IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003380
First-tier Tribunal No: IA/02583/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 26 March 2023

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

Md Rasel Ahmed
(NO ANONYMITY ORDER MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr P Lewis (Counsel) instructed by Lawmatics, solicitors
For the Respondent: Mrs A Nolan, Senior Home Office Presenting Officer

Heard at Field House on 11 January 2023

DECISION AND REASONS

1. This is an appeal against the decision of the First-tier Tribunal dismissing the appeal of the appellant, a citizen of Bangladesh, against the respondent's decision on 4 December 2020, refusing him leave to remain on human rights grounds.

2. The core point it that the respondent regards the appellant as an ETS cheat, that is a person who obtained a certificate of competence in the use of English language dishonestly. The appellant has consistently denied in emphatic terms that he has misbehaved as alleged.

3. Mr Lewis prepared a skeleton argument for the hearing for the First-tier Tribunal dated 7 December 2021 and also a supplementary skeleton argument, (I cannot see the date on my copy) in response to the decision of the Upper Tribunal in **DK**

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and RK (ETS evidence; proof) India [2002] UKUT 00112 (IAC). This was a decision of a division of the Tribunal chaired by the president Lane J and the decision was written by Mr C M G Ockelton Vice President. It was promulgated on 25 March 2022.

4. In **DK and RK** the Tribunal looked carefully at the standard evidence relied upon by the Secretary of State in ETS cases and concluded that that evidence:

> "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."

5. Mr Lewis reminded me, correctly, that this decision is not a factual precedent. Such I think they have been described as "quaint notions", should not be extended beyond the very particular work of country guidance cases. Nevertheless, it is a very detailed analysis of the evidence from a very senior division of this Tribunal and whilst each judge must make up his or her own mind, the reasons for the decision are something that judges will want to respect.

6. Permission to appeal to the Upper Tribunal was granted by the First-tier Tribunal on grounds settled by Mr Lewis. When the First-tier Tribunal gave permission it consider the grounds and said at paragraph 2 of the grant:

> "The first consists of a lengthy critique of the judge's reasons, which might charitably be read as an argument that the judge's decision was not reasonably open to the judge on the evidence led.
>
> The second, set out in the penultimate paragraph of the grounds, is that the judge declined to address, but ought to have addressed, the appellant's submissions concerning **DK and RK (ETS: SSHD evidence; proof)** India [2022] UKUT 00112 (IAC)."

7. The judge then gave permission on all grounds.

8. The judge who decided the appeal has rather invited this sort of criticism. The judge said at paragraph 57 that she would turn to the final argument in Mr Lewis' skeleton argument in which he sought to rely on a statistical analysis undertaken by the National Audit Office and in 58 the judge indicated:

> "The interrelation between the statistical evidence and the findings in **DK and RK** is complex and I do not consider that I am able, on such material an argument as was before me, to reach a conclusion on this issue."

9. In other words the judge did not engage with the detailed skeleton argument prepared by Counsel. However, although I fully understand why permission was given, permission was given because the grounds were arguable. I have to decide if the arguments stand up. I want to look carefully at the Decision and Reasons and see if the accrued summary above is a fair description of the judge's approach. I indicate now, because I have considered all the material at some length before commencing to write my Decision and Reasons that I find that it is not.

10. The judge began by considering the appellant's immigration history. He is a citizen of Bangladesh who entered the United Kingdom on 14 October 2010. There had been several encounters of different kinds with the immigration authorities. On 6 September 2017 the appellant claimed asylum. The application was refused and his appeal was dismissed. As the judge explained later in the decision, the appeal was dismissed because the appellant was not believed and the judge found that significant. The judge then set out the substantive issues under appeal. I do not consider this controversial. The judge directed herself on the law and outlined the documentary evidence that was

before her. She took particular note of the decision in **DK and RK**. The judge also noted how in a determination in 2018, following the protection claim, the appellant was found to have "totally fabricated" his case.

11. The judge reviewed the appellant's case, in particular his insistence that he had told the truth and he had outlined how he had prepared for the test. He achieved a IELTS pass at band 5.5 in 2009 and he had studied in the United Kingdom since then. He obtained an IELTS pass in October 2014, again at 5.5 and said that he had also undertaken university education in the United Kingdom to masters level where the tuition was in the English language.

12. The judge also noted at paragraph 33 that in the Upper Tribunal's analysis in **DK and RK**, it had not, according to Mr Lewis, considered the statistical analysis undertaken by the National Audit Office. The judge then summarised Mr Lewis' submissions on its findings. These began with the observation that "virtually every test in the UK" was identified as suspicious. There were also a very small proportion of examples of people who were identified as cheats but who had nevertheless *failed* to achieve the score that was required. This tranche was said to undermine the efficacy of the deception and therefore to cast doubt on cheating being the explanation for the result. A similar point was made about people being given answers to multiple choice tests but still not achieving the required standard.

13. Mr Lewis said that his most important point was that the data provided by ETS identified 6,000 UK "test takers" as UK nationals when that was clearly not right because there was no reason for a UK national to take such a test. Mr Lewis said that this clearly showed something was fundamentally wrong with the ETS data recording. In particular, he said it impacted on the known weak spot in the ETS evidence, that is the chain of custody of the wrong sample.

