IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001692

First-tier Tribunal No: HU/50913/2021
IA/05644/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 17 October 2023

Before

UPPER TRIBUNAL JUDGE OWENS

Between

The Secretary of State for the Home Department

Appellant

and

Muhammad Amman Anwar
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Ms A Ahmed, Home Office Presenting Officer
For the Respondent: Mr J Gajjar, Counsel instructed by Wildan Legal Solicitors

Heard at Field House on 13 July 2023

ERROR OF LAW DECISION

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Bibi dated 17 March 2023, allowing Mr Anwar's appeal against a decision dated 17 March 2021 refusing his human rights claim.

Background

2. Mr Anwar is a national of Pakistan born on 28 February 1987. He initially entered the United Kingdom as a Tier 4 (General) Student on 9 April 2011. His student leave was extended until 24 July 2013 and a subsequent application to remain in the United Kingdom as a Tier 4 (General) Student was refused on 2 May 2014 with no right of appeal. From that time he remained in the UK as an overstayer. There were then several applications for judicial review before he made human rights claim on 21 August 2020, the refusal of which forms the subject of this appeal.

3. Mr Anwar's position is that he has been residing in the United Kingdom for thirteen years and the Secretary of State has wrongly decided that he fraudulently obtained an Educational Testing Service ("ETS") TOEIC English language test certificate dated 17 April 2012 from the Thames Education Centre. He has established a strong private life in the United Kingdom pursuant to Article 8 ECHR. He should be provided with a period of leave in order to regularise his position.

4. The Secretary of State's position is that Mr Anwar fraudulently obtained his English language test certificate by using a proxy test taker. He does not satisfy any of the private life requirements of the Immigration Rules and it is proportionate and reasonable for him to leave the United Kingdom because it would not be unjustifiably harsh.

The Decision of the First-tier Tribunal

5. Mr Anwar gave oral evidence and adopted his witness statement. There were no further witnesses. The judge found Mr Anwar to be a cogent and credible witness and that he had a good command of English. The judge took into account that the voice recording has never been served on Mr Anwar. She afforded Mr Anwar the benefit of the doubt in relation to his evidence that he sat all of the elements of the TOEIC exam himself. She found that the evidence before her was sufficient to show that Mr Anwar was not involved in any fraudulent activity. He therefore qualified for leave to remain in the United Kingdom. There would be no real public interest to be served by refusing Mr Anwar permission to remain in the United Kingdom because in her words "meeting the requirements of the Rules is dispositive of the appeal". The appeal was allowed.

6. I note here the judge does not specify which immigration rule Mr Anwar met. His application was made on the basis that his Article 8 ECHR rights are engaged and that under the wider Article 8 ECHR balancing exercise it would be disproportionate to remove him from the UK.

Grounds of Appeal

7. I comment firstly that the grounds were brief and poorly drafted.

Ground 1

8. Material misdirection of law/ taking into account an immaterial matter/ failing to take into account material matters. The judge reversed the burden of proof by giving weight to the fact that the Secretary of State did not provide copies of the ETS recordings. It was for Mr Anwar to adduce this evidence. The judge did not give sufficient weight to the fact that a significant number of the tests taken at Thames Education Centre, Hounslow were invalid.

Ground 2

9. The decision is confusing and so nonsensical as to be irrational.

Permission to appeal

10. Permission was granted by UTJ Pickup on 19 June 2023 on the basis that it is arguable that the judge reversed the burden of proof and that the judge incorrectly gave weight to the appellant's ability in English without taking

account of the fact that there are several reasons why a person fluent in English might wish to use a proxy for the test.

Rule 24 Response

11. There was no Rule 24 response.

Preliminary Matters

Amended Grounds

12. On 12 July 2023, the day prior to the hearing, the Secretary of State filed an application to amend the grounds of appeal. The first amended ground was that the judge materially misdirected herself in law by proceeding on the basis that the burden of proof switches between the parties. The judge failed to apply the authority of DK and RK (ETS; SSHD evidence; proof) India [2022] UKUT 112 (IAC) which clarifies that the burden of proof does not switch between the parties but are those assigned by law. This erroneous approach influenced her assessment of the evidence.

13. The second amended ground advanced was that the judge gave inadequate reasons for finding that Mr Anwar did not cheat in his test. The judge did not take into consideration that there is a range of reasons why a person proficient in English might engage in fraud. The judge's findings on this point were perverse. Further, the judge did not give adequate reasons for accepting Mr Anwar's evidence. In particular, the judge did not approach Mr Anwar's evidence with caution and her findings are not adequately reasoned.

