IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-000469
First-tier Tribunal No:
HU/57361/2021
IA/16661/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 01 May 2023

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

Muhammad Khalid
(NO ANONYMITY DIRECTION)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr MJ Azmi of Counsel
For the Respondent: Ms S Rushforth, Senior Home Office Presenting Officer

Heard by remote video at Field House on 26 April 2023

DECISION AND REASONS

1. The respondent has been granted permission to appeal to the Upper Tribunal against the decision of the First-tier Tribunal (Judge Borsada) promulgated 24.1.23 allowing the appellant's appeal against the respondent's decision of 12.11.21 to refuse the application for Leave to Remain (LTR) as the fiancé of his sponsor, CR.

2. In granting permission, the First-tier Tribunal restricted permission to one issue only: "Whether the judge erred in law by not demonstrating sufficient consideration of the assessment in DK [2022] UKUT 112 (IAC) as to the strength and quality of an indication by ETS that a test was taken by a proxy [application, para. 2]." There was no application before me to vary the terms of the permission. Mr Azmi, who represented the appellant at the First-tier Tribunal, submitted a Rule 24 Reply, which had not been received by the Tribunal but was provided to Ms Rushforth and myself at the outset of the hearing. I confirm that I

have taken those written submissions into account along with the oral submissions of the two representatives.

3. After careful consideration, I agree with the judge granting permission that there is no arguable error of law in the First-tier Tribunal going straight to considering whether the appellant had provided an innocent explanation and whether, considering the evidence as a whole, the legal burden of proof of dishonesty had been discharged by the respondent. This conclusion is strengthened by the judge's summary and assessment at [3(iii)] of the respondent's submissions. The judge appears to have accepted that the respondent's evidence was sufficient to shift the burden of proof to the appellant. Ms Rushforth did not seek to go beyond that limitation.

4. In summary, Ms Rushforth submitted that the First-tier Tribunal failed to take into account the strength of the respondent's ETS evidence, which had a false positive rate of only between 1-3%. It was submitted that in effect the evidence was overwhelmingly reliable as suggested in DK and RK. Ms Rushforth submitted that what is set out at [8] of the impugned decision was insufficient to demonstrate that the judge had proper regard to the strength of the respondent's evidence.

5. Mr Azmi relied on his Rule 24 response and pointed out that the judge had referenced DK and RK, as well as the analysis in the respondent's review, but noted that each case must be considered on its own merits. Mr Azmi went on to argue that there are errors and inconsistencies in the test results, including as to the appellant's nationality, which undermined the reliability of the results. However, these were not referenced by the judge at any part of the decision. Mr Azmi accepted that the judge could have provided more detailed reasoning but maintained that that which has been provided was adequate.

6. I am satisfied that had the judge followed the correct approach recommended by the case law and in particular taken a more careful consideration of DK and RK, the Tribunal would have first recognised that the evidence relied on by the respondent was more than sufficient to discharge the evidential burden on the respondent and by far more than a mere narrow margin, so that the appellant undoubtedly had a case to answer. More significantly, the judge would have realised that the strength of that evidence had to be given full and proper weight. As the Upper Tribunal stated at [129] of DK and RK, "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.." In effect, the Tribunal should have recognised the strength of the evidence now available to the respondent in ETS cases but it is not clear from the decision that there was any such recognition. By not following the logical approach and not applying DK and RK properly, the judge failed to accord proper weight to the strong and persuasive evidence relied on by the respondent when assessing it against the appellant's evidence.

7. It follows that I am satisfied that the First-tier Tribunal did not give sufficient or appropriate consideration to the strength of the respondent's evidence that a proxy was used in taking the test. That failure had clear implications for the

judge's subsequent assessment of the appellant's 'innocent explanation,' so that the assessment of the evidence was unbalanced and likely to have been unfair to the respondent's case.

8. The peculiar way in which the judge set out the decision was not helpful to understanding what of the various submissions was accepted; it is not immediately clear from the decision if submissions were merely being summarised or adopted, which gives rise to doubt whether the findings were adequately reasoned.

9. However, the judge did appear to accept, without question, the appellant's submissions summarised at [4(i) to (ii)] of the decision but in doing so adopted a flawed approach, one inconsistent with the current case law. For example, the judge gave positive weight to the appellant's ability in spoken English, to which the appellant was not entitled. Furthermore, the judge ignored that, as the President pointed out in SSHD v MA [2016] UKUT 450 (IAC) at [57], "there are numerous reasons why a person who could pass a test might nevertheless decide to cheat." The judge was naïve and in error of law to assume that a person apparently fluent in English had no reason to cheat. None of the factors cited at [7] of the decision in fact precluded the use of a proxy and the conclusion that "in this case there is a wealth of credible evidence that this particular appellant did not in fact cheat," is flawed as drawn from an obviously unbalanced assessment of the evidence. Considered as a whole, I am satisfied that there had not been an objective assessment of the strength of the evidence on each side; the Tribunal did not act in fairness to both parties.

10. It necessarily follows from the above that the article 8 ECHR assessment is also flawed and cannot stand.

11. In all the circumstances and for the reasons set out above, the decision of the First-tier Tribunal cannot stand and must be set aside to be remade. As the entire findings must be remade, this is case in which it is appropriate to remit to the First-tier Tribunal to be remade de novo, consistent with paragraph 7.2 of the Practice Statement of the Senior President of Tribunals.

Notice of Decision

The decision of the First-tier Tribunal involved the making of a material error of law and is set aside in its entirely.

The making of the decision in the appeal is remitted to the First-tier Tribunal to be remade de novo with no findings preserved.

I make no order for costs.

DMW Pickup

DMW Pickup

Judge of the Upper Tribunal
Immigration and Asylum Chamber

26 April 2023