IDRISHBHAI PATEL
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr B. Malik instructed by Axis Solicitors Limited
For the Respondent: Ms S Mckenzie, Senior Home Office Presenting Officer

Heard at Field House on 16 February 2024

DECISION AND REASONS

1. The appeal is brought by the Secretary of State but for ease of reference I continue to refer to the Secretary of State as the Respondent and Mr Patel as the Appellant below.

2. This is an appeal against a decision of First-tier Tribunal Judge Reid ("the Judge") dated 4 December 2013 ("the Decision"), allowing an appeal by the Appellant, against a decision of the Respondent to refuse his human rights claim. In refusing that claim the Respondent alleged that the Appellant had made false representations in an application for leave to remain by virtue of submitting an invalid ETS certificate which had been fraudulently obtained. The Judge decided that the Respondent had not discharged the burden on him to prove deception. It is that part of the Decision which the Respondent challenges.

3. Permission to appeal was granted by First-tier Tribunal Judge Sills on 6 January 2023. Judge Sills decided that it was arguable that the Judge failed to follow the correct approach in considering whether the Respondent had discharged the burden of proof on him.

The FTT Decision

4. The key part of the Decision which is challenged is as follows:

> "The Respondent has produced evidence [the standardised general evidence produced in these cases and data from the lookup tool] to show that a proxy was used which is sufficient for the Appellant to have a case to answer applying DK and RK headnote 1.
>
> However, looking at the evidence in the round on the balance of probabilities I find that the Appellant took the speaking and writing test himself on 24 April 2013, did not send a proxy, and has thus provided an innocent explanation for the disputed test result... There is credible oral evidence underpinned by explained credible factual circumstances to mean that the Respondent has not shown dishonesty on the balance of probabilities (DK and RK para 127)"

The Respondent's Ground of Appeal

5. In summary, the Respondent's ground of appeal is that the FtT erred in stating that the evidence shows a proxy could have been used but then proceeding to apply a balance of probabilities assessment in the round.

6. Ms McKenzie denied the grounds of appeal provided in the application for permission to appeal were inadequate (as Mr Malik submitted).

7. Ms Mckenzie submitted that the Decision lacked adequate findings and the conclusion reached was perverse. The Judge had given the wrong weight to the Respondent's evidence by saying that it was "sufficient" whereas the Upper Tribunal in DK & RK (ETS: SSHD evidence; proof) India [2022] UKUT 00112 IAC said that the evidence (where not otherwise undermined) was "amply sufficient. By then starting the next paragraph with the word "however" Judge appeared to have been rejecting the sufficiency of the evidence provided by the Respondent.

8. Furthermore, paragraph 129 of DK and RK makes clear that any determination of an appeal of this sort must take into account the highly probable fact that on the balance of probabilities the story shown by the documents relied upon by the Respondent is the true one. There was no reference to the lookup tool data in the decision and the Judge had not given sufficient weight to the Respondent's evidence as required by DK and RK.

9. Ms Mckenzie denied (as submitted by Mr Malik) that the Respondent was applying an approach that the evidence in cases of this nature would almost always be sufficient. However, in this case the Judge had not taken into account the extent of the strength of the weight of the Respondent's evidence.

The Response of the Appellant

10. Mr Malik submits that the Respondent has failed to properly identify any error of law. The grounds of appeal submitted to seek permission for the appeal were inadequate and Ms McKenzie should have applied for permission to amend the grounds in order to advance the matters to which I was referred in the hearing.

11. If I did not agree with that submission the application should be refused in any event. While there was plainly a prima facie case to answer put forward by the Respondent in his evidence, DK and RK recognises that where an assertion of dishonesty is made, a plausible innocent explanation suffices to show that the party asserting dishonesty has not discharged the burden of proof upon them. The submissions made on behalf of the Respondent indicated that it was considered that there was some overarching conclusion that the Respondent's evidence sufficed to discharge the burden upon him. That would drive a coach and horses through the concept of fact sensitive decisions. The key point in DK and RK lies in the Upper Tribunal's conclusions which specifically state that "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 amply sufficient to prove the dishonesty. This is not a case where the Appellant simply made "mere" assertions that he took the test. The Judge made comprehensive findings before reaching the conclusions resulting therefrom which the Respondent has challenged.