14. Ms Ahmed acknowledged that there was no good reason for lateness of the application to amend the grounds, however she submitted that Mr Anwar was not prejudiced by the late service of the amended grounds because his representative had had an opportunity to consider the grounds. Further, she submitted that the claimed errors are significant, and it is in the interest of fairness that the Secretary of State should be allowed to rely on the amended grounds.

15. Mr Gajjar opposed the application to amend the grounds. He submitted that the Secretary of State acknowledged that the application was late and that there was no good reason for the lateness. The explanation did not satisfy the third limb of the "Denton" test. It was not in the interests of justice to allow the Secretary of State to amend the grounds at this late stage.

16. When considering whether to admit the application to amend the grounds of appeal, I took into account the authority of Latayan v the Secretary of State [2020] EWCA Civ 191 which states:

> "I would however comment on the additional submissions made by Mr Ó Ceallaigh as recorded at paragraph 28. 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 on behalf of this Appellant. Nor should a party be penalised for drafting grounds of appeal concisely. However, these arguments were not pleaded at all on this appeal and in my view they cannot be raised now. An appeal court can entertain a new argument of law where that is in the interests of justice (though it will be slow to do so) – *Miscovic v Secretary of State for Work and Pensions* [2011] EWCA Civ 16 per Elias LJ at to an assessment of the facts and they cannot fairly be raised on the hoof. They are not *Robinson-*

> obvious points that the tribunals or court could be expected to appreciate for themselves in a case where the Appellant was represented by counsel. As my lord, Lord Justice Singh, said in *Talpada v The Secretary of State for the Home Department* [2018] EWCA Civ 841 at [69]:
>
> > 'Courts should be prepared to take robust decisions and not permit grounds to be advanced if they have not been properly pleaded or where permission has not been granted to raise them. Otherwise there is a risk that there will be unfairness, not only to the other party to the case, but potentially to the wider public interest, which is an important facet of public law litigation'."

17. This, in my view, applies to the second amended ground in which it is argued that the judge has given inadequate reasons and approached the evidence without caution. This ground was not raised in the original grounds, and I do not find that it is in the interests of justice to permit the ground to be added at this late stage because of the wider public interest in having robust legal procedures in place. I indicated that I would not permit the Secretary of State to rely on the second amended ground of appeal.

18. I find that the "first amended ground" which relates to the burden of proof is not a new ground of appeal but is an amplification of Ground 1 of the original grounds. Ground 1 has been expanded upon because it relates to the manner in which the judge approached the burden of proof and the legal authorities on that approach. I indicated that Ms Ahmed could proceed to make submissions on this when she dealt with Ground 1 of the original grounds.

19. At the outset of the hearing, Ms Ahmed also indicated that the second original ground of appeal that the decision was so disorganised and nonsensical that it was irrational was not relied on and she would not pursue it.

20. It was therefore agreed that the only ground in dispute was ground 1 which relates to whether the judge misdirected herself in law when approaching the burden of proof.

Ground 1- misdirection in law

21. The Secretary of State provided evidence that the test taken by a proxy in the form of a "lookup tool" which confirmed that Mr Anwar's test had been found to be "invalid". He had scored 200 in his speaking test out of a possible score of 200. The Secretary of State also provided evidence in relation to the Thames Education Centre in the form of a Project Façade report which said that ETS had found evidence of considerable fraud at the Thames Education Centre which had been subject to a criminal investigation. A total of 24 out of 28 tests taken on 17 April 2012, the day on which the appellant sat his test, were found to be "invalid" and obtained by proxy. The investigation states inter alia that 26% of the tests taken at Thames Education Centre, Hounslow between 14 December 2011 and 14 May 2013 were deemed invalid.

22. Mr Anwar's evidence was that he attended and took both components of the TOEIC test on 17 April 2012. He chose the test centre because it was the closest to him in location. He travelled to the test centre by public transport. He was not able to provide receipts for his test because he paid in cash. His Yahoo email account which he used to book the test was now closed. The friend that lent him the money to pay for the test has returned to Pakistan. He had a good command of the English language at the time of the test and had no reason to cheat.

