IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001652
First-tier Tribunal Nos:
HU/50405/2022
LH/00178/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 16 July 2023

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

The Secretary of State for the Home Department

Appellant

and

Amanat Hussain Chowdhury
(no anonymity order made)

Respondent

Representation:
For the Appellant: Ms H Gilmore, Senior Home Office Presenting Officer
For the Respondent: Mr Z Malik, KC, instructed by Lawmatics Solicitors

Heard at Field House on 5 July 2023

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of the First-tier Tribunal allowing the appeal of the respondent, hereinafter "the claimant" against the decision of the Secretary of State refusing him leave to enter the United Kingdom and to remove him from the United Kingdom by way of directions.

2. It is necessary to consider in some detail just what the First-tier Tribunal did but, for the purposes of introduction, the Secretary of State identified the claimant as a person who had obtained leave by cheating in an English language test. The claimant denied this allegation. The First-tier Tribunal found for the claimant.

3. The claimant is a citizen of Bangladesh who was born in 1988. He entered the United Kingdom in October 2012 with permission as a student and his leave was extended in stages until 19 April 2015. On 3 April 2015 he applied for leave to remain on private and family life grounds. The application was refused and at that time attracted an "out of country" right of appeal. The judge noted, correctly, that:

> "the [claimant's] present application was made for leave to remain outside the Immigration Rules based upon compassionate circumstances. It was

> indicated that the [Secretary of State] alleged that the [claimant] used fraudulent documents (TOEIC certificate) in order to extend his leave to remain in the UK, which claim the [claimant] rejected maintaining that he had sat the exam himself."

4. The appellant remained in the United Kingdom but, following the decision of the Court of Appeal in **Ahsan v SSHD [2017] EWCA 2009**, he decided that he was entitled to make a further human rights application, which he did, relying additionally on health issues to support a claim that it would be in breach of his human rights to remove him.

5. The Secretary of State refused the application and gave detailed reasons in a letter dated 9 December 2021. This was not a "family life" case and the Secretary of State was satisfied that the claimant had made false representations in order to obtain leave in an earlier application. It was the Secretary of State's case that the claimant used an ETS certificate dated 19 February 2013 and obtained at Eden College International but that ETS confirmed that the certificate was invalid and the Secretary of State was satisfied that it was obtained by deception. It followed that the claimant was unsuitable for admission to the United Kingdom.

6. The claimant had not lived in the United Kingdom long enough to entitle him to remain. The respondent found that there was no strong links with the United Kingdom that gave him a human right to remain and that he could be expected to re-establish himself in Bangladesh. It was the claimant's case that he had a strong private life in the United Kingdom and had been treated unfairly concerning the ETS certificate.

7. If the claimant was shown to be a cheat his case on human rights grounds was hopeless.

8. The claimant insisted that he had not cheated. He drew attention to documents showing that he was a competent English speaker so had no reason to cheat. Through his representatives he had asked for the incriminating tapes to be checked but they were not available. He could not explain how a mix up had occurred. The claimant was particularly concerned that the certificate relied on by the Secretary of State was connected to the claimant's current Home Office reference number which he maintained did not exist at the material time. He also gave an account of going to the test centre and taking the examination and outlined his health problems.

9. The judge referred to "the case of **Qadeer**" which persuaded the judge that the claimant's conduct in seeking a copy of the voice recording was consistent with that of an innocent person who had taken the test himself. The judge said at paragraph 8:

> "I find that the [Secretary of State] in failing to address or respond to the same has failed to meet the burden reverting to him."

10. The judge went on to say that the claimant had satisfied him that he took the test himself and allowed the appeal.

11. The judge referred again to the claimant having shown he was proficient in the use of English, which the judge regarded as a further pointer that the claimant did indeed take the test as he alleged. He had no need for the dishonest assistance. The judge also found the explanation for choosing the particular test centre as "credible and logical" and his evidence about attending the centre was "compelling". The judge said at paragraph 14:

> "I further have regard to the APPG report on TOEIC submitted to me. It was indicated therein that students were just given 6 short clips taken from a longer recording and that many of the students reported that the recordings were not of them. There was no chain of custody for the voice files rendering them unreliable. There were no checking systems at ETS."

12. I consider in more detail below the grounds of appeal.

13. Permission to appeal was granted by a First-tier Tribunal Judge who was particularly concerned that the decision did not show an awareness of the decision of this Tribunal in **DK and RK (ETS: SSHD evidence, proof) India [2022] UKUT 112 (IAC)**. The Secretary of State's grounds, which happen to be drawn by Ms Gilmore, do indeed maintain that failure to follow **DK and RK** is a material misdirection in law. In particular the grounds complain that concluding a person was not a cheat because they are competent in the English language was "materially and entirely at odds with the findings in **DK and RK**." The grounds maintain that the decision in **DK and RK** prevents the judge concluding that asking for a copy of the recordings was somehow proof of innocence.

14. Further the decision in **DK and RK** shows that difficulties in the chain of custody are not important and the failure to appreciate this, it was said, just showed no awareness of **DK and RK**.

15. Mr Malik had produced a helpful Rule 24 notice dated 30 June 2023. This was the basis of his representations before me but I will refer to the claimant's case after I have considered what the Tribunal actually decided in **DK and RK**.

16. The decision in **DK and RK** was the decision of the then President Lane J and the Vice President Mr C M G Ockelton. It followed a hearing in which "Migrant Voice" was and an intervener. Migrant Voice and the appellants were represented by Counsel experienced in litigation arising from the ETS problems and the Secretary of State was represented by extremely experienced leading Counsel and junior.

17. The judicial headnote makes two observations about the burden of proof, which are not relevant to this appeal and also says:

> "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."

