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

Case No: UI-2023-005543
UI-2022-006196

First-tier Tribunal No:
HU/55398/2021
HU/55398/2021

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**

26th February 2024

**Before**

**UPPER TRIBUNAL JUDGE SHERIDAN**

**Between**

**AMRAN HUSSAIN**
**(NO ANONYMITY ORDER MADE)**

Appellant

**and**

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

Respondent

**Representation:**
For the Appellant: Mr S Karim, Counsel instructed by Liberty Legal Solicitors LLP
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

**Heard at Field House on 5 February 2024**

**DECISION AND REASONS**

1. This decision is delivered orally following a hearing on 5 February 2024 at which the appellant was represented by Mr Karim and the respondent by Mr Melvin. I am grateful for the clear and well-articulated submissions made by both representatives.

The First-tier Tribunal Decision

2. The appellant is appealing against a decision of Judge of the First-tier Tribunal Rodger ("the judge") promulgated on 15 November 2023.

3. The central issue in contention before the judge was whether the appellant cheated in a TOEIC speaking and writing English language test taken with the provider ETS on 18 April 2012.

4. The respondent's position before the judge was that evidence provided by ETS demonstrates that the appellant has been identified as one of numerous people who cheated at the test centre where he took the test.

5. The appellant's position is that he did not cheat and has been telling the truth about this.

6. The judge was persuaded by the respondent. I would summarise the main reasons given by the judge as follows:

   (a) In the light of the recent Upper Tribunal decision in *DK & RK (ETS: SSHD evidence; proof) India* [2022] UKUT 00112 IAC, the evidence relied on by the respondent to establish that the appellant cheated was amply sufficient to discharge the evidential burden and ought to be given significant weight.

   (b) As the appellant obtained a voice recording of the test taker which he acknowledges is not him his case depends on there being a chain of custody error. However, in *DK and RK* it was found that there was no reason to consider ETS's chain of custody to be unreliable.

   (c) The appellant's evidence was inconsistent and unpersuasive. In particular (i) the judge drew an adverse inference from the appellant stating that he faced rejection from colleges in 2014/2015 on account of having taken an ETS test but not pursuing this with any of the colleges; and (ii) the judge found it unclear whether, when the appellant was describing his experience taking the test, he was referring to the day of the alleged cheating or the previous day when he took tests where there was no allegation of cheating.

   (d) The judge found that the appellant's proficiency in English did not assist him, for the reasons given in para. 108 of *DK and RK*.

7. The judge stated (in paragraph 35) that although the appellant had being identified in an EEA decision in 2017 as someone who may have staged a relationship this was not being taken into consideration as it had not been raised by the respondent.

Grounds of Appeal and Submissions

8. Mr Karim's submissions closely track the grounds, where they are set out with clarity. There are three grounds.

9. *Ground 1*. The first ground concerns various matters that Mr Karim contends were overlooked by the judge. The specific matters are:

   (a) Communications between the appellant and ETS' solicitors regarding the retention, labelling, storage and transmission of evidence. The appellant contacted ETS's solicitors to obtain information about the evidence but received only a cursory response. Mr Karim argues that the judge needed to take this into consideration as it puts into question the reliability of the evidence obtained from ETS and also it is indicative of the appellant being credible (as it shows him endeavouring to uncover what has occurred).

(b) A BBC Newsnight article that had not been considered in *DK and RK* calling into question the reliability of the ETS evidence.

(c) The APPG report about ETS. Mr Karim acknowledged that *DK and RK* found this was inadmissible but argued that the Court of Appeal took a different view in *Alam v Secretary of State for the Home Departme*nt [2021] EWCA 1538 and *Secretary of State for the Home Department v Akter & Ors* [2022] EWCA Civ 741.

(d) The factors identified in paragraph 69 of *SM and Qadir*. These are the following:

> "..[T]he relevant factors to be weighed include (inexhaustively, we would add) what the person accused has to gain from being dishonest; what he has to lose from being dishonest; what is known about his character; and the culture or environment in which he operated. Mr Dunlop also highlighted the importance of three further considerations, namely how the Appellants performed under cross examination, whether the Tribunal's assessment of their English language proficiency is commensurate with their TOEIC scores and whether their academic achievements are such that it was unnecessary or illogical for them to have cheated".

10. *Ground 2*. The second ground of appeal is a procedural unfairness submission. It argues that the judge acted procedurally unfairly in several respects. First, it is argued that the reference in paragraph 35 to an earlier EEA decision is problematic because although the judge stated explicitly that this was not being taken into consideration the fact that it is described in considerable detail indicates that it was given some consideration. Second, it is argued that the judge (in paragraphs 30 and 31) made adverse findings that had not been put to the appellant. These concerned which day a pencil was used and the appellant's evidence about how many other test takers there were. Third, it is argued that the adverse findings which were not put to the appellant were based on a misunderstanding of the evidence. It is submitted that if these points had been put to the appellant he would have been able to address the judge's concerns.