23. In the skeleton argument prepared by Counsel, which was before the judge, the case was put as follows:

> Issues before the judge
>
> (a) Whether there was evidence specific to the appellant which was sufficient to found a suspicion that the appellant had cheated or used deception in any previous Home Office application.
>
> (b) If the respondent had discharged the initial evidential burden, then "whether or not the appellant has provided an innocent explanation which satisfies the minimum level of plausibility demonstrating that he actually sat for his test and did not use any deception/fraud."
>
> (c) Whether or not the respondent has discharged the legal burden of proving dishonesty against the appellant.

24. At [28] the judge directed herself to the relevant authorities, some of which addressed the burden of proof:

> "I have considered in this regard the reported cases of Ahsan [2017] EWCA Civ 2009, R (on the application of Nawaz) v SSHD (ETS: review standard/evidential basis) Majumder v Secretary of State for the Home Department (Rev 1) [2016] EWCA Civ 1167, MA (ETS – TOEIC testing) [2016] UKUT 00450 (IAC), SM and Qadir (ETS – Evidence – Burden of Proof) [2016] UKUT 00229 (IAC), (Abbas) v SSHD [2017] EWHC 78 (Admin)), DK and RK (ETS; SSHD evidence; proof) India [2022] UKUT 112 (IAC) and The SSHD v Akter & Ors [2022] EWCA Civ 741 (27 May 2022)."

25. The judge at [61] stated:

> "There are three stages to be followed when determining whether deception has been employed as is being alleged here, namely, (i) has the Respondent met the burden of identifying evidence that the TOEIC certificate obtained by the Appellant in 2012, may have done so using fraudulent means? (ii) has the Appellant satisfied the evidential burden of raising an innocent explanation? And if so, (iii) has the Respondent met the legal burden of showing that deception actually took place?"

26. At [62] the judge found that the Secretary of State had discharged the burden of establishing prima facie deception on the part of Mr Anwar by virtue of the evidence provided in the "look up tool". She also referred to the evidence into the Project Façade Report at [63].

27. At [28] the judge went on to find that Mr Anwar had provided documentary evidence of his qualifications. His good command of English led her to:

> "…..afford him the benefit of the doubt" in relation to his explanation regarding how he sat all elements of the TOEIC examination himself, and crucially that he did not cheat or use a proxy test taker and I therefore find the respondent's generic and specific evidence must be viewed in this light and context including the fact the recording of the appellant's reported tests have never been served on the appellant. Additionally, the appellant sat the test at Thames Education Centre, Hounslow. This was also the closest test centre to him at the time."(my emphasis)

28. The judge then noted the lack of supporting evidence in relation to Mr Anwar's attendance and payment of the test stating at [76]:

> "I should also make clear the fact the voice recording has never been served on the Appellant. The wider background evidence in TOEIC fraud cases shows that there were many irregularities in the way in which these tests were managed and administered, and it is therefore not inconceivable that the mismanagement and criminal activities that took place at the Thames Education Centre (and many other) where TOEIC fraud took place included the substitution and/or falsification of legitimate tests and voice recordings taken by those such as the Appellant in this appeal."(my emphasis)

29. At [77] the judge states:

> "In other words, this does not necessarily mean that the Appellant before me was complicit in such activities and I find that the evidence before me is sufficient to show that the first Appellant was not in any way involved, and I also accept that he had taken his test in good faith and on the assumption that all was in order, and crucially, that she (sic)had no control over the fact that her (sic) test/voice recording was at some later point substituted with the voice of someone else, for which he was now being held responsible."

30 And at [78] and [79]:

> "Taking into account the evidence as a whole, including the fact that the Appellant spoke English very well at the hearing, alongside the evidence in the form of his extensive educational background, and the fact that he has completed his qualifications in the UK. I find are sufficient for me to find that he is, on balance, telling the truth when he insists, he did not use a proxy and hence any deception of any kind, when she (sic) obtained her TOEIC test certificate which he relied upon to support of his leave to remain application made on 24 July 2013".
>
> "I therefore do find that the Appellant has discharged the burden upon him to show that he did not cheat in the TOEIC test he sat in 2012."

30. In her conclusion at [84] the judge states: "In totality, and having considered all the evidence placed before me in the round, I find that the appellant has successfully discharged the burden which rests upon him to prove his cases (sic) to the requisite standard."

31. Ms Ahmed's submission was that although the judge referred to the authority of DK and RK at [28], the judge completely failed to have any regard to or apply this guidance in respect of the burden of proof.

32. The headnote of DK and RK reads as follows:

> "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."

