



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM**  
**CHAMBER**

Case No: UI-2022-005205

First-tier Tribunal No: HU/55932/2021  
IA/14506/2021

**THE IMMIGRATION ACTS**

**Decision & Reasons Promulgated**  
**On 12 March 2023**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE GRIMES**

**Between**

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

Appellant

**and**

**WASIM UL GHANI**  
**(NO ANONYMITY ORDER MADE)**

Respondent

**Representation:**

For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer  
For the Respondent: Mr D Bazini, Counsel, instructed by JJ Law Chambers

**Heard at Field House on 21 February 2023**

**DECISION AND REASONS**

1. Although this is an appeal by the Secretary of State, I refer to the parties as they were in the First-tier Tribunal.
2. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Clarke who, in a decision promulgated on 5 September 2022, allowed the Appellant's appeal finding that the Appellant had not engaged in deception in taking an English language test (a 'TOEIC' fraud).

3. The hearing took place in person in Field House. I heard submissions from Mr Bazini and Mr Tufan. I decided that there is no material error of law in the decision of the First-tier Tribunal for the reasons set out in this decision.

### **The Hearing**

4. At the outset of the hearing Mr Bazini highlighted that he understood that the Upper Tribunal is to deal with an appeal considering the expert evidence of Mr Stanbury in relation to eight ETS cases. Mr Tufan submitted that the Respondent would agree to an adjournment if the case involved or relied on any expert evidence from Mr Stanbury, but as this case did not refer to such evidence, he objected to an adjournment in this case. I decided to refuse the application for an adjournment in light of Mr Tufan's objection and as I considered that it was not necessary to wait for the outcome of the appeal in the Upper Tribunal before going on to consider this appeal.

### **Background**

5. In summary, the background is set out in the papers as follows. The Appellant was issued with an entry clearance on 16 April 2011 as a Tier 4 (General) Student and arrived in the UK on 9 May 2011 when he was granted leave to enter until 11 September 2012. He made an in-time application for leave to remain as a Tier 4 (General) Student on 4 September 2012 which was granted on 30 October 2012 until 7 February 2014. He made an application for an EEA residence card which was issued on 16 November 2013 until 16 November 2018. He applied for an EEA permanent residence card which was refused on 5 November 2018. His appeal against that decision was dismissed and permission to appeal was granted by the Upper Tribunal on 18 March 2020 and the appeal was remitted to the First-tier Tribunal on 6 August 2020. The refusal decision was upheld on 25 February 2021 and permission to appeal to the Upper Tribunal was refused.
6. The Appellant applied on 1 May 2021 under the Immigration Rules for leave to remain on the basis of his private and family life with reference to his length of residence in the UK. The Respondent refused that application on 17 September 2021 on the basis that with his application dated 4 September 2012 for leave to remain as a Tier 4 (General) Student the Appellant submitted a TOEIC certificate from the Educational Testing Service (ETS).
7. The Respondent concluded on the basis of information provided that the Appellant obtained a TOEIC certificate as a result of a test he took at the Premier Language Training Centre on 25 July 2012. ETS undertook a check of the test and confirmed to the Secretary of State that there was significant evidence to conclude that his certificate was obtained fraudulently by the use of a proxy test taker and declared his certificate to be invalid. The Secretary of State concluded that the certificate was fraudulently obtained. The application for indefinite leave to remain was refused under paragraph 9.1.1. of the Immigration Rules on the basis that false documents had been submitted in relation to his previous application. The application was further refused under general grounds under paragraph 276B(ii) and (iii) of the Immigration Rules as the Secretary of State considered that the Appellant's character and conduct is not conducive to the public good. The application was refused under paragraph 276D with reference to paragraph 276B(ii) and (iii) and 9.1.1. of HC 395 as amended. The Respondent also refused the application outside of the Immigration Rules.

### **First-tier Tribunal Decision**

8. At the hearing in the First-tier Tribunal the judge heard oral evidence from the Appellant. The judge set out the conclusions in relation to that evidence, finding that he accepted the Appellant's oral evidence that he undertook the test on the date claimed. The judge concluded at paragraph 13 that he found that the Appellant took the tests himself and not using a proxy. The judge concluded that the Secretary of State had not discharged the burden of proof to establish that the test was taken by proxy and the judge allowed the appeal given that this was the only issue to be determined.

### **The Challenge to the First-tier Tribunal Judge's Decision**

9. In the Grounds of Appeal the Secretary of State submitted that the First-tier Tribunal Judge erred in law in failing to have regard to **DK and RK (ETS: SSHD evidence; proof) India [2022] UKUT 00112 (IAC)** which found that there was widespread fraud in ETS cases and that this background is relevant to the individual claim or appeal; the SSHD's evidence is reliable (voice recognition evidence and the look-up tool); the criticism from, among others, the APPG Report and Professor Sommer, does not impugn the SSHD's evidence; and ETS provided a reliable service. In the grounds the findings in the case of **DK and RK** were summarised and it is contended that the First-tier Tribunal Judge erred in law and the decision should be set aside.