My decision

12. I do not agree that the Respondent's ground of appeal was inadequately articulated. It referred to DK and RK and was juxtaposing the statement that the Respondent had shown that a proxy could have been used in the ETS test with the extract from the Decision concluding that the credible evidence of the Appellant had not shown dishonesty. It is clear that the application was specifically directed at the way in which the Judge applied the burden of proof and more particularly applied the guidance in DK and RK.

13. Similarly, I do not accept Mr Malik's submission that Ms Mckenzie had unacceptably constructed grounds at the hearing. It is entirely standard procedure for a ground of appeal to outline the claimed error of law and for that outline to be expanded upon at the error of law hearing if permission to appeal is granted. As Lord Justice Peter Jackson stated in Latayan v SSHD [2020] EWCA Civ 191 (at paragraph 32) "Any counsel appearing for the first time on an appeal will seek to refresh the arguments so as to present them in the most persuasive way, and I do not criticise counsel for his efforts in behalf of this Appellant. Nor should a party be penalised for drafting grounds of appeal concisely."

14. While Judge Sills' grant of permission is extremely concise, I am satisfied that it was clear in this case that the issue being challenged was the approach to the application of DK and RK. Indeed, Mr Malik had produced a skeleton argument addressing exactly the point on which the dispute focussed at the hearing, referring specifically to paragraph 127 of DK and RK to submit that as a result of the Respondent's evidence being contradicted by credible evidence from the Appellant, the allegation was not proven.

15. Moving on to consider the substance of the ground of appeal, the core contention is that the Judge's assessment of the discharge of the burden of proof by the Respondent was flawed. In DK and RK the approach to be taken in ETS appeals to consideration of the burden of proof was set out by the Upper Tribunal President and Vice President. The head note to that case states that:

> *"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."*

16. More specifically, at [60] the Upper Tribunal set out what it was considering in that case: was the evidence provided by the Respondent sufficient to support a finding that the matter of alleged deception was proved on the balance of probabilities? If not, that was an end of the matter and the appellants would succeed. If it was, then the evidence as a whole fell for consideration in order to decide whether the appeals succeeded or failed. In other words, was the evidence sufficient for it to be concluded that the Appellant had a case to answer.

17. The Upper Tribunal went on to consider the standard evidence provided by the Respondent in ETS cases. The Upper Tribunal made clear that the evidence should not be regarded as determinative. There may be room for error (although none of the experts involved had detected any error, as distinct from showing that there was room for error). What was clear was that there was every reason to suppose that the evidence is likely to be accurate.

18. The Upper Tribunal went on to conclude as follows at [127-128]:

> "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."[underlining added]

19. The Upper Tribunal was therefore at pains to emphasise that the Respondent's evidence was "amply sufficient" and went on to explain the meaning of that phrase and the extent of the weight of the Respondent's evidence.

20. The Decision in this case is prepared with care and well-reasoned save for the error in referring to the Respondent's evidence being "sufficient" rather than "amply sufficient". Given the fact that the Upper Tribunal used this as a term of art and took pains to emphasise the weight indicated by the phrase, I have concluded that the error is sufficiently material to require the Judge's decision about the allegation of dishonesty to be set aside and for the decision to be remade.

21. However, the error of law in the Decision does not undermine the findings made in paragraphs 22-29 thereof which are retained.

22. For the avoidance of doubt, given that the Appellant's human rights appeal was allowed as a result of the decision about alleged dishonesty and consequential analysis of whether he had established 10 years' long residence in the UK, the remaking will not only address the allegation of dishonesty but also the human rights appeal overall.

23. Given the retained findings and narrow focus of the remaking required, I am satisfied that the remaking should take place at a resumed hearing in the Upper Tribunal.

Notice of Decision

24. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside but the findings made at paragraphs 22-29 are preserved.

25. The decision will be re-made at a resumed hearing on a date to be notified to the parties. This will take place in the Upper Tribunal.

26. In the circumstances, full and detailed skeleton arguments need to be produced for the resumed hearing setting out the case for each party.

27. I therefore DIRECT that:

    a. No later than 7 days before the hearing, the parties shall file and serve skeleton arguments setting out in full their legal submissions in relation to the appeal.

    b. The parties are at liberty to apply.

T. Bowler

Judge of the Upper Tribunal
Immigration and Asylum Chamber

27/02/2024