33. Ms Ahmed's contention was that the judge, contrary to the headnote in DK and RK had switched the burden between the respondent and the appellant.

Secondly, the judge had given weight to a immaterial factor by taking into account that the Secretary of State had not provided the recording of the test when it was not her responsibility to provide this but Mr Anwar's. It is clear from the authorities that it is possible for an individual to obtain a voice recording for free. The judge also did not follow DK and RK in which it was found that it is highly unlikely that a genuine test would be tampered with and substituted with a fraudulent test. Moreover, the starting point when considering the burden of proof following DK and RK is that where the Secretary of State has provided evidence from ETS pointing to a particular test result having been obtained by proxy, it is highly plausible that this was the case and this is the lens through which the facts should be considered. In a college where there has been shown to be frequent and widespread fraud, (a so-called "fraud-factory"), "it is overwhelmingly likely that those to whom proxy results are now attributed are those who took their tests by that method". If the evidence points to an individual test 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 amply sufficient to prove that fact on the balance of probabilities".

34. Mr Gajjar submitted that there was no material error of law in the way in which the judge approached the burden of proof in this appeal. He referred to [45] to [49] of DK and RK. In DK and RK the Upper Tribunal did not explicitly state that the boomerang approach is wrong. If this "process" has been deployed, it is wrong to rush to the conclusion an appeal outcome is erroneous. He submitted that as a result of the ratio in DK and RK it is easier for an appellant to prove their case because the burden does not shift to the appellant. The burden of proof is on the Secretary of State at all times.

35. He submitted that the judge at [17] directed herself appropriately and that it was for the Secretary of State ultimately to prove her case. The judge at [28] directed herself correctly to DK and RK and should be taken to be aware of its contents. She gave a detailed and lengthy determination. She was not required to cite the headnote. The judge found that the generic evidence was sufficient to meet the evidential burden. It is dangerous to say as Ms Ahmed seemed to have suggested that "the starting point" is that an appellant has cheated. It is only if the evidence of deception is uncontradicted by credible evidence, unexplained and not the subject of any material undermining its effect that the allegation is made out. Mr Gajjar's submission is that the judge stepped back and holistically considered the evidence and found that such evidence was provided by Mr Anwar. The allegations were answered.

36. There is no material error at [28] because the judge does not go as far as to say that the Secretary of State's failure to serve the recording on the appellant was a material factor. This was at best was an observation. The judge was manifestly correct in stating at [55] that each case is fact-sensitive even where the test was taken at a fraud factory. The judge did not treat the absence of the recording as determinative of the appeal despite what is said at [28]. Although the decision may be poorly structured, if one looks through the decision, the judge has dealt with the submissions and the evidence and made findings open to her. The judge was entitled to find that the appellant's educational qualifications including the fact that he previously passed an IECT test at [40] as well as his evidence of taking the test was sufficient for her to find that Mr Anwar did not cheat. He

submitted that even if the judge had misdirected herself on the shifting burden, the error was not material because there would have been the same outcome.

Discussion

37. I take into account [126] to [199] of DK and RK which state:

> "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 at the test centres and the candidates working in collusion.
>
> 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 our judgment amply sufficient to prove that fact on the balance of probabilities.
>
> 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 Secretary of State for the Home Department. 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.
>
> 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 into account in assessing whether the respondent has proved the dishonesty on the balance of probabilities."

38. I consider whether judge misapplied the burden of proof and whether she misdirected herself in accordance with DK and RK. The judge clearly refers to the "switching" burden of proof at [17] and at [61] which is set out in full above. Moreover from reading the decision as a whole, it is manifest that the judge continued to deal with the appeal in this manner, ultimately finding that Mr Anwar's "innocent explanation" and credible and cogent evidence was sufficient to allow him to afford him "the benefit of the doubt." The reference to the benefit of the doubt is particularly telling. This is manifestly incorrect. This was more than a "process". It was a statement of the law which was wrong and as such is an error of law. Nevertheless on its own this error is not necessarily material.

39. Mr Gajjar accepted that the judge erred by placing the responsibility on the Secretary of State to produce the tape recording. This is a further error of law. I turn to whether this error was material. At [28] the judge's wording "I therefore find that the respondent's generic and specific evidence must be viewed in this light and context including the fact the recording of the appellant's purported test has never been served on the appellant"(my emphasis), is indicative of her erroneous approach.