### **Discussion**

10. The sole issue before the judge, as set out in the decision, was whether the Appellant used fraud to obtain the TOEIC. The relevant provision for the purposes of this appeal is the contention that false documents have been submitted in relation to a previous application, that is the application made on 4 September 2012 for leave to remain as a Tier 4 Student. As recently confirmed by the Upper Tribunal in **DK and RK** the burden of proving fraud or dishonesty is on the Secretary of State, the standard of proof is the balance of probabilities and the burden of proof does not switch between the parties but are those assigned by law.
11. In considering the case before it the Upper Tribunal in **DK and RK** said:

“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.”
12. I note the decision in **DK and RK** where the findings are summarised in headnote (1) as follows: “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”.

13. I note further paragraph 4 of the decision in **DK and RK** as highlighted by Mr Tufan:

“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.”

14. At the hearing before me Mr Tufan submitted that the evidence considered by the judge in assessing the Appellant’s credibility was not adequate. He highlighted that there were gaps in the Appellant’s evidence as highlighted by the judge at paragraph 12. He submitted that the judge did not take account of the look-up tool which indicated that the Appellant’s test was invalid. Mr Tufan relied on the case of **MA [2016] UKUT 450** paragraphs 50 to 51. He relied on the case of **DK and RK** submitting that the effect of this case is that the Secretary of State’s evidence goes a long way to discharging the burden. In his submission, following paragraph 75 of **DK and RK**, the burden of proof has been discharged because the Tribunal should take into account that many thousands of results were obtained fraudulently. In his submission the judge made findings, for example at paragraph ,7 with no supporting evidence. He referred to paragraph 9 which highlighted that the Appellant no longer has booking confirmation and paragraph 10 where he found that the Appellant’s friend was no longer in the country. He submitted that the judge relied only on the Appellant’s oral evidence apart from his photographs. In his submission there is a lack of reasons, no reference to case law and the decision is irrational.
15. Mr Bazini’s submitted that an analysis of the decision in **DK and RK** from paragraphs 127 to 134 show that the Tribunal assessed the evidence of DK and his wife in order to consider whether the Respondent had discharged the burden of proof. He submitted that at paragraph 135 the Tribunal indicated that they did not believe the Appellant in that case. He also referred to paragraph 136 where the Tribunal assessed whether the Appellant's evidence reached ‘the minimum level of plausibility’ or whether his wife’s evidence made ‘any impact against the evidence on the other side’.
16. I agree with Mr Bazini’s submissions that the judge could have taken a more detailed approach to the case law. However, in my view the judge did not need to set out the case of **DK and RK** or any of the other cases in relation to this matter. What is important is whether the judge properly applied the burden and standard of proof as set out in the case law.
17. The judge set out that the burden of proof lies on the Respondent to show that the Appellant used fraud to obtain the TOEIC [paragraph 6]. The judge did not undertake any detailed analysis of the Secretary of State’s evidence, however he had before him the Respondent’s bundle which contained evidence in relation to the English language test and the Respondent’s further evidence bundle which included the look-up tool excerpt and the Project Façade report on Premier Language Training Centre. Although the judge did not specifically address this, I

am satisfied that it is clear that the judge accepted this evidence as establishing the Secretary of State's case in a general sense.

18. It is clear that the judge accepted the evidence put forward by the Respondent and then went on, as set out at paragraph 4 of the decision in **DK and RK**, to consider the response from the Appellant in order to determine the case on its own individual facts and evidence. It is clear from an overall reading of the decision that the judge was aware that the context for the decision is that there were many fraudsters and the Appellant has been identified as one of them.
19. In considering the judge's approach in this case, I note that, having correctly identified that the burden of proof is on the Respondent, the judge went on to consider the Appellant's response to the accusation that his test entry is attributed to a proxy. At paragraph 7 the judge analysed the Appellant's oral evidence, taking into account that the Appellant's name and photograph appears on the certificate, the fact that the test was taken ten years ago and it is plausible that the Appellant could not provide evidence of the payment, nor could he recall the cost of the test. At paragraph 8 the judge took account of the Appellant's description of his attempts to contact Premier Language Centre and the Presenting Officer's search during the hearing which confirmed the Appellant's evidence. At paragraph 9 the judge found that the Appellant was "a credible and reliable witness who answered the questions with detail, without hesitancy and described how he booked the test online and in advance at the centre in Barking". The judge accepted the Appellant's description of attending English language classes for the purposes of preparing for the test.
20. At paragraph 10 the judge took into account that the Appellant described attending the test with his friend who is no longer in the UK. At paragraph 11 the judge took into account the Appellant's description of his attendance at the test and description of the room in which the test was conducted. At paragraph 12 the judge went on to say that he considered the detailed answers in the round and accepted that the Appellant's account is credible. The judge found that there are some gaps in the evidence but found that these are limited gaps. The judge concluded that the Appellant took the tests himself and not using a proxy and that the Respondent has not discharged the burden of proof.
21. The judge clearly took the Respondent's evidence as his starting point and analysed the response from the Appellant and concluded that response was credible. It is clear that the judge took into account the Appellant's individual facts and evidence. The judge reached conclusions open to him on the evidence.
22. For the reasons set out above I find that the Respondent has not established that there is a material error of law in the decision of the First-tier Tribunal Judge.

### **Notice of Decision**

**For the foregoing reasons my decision is as follows:**

- **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.**

Appeal Number: UI-2022-005205  
First-tier Tribunal Number: HU/55932/2021

Anne Grimes  
Deputy Judge of the Upper Tribunal  
Immigration and Asylum Chamber

2 March 2023