18. However, **DK and RK**, then known as **DK and RK** (2), was considered by the Court of Appeal in **SSHD v Akter and ors [2022] EWCA Civ 741**. There the court (Macur LJ) said at paragraph 29:

> "I do not accept Mr Wilcox's initial submission that *DK and RK (2)* has no precedential authority in establishing that the 'generic' evidence relied upon by the SSHD in the 'fraud factory' cases is sufficient to satisfy the evidential burden, because it is neither a 'starred' nor a Countries Guidance case. The cases arise from the same factual matrix, 'such as the same relationship or the same event or series of events.' (See *AA (Somalia) and SSHD* [2007] EWCA Civ, [69]). The judgment in *DK and RK (2)* includes a comprehensive account of the evidence which the UT heard and its analysis of the same and upon which it based its decision. That is, the UT in *DK and RK (2)* demonstrably undertook the forensic examination and reached the definitive conclusions that were not open to Dove J upon the evidence before him in *Alam*. There would need to be good reason, which would inevitably mean substantial fresh evidence, for another UT to revisit and overturn the

> determination. This is not a situation, as Mr Wilcox suggested on behalf of HA, in which different Tribunals could reasonably reach a different conclusion about the same factual matrix."

19. In its judgment in **DK and RK** (2) the Upper Tribunal analysed the evidence and concluded that the generic material established a prima facie case. This means that unless the case is rebutted by other evidence it has been shown that the person is a cheat. The decision recognised that there was a possibility of test recordings being wrongly allocated but found this improbable. This then left the possibility of test recordings being deliberately wrongly allocated without the candidate's knowledge or of the candidate being well-aware of what went on. It was very difficult to see why a college would be involved in dishonest test results except for gain of some kind. The Tribunal was also not impressed with suggestions there was something wobbly about the evidence relating to the chain of custody. It was too important to the administration of the system to link results with specific candidates for there to be any milage in that point in the absence of some specific evidence of some dreadful error in a particular case. At paragraph 125 the vice president said:

> "There is no perceptible way in which the proxy test entries could have been inserted in the system after the candidates had taken honest tests; and there is no perceptible reason for anybody to insert or substitute them, except at the instance of the candidate. We are left, therefore, with the time of the taking of the test. The material that achieved notoriety in the Panorama investigation and which was used in the criminal trials as well as in earlier episodes of the ETS litigation in these Tribunals shows what happened there. Two observations need to be made. The first is that it is highly unlikely that any candidate present on one of the occasions when proxies were being used was not fully aware of what was going on. The second is that it is if anything even more unlikely that such a system would then attribute proxy entries to anybody who had not taken part in the dishonest scheme, making whatever payment or other arrangement was in place."

20. Mr Malik's Rule 24 response was, with respect, fair and helpful, but I found it of limited value.

21. It begins by reminding me, correctly, that there is nothing wrong in principle with the First-tier Tribunal Judge concluding that fraud had not been established. Deciding if fraud had been established was the judge's function.

22. Mr Malik described it as "well-settled" that the First-tier Tribunal is a specialist fact-finding Tribunal and that the Upper Tribunal should not rush to find an error of law or to assume that something not specifically mentioned had been overlooked.

23. It is a feature of the case that both parties accept that **DK and RK** was drawn to the judge's attention. The Upper Tribunal should be slow to conclude that it was ignored.

24. Neither should gaps in the reasoning lead easily to the conclusion that there was a deficiency in the reasoning. The First-tier Tribunal's judgment is an explanation of part of the thinking process. Everything relevant does not have to be there.

25. Mr Malik pointed out that, accepting that the prima facie case was established, the judge was expressly following what was said in **DK and RK** and that sits uneasily with the contention that the judge ignored it.

26. The judge also recognised it was for the Secretary of State to prove dishonesty. The decision in **DK and RK** was not intended to be conclusive or determinative. How could it be? It was not intended to dispose of appeals but to help determine them. The test in each case was fact-specific, to be decided on the particular evidence relating to the particular appellant. That, he submitted, is said, is precisely what the judge had done. I reminded myself of Mr Malik's submissions (I heard the case the day before I dictated this decision) and my notes. The difficulty he has, and around which he has skilfully skirted, is that the judge was obliged not only to make clear conclusions but to give some indication of how those conclusions were reached.

27. There has to be an individual assessment in each case but the evidence as reviewed in **DK and RK** shows that there is a formidable hurdle in the path of someone wishing to dislodge the prima facie presumption of dishonesty. The reasoning was approved expressly by the Court of Appeal. The judge has not explained how he reached the conclusion that he did. That the claimant had no need to cheat is something to consider in the mix but it does nothing to explain how the evidence points to his being a cheat. It cannot, on its own, support a finding that the claimant was not a cheat anymore than being a person of good character is a defence to a criminal charge. The finding that there was a plausible explanation for taking the test at a particular test centre is not conclusive or even sufficient on its own to dislodge the primary case established in **DK and RK** unimportant.

28. The problem is that the claimant's test result is unreliable and, in the absence of a persuasive explanation consistent with the reasoning in **DK and RK**, (or conceivably, showing that the reasoning in **DK and RK** is wrong) the conclusion that the certificate was obtained dishonestly is very hard to avoid and a proper explanation has to be given for avoiding it. That has not happened here.

29. Mr Malik is quite right that each case has to be assessed on its own evidence. That is why I have decided that the case must be heard again. There may be a good explanation but it does not emerge in the Decision and Reasons that is before me.

Notice of Decision

30. The First-tier Tribunal erred in law. I set aide this decision and direct the case be heard again in the First-tier Tribunal.

Jonathan Perkins

Judge of the Upper Tribunal
Immigration and Asylum Chamber

13 July 2023