40. I do not agree with Mr Gajjar that this was a mere observation. The judge manifestly misunderstood that it was the Secretary of State's responsibility to provide the recording and not that of Mr Anwar and she plainly gave this factor significant weight, as can be seen at [28] and [76] of the decision. She expressly refers to the fact that the voice recording has never been served on the appellant as a factor in his favour. It may not have been the determinative factor but it certainly influenced her approach to the issue of whether the Secretary of State had discharged the burden of proof. I do not agree with Mr Gajjar that it would have made no difference to the outcome of the appeal, had the judge approached this issue correctly. I find that this error is material.

41. I turn to whether the judge misdirected herself in relation to DK and RK. The Secretary of State addressed DK and RK and quoted passages from it in her review and invited the judge to follow the approach in the authority on the standard and burden of proof. It is correct that the judge directed herself to the authority along with several other authorities at [28] and in normal terms should be taken to have applied the law correctly. However, having read the decision carefully I am satisfied that despite directing herself to the authority the judge did not follow it when considering the burden and standard of proof.

42. It is not clear from the decision that judge found that the evidence of Mr Anwar cheating was particularly strong. Not only was there evidence that his test result was invalid, there was evidence that a total of 24 out of 28 tests taken at that college on that day were found to be invalid and obtained by proxy. Furthermore, the college at which Mr Anwar sat his test was one of those colleges specifically referred to in the respondent's Project Façade document, which sets out the criminal investigation into the abuse of TOEIC indicating that it was considered to be one of the "fraud factories". That document was evidence that ETS, when carrying out their own internal investigation into Thames Education Centre, Hounslow found there to be evidence of cheating. This is strong evidence in line with DK and RK. The judge's approach to this evidence at [70] is erroneous. The judge took the fact that the Project Façade report was seven years old and that the parties had not been informed of the result of the criminal proceedings as undermining this evidence, rather than considering ETC's own acceptance that there was widespread cheating at the college around the time that the appellant took the test.

43. Mr Anwar did not seek to obtain his voice recording to demonstrate that it was his voice on the recording and not a proxy. As I have already noted the judge erroneously found that the burden was on the Secretary of State to provide this. This would have been credible and incontrovertible evidence that would have undermined the Secretary of State's allegation. It was not before the judge.

44. As DK and RK makes clear, at [125] 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. At [76] the judge proceeds on the opposite footing that this was a possibility and that there may have been the substitution and/or falsification of legitimate tests. The judge has not followed the guidance in DK and RK in this respect and the approach undermines the judge's finding that Mr Anwar should be "given the benefit of the doubt" in relation to this possibility. I am satisfied that the judge's has misdirected herself in respect of DK and RK.

45. I do not accept Mr Gajjar's submission that there was incontrovertible evidence or credible evidence capable of undermining the effect of the Secretary of State's evidence which would mean that these errors are not material. The tape recording demonstrating that Mr Anwar had not taken the test was not adduced. Mr Anwar was not able to provide supporting evidence that he had taken the test in terms of how he booked the test or paid for it. The only evidence he produced was his statement that he genuinely took the test and evidence of his competency in English at around the time he took the test.

46. In summary, I am satisfied that the judge erred in her approach to the burden of proof, misdirected herself by finding that the failure of Secretary of State had to produce the test recording was a factor in Mr Anwar's favour and misdirected herself to RK and DK. I am satisfied that the judge's errors have infected her approach to the entire appeal and her finding that Mr Anwar did not use a proxy test take when taking his test and are therefore material to the outcome. The decision is unsafe and should be set aside in its entirety. The appeal is allowed to the extent that it should be remitted to the First-tier Tribunal for rehearing.

Disposal

47. Mr Gajjar's submission was that in the event I found a material error I should remit the appeal to the First-tier Tribunal. Ms Ahmed also submitted that were I to find that there had been a material error of law that the appeal would need to be reheard so that the correct burden of proof could be applied and that the facts of the appeal could be determined through the lens of DK and RK. I am in agreement. I am satisfied that the appropriate disposal in this appeal is for the appeal to be remitted for fresh factual findings to be made.

Notice of Decision

48. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

49. The decision is set aside in its entirety with no findings preserved.

50. The appeal is remitted to the First-tier Tribunal to be reheard de novo in front of a judge other than First-tier Tribunal Judge Bibi.

R J Owens

Judge of the Upper Tribunal
Immigration and Asylum Chamber
16 October 2023