



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2023-
004285
First-tier Tribunal No:
HU/53829/2022
(LH/01166/2022)

THE IMMIGRATION ACTS

Decision & Reasons Issued:

24th November 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

MR FAIZAN ARAIN
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Biggs, Counsel

For the Respondent: Mr Wain, Senior Home Office Presenting Officer

Heard at Field House on 8 November 2023

DECISION AND REASONS

1. The Appellant is a national of Pakistan, date of birth 6 October 1986, who on 1 July 2010 entered this country as a student with leave until 24 December 2012. This leave was extended until 31 May 2014. A subsequent application to extend the leave was refused without a right of appeal.
2. On 3 February 2021 the Appellant applied for leave to remain outside the Immigration Rules. The Respondent refused this application on 21 June

2022. The Appellant appealed this decision and his appeal came before Judge of the First-tier Tribunal Latta (hereinafter referred to as the FTTJ) on 24 August 2023 who dismissed the Appellant's appeal.

3. Permission to appeal was granted to the Appellant by First-tier Tribunal Judge Dainty on 2 October 2023 who found it was arguable there was an error in law because:

“The judge properly directed himself in light of DK and RK (ETS: SSHD evidence, proof) India [2022] UKUT 112 (IAC) and in light of The Secretary of State for the Home Department v Akter & Ors [2022] EWCA Civ 741. The unreported decision referred to in the grounds cannot trump the guidance given in those cases as Akter was decided in the Court of Appeal and confirmed DK. The judge has when the whole judgment is considered understood that the burden is on the Respondent but has also in light of DK directed himself to consider in the round all the material brought by both parties to establish whether anything said by the Appellant prevented the Respondent from discharging her burden. The matter appears finely balanced in that the case is fundamentally about the judge taking a view on the question of whether he accepts on the evidence that the Appellant did cheat (or whether he did in fact go to the centre to take the test).

Counsel in a signed skeleton argument states that contrary to what is said at paragraph 39 of the judgment the Appellant did answer in the hearing what details of the topic of the written test and the word limit (and therefore it was arguably misleading or mistaken of the judge at 39 without more explanation to state that the Appellant failed to answer in sufficient detail what his written test comprised or the length of the actual essay).

Further, there are sufficient items at paragraphs 10 and 17 which arguably add up to a cumulative position that the judge failed to take into account the matters which might have pointed towards the Appellant having taken the test.

Where fraud is alleged it is arguably particularly important to give detailed reasons. Therefore there is an arguable error of law.”

4. Mr Biggs adopted the grounds of appeal and skeleton argument and invited the Tribunal to find there was an error in law. With regard to ground one was concerned Mr Biggs asked me to look at paragraphs [17] and [18] of the skeleton argument. Mr Biggs then referred to paragraphs [45]-[50] of the decision and submitted the FTTJ had erred in his approach to the allegation the Appellant had cheated and further submitted that the FTTJ wrongly required the Appellant to put forward objective evidence when there was no requirement placed on him.
5. With regards to grounds 3-5 Mr Biggs referred to paragraphs [5]-[10] of the skeleton argument. He submitted there was a material mistake as to fact which led the FTTJ to reach an irrational conclusion. Specific reference

was made to paragraphs [38]-[41] of the FTTJ's decision and in particular paragraph [39]. Mr Biggs invited the Tribunal to consider pages 11 and 14 of the transcript from the First-tier Tribunal hearing. Paragraph [39] of the decision did not reflect what was actually said at the hearing as identified in paragraph [7] of the skeleton argument. Mr Biggs submitted it cannot rationally be said the