11. *Ground 3*. Ground 3 argues that the judge failed to properly apply the burden of proof by essentially reversing it and reaching conclusions based on the absence of evidence on points. The grounds set out six examples of this.

Analysis

Ground 1

12. *DK and RK* is a recent decision of a Presidential Panel. In this decision, the Upper Tribunal found that the evidence tendered on behalf of the Secretary of State in ETS cases is:

> "amply sufficient discharge the burden of proof and so requires a response from any appellant whose test entry is attributed to a proxy"

13. The Panel in *DK and RK* considered in detail criticisms of the ETS evidence and concluded that, broadly, the ETS evidence is reliable. In paragraph 103 it is stated:

> We conclude that the voice recognition process is clearly and overwhelmingly reliable in pointing to an individual test entry as the product of a repeated voice. By

> "overwhelmingly reliable" we do not mean conclusive, but in general there is no good reason to doubt the result of the analysis.

14. In respect of the argument that there was a flaw in ETS's "chain of custody" (such as by mis-labelling test data), the Panel did not accept that there was evidence indicating anything more than that this is a theoretical possibility. See paragraphs 114-120 of *DK and RK.* That said, it was recognised that, if credible and sufficiently comprehensive, an assertion that there must have been a chain of custody error might suffice to prevent the respondent establishing dishonesty on the balance of probabilities. See paragraph 131.

15. *DK and RK* has received positive treatment in the Court of Appeal. In para. 29 of *Akter* the following is stated:

> 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 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 1040, [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 different conclusions upon the same factual matrix. [Emphasis added]

16. In the light of *Akter*, for the judge to have reached a different view on the reliability of the ETS evidence to that of the Panel in *DK and RK,* there would need to have been "substantial fresh evidence" about the ETS evidence. However, the only new evidence referred to in the grounds is a BBC Newsnight article. Clearly, this is far removed from constituting substantial fresh evidence. As there was no substantial fresh evidence - and therefore no evidential basis for the judge to depart from *DK and RK* - it is irrelevant that the judge did not take into consideration that ETS's representatives failed to engage with the appellant or consider whether the APPG report could be admitted, as there was no purpose to this evidence other than to put into question the reliability of the ETS evidence.

17. I also do not accept that the judge erred by not explicitly addressing the factors set out in *SM and Qadir*. *DK and RK* is a very recent – and authoritative – Panel decision, and it was not legally erroneous to address the issues in dispute through the framework provided by, and in accordance with, *DK and RK*, without referring to earlier case law. In any event, the judge, essentially, undertook the assessment referred to in paragraph 69 of *SM and Qadir* by considering the credibility of the appellant's account and the relevance of his ability to speak English.

Ground 2

18. A party needs to know the case against him, so that he has an opportunity to refute adverse points; and there are numerous authorities confirming that where there has been a failure to raise a point procedural unfairness may arise. See *Abdi & Ors v Entry Clearance Officer* [2023] EWCA Civ 1455.

19. That said, as explained in *WN (Surendran; credibility; new evidence) Democratic Republic of Congo* [2004] UKIAT 00213:

> It is not necessary for a fair hearing that every point of concern which an Adjudicator has, be put expressly to a party, where credibility is plainly at issue

20. I am not persuaded that there has been procedural unfairness in this case. The credibility of the appellant's account was front and centre of the case before the judge: as in *WN*, it was plainly at issue. The appellant was cross-examined and he could have been in no doubt that all of his claims relating to taking the test were not accepted by the respondent, whose position was that he was lying about taking the test. In these circumstances – where the entirety of the appellant's credibility was plainly in issue - specific points about credibility did not need to be put to the appellant by the judge. Having heard the appellant give oral evidence, and considered it alongside other evidence (including what is said about the reliability of the ETS evidence in *DK and RK),* the judge was entitled to form a view on the appellant's credibility.

21. There is no merit to the contention that the judge erred by taking into consideration the EEA decision given that the judge stated explicitly that it was not taken into consideration.

Ground 3

22. I am not persuaded that the judge reversed the burden of proof.

23. Firstly, the judge clearly directed himself correctly as to the burden of proof. See paragraph 8 where it is stated that the burden lies with the respondent.

24. Secondly, the various parts of the decision identified in ground 3 in order to support Mr Karim's argument about the burden of proof demonstrate not that the wrong burden was applied but rather that the judge considered the appellant's case consistently with *DK and RK*, where it is stated in para. 128 that the evidential burden was not discharged by only a narrow margin and "it is clear beyond a peradventure that the appellants had a case to answer"; and in para. 129 that:

> 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 that into account in assessing whether the respondent has proved the dishonesty on the balance of probabilities.

Notice of Decision

25. The decision of the First-tier Tribunal did not involve the making of an error of law and stands

**D. Sheridan**

Judge of the Upper Tribunal
Immigration and Asylum Chamber

**21 February 2024**