14. I note that in this case it is accepted that the sample of English attributed to the appellant did not come from the appellant. It was examined and immediately recognised to be the voice of someone else.

15. Mr Lewis also argued that the analysis in **DK and RK** assumed a level of competence on the part of the administrative authorities of the dishonest centres which he said should not be assumed.

16. In reaching her conclusions, the judge directed herself, correctly, that **DK and RK** was not a binding authority and she made plain that she had decided the case on the facts before her.

17. The judge said that her starting point was the consideration in **DK and RK** of the evidence of Professor Sommar about the chain of custody. The judge asked herself if the evidence that linked a particular recording to a particular candidate was reliable. She noted that the Tribunal had found misattribution to be unlikely and recorded the Tribunal's reasons. These included noting that Professor Sommar had not provided any clear evidence of any misattribution, but had simply postulated how something might have gone wrong. The Tribunal regarded it as incumbent upon the test centres to keep accurate attribution because that was the source of their dishonest gain. The Tribunal rejected any idea that ETS had mislabelled the tests because it was absolutely fundamental to its global reputation that it processed properly the test papers. ETS is a very big business and must get things right.

18. The judge then quoted directly from paragraph 120 in **DK and RK** where it said:

> "There is no good reason to think of any error in linking the entries examined and classified by ETS with the entries actually submitted on

> behalf of the candidates to whom they are attributed. The academic evidence was that the 'chain of custody' was not absolutely secure and could have been better. That is a world away from saying that it was not in fact wholly reliable."

19. The judge also noted the Tribunal's findings that it would be highly unlikely that an honest candidate would not realise that something was "going on".

20. The judge noted the summary that the evidence was ample to establish the probability of cheating in the absence of an explanation.

21. The judge then looked for evidence in the particular case that assisted the appellant. She did note that some evidence relied on by the Secretary of State was for the wrong day and she discounted that although it did not really make much difference to the reasoning that she had already outlined. The judge also directed herself that it was unsurprising after the lapse of time that memories faded or documents had been not available from the appellant. The judge described the appellant's account as "prima facie plausible". By that she clearly meant that he had given a coherent, believable account of how he had presented himself and conducted the test. However, she also reminded herself that he had been shown in early proceedings to be quite unreliable and dishonest. The judge conducting the protection claim said how the appellant had "totally fabricated" the evidence to support his claim. These were findings described in the instant case as "clear and unequivocal terms". The judge concluded that the appellant had resorted to dishonest means in an attempt to remain in the United Kingdom.

22. The judge did not leave it there. She mused that the appellant may have lacked confidence or feared failure. Although he claimed to have come from comfortable circumstances in Bangladesh, he was working in the United Kingdom earning money and clearly wanted to remain.

23. The judge considered the fact the appellant had given evidence in English. He had given evidence in English in December 2017 when another appeal was heard, but the asylum interview was in 2017 and an interpreter was used. This was not conclusive but something she found "surprising" if his English is as good as he maintains; in any event, his fluency in 2017 is of somewhat limited assistance when it comes to making an assessment of his abilities in 2012.

24. The judge did not find it necessary to pick up on Mr Lewis' point that the data from the National Audit Office was not subject to Parliamentary privilege. There was no concession or assistance for the appellant from the Secretary of State on that point. Mr Lewis indicated how the judge appeared not to engage with the statistical evidence. At paragraph 59 the judge said:

> "Mr Lewis' argument is undoubtedly an interesting one and no doubt he will wish to deploy it again but there are particular difficulties for this appellant on the facts of the case and those arise, in my view, largely because of the previous findings as to his credibility, upon which I place great weight so far as these proceedings are concerned."

25. What the judge clearly did was to follow the reasoning in **DK and RK** and then add to that the fact that the appellant was known to have been dishonest in an earlier case. The judge found no basis for going behind the persuasive conclusion from the prima facie case that the appellant had been identified correctly as a cheat. Obviously this approach is only valuable if the analysis in **DK and RK** is sound. It is the appellant's case that Counsel heard arguments against it which were not considered. However, when I consider the supplementary skeleton argument, I have difficulty discerning just what the point is that was supposed to

undermine the reasoning in **DK and RK**. There was a suggestion that the Tribunal was not entitled to or was wrong to assume that the tests were mislabelled but that point was considered by the judge and the judge preferred the Tribunal's explanation, which is that there was a strong incentive to get it right.

26. Two further points were made about the statistical evidence. I will assume that it is admissible. The fact, if it is a fact, that so many tests were suspicious does not mean that the analysis was wrong. It means that cheating was widespread. There was no point to be made. Neither does the existence of 6,000 people being identified as British citizens do anything to undermine the chain of custody. There is no indication at all where that information comes from so it is not clear what sort of mistake was made. The nationality of the people taking the test is of no concern whatsoever to the test centre. It is not a strong point that irrelevant information was said to have been categorised wrongly. There is nothing here. The judge has studied **DK and RK** carefully and has acknowledged the counter arguments and found **DK and RK** persuasive, especially when it is remembered that the appellant is someone who has shown himself to be dishonest.

27. This is an interesting argument in a long and concerning saga but with respect to Mr Lewis I find there is no material error by the First-tier Tribunal and I dismiss the appeal.

Jonathan Perkins

Judge of the Upper Tribunal
Immigration and Asylum Chamber

9 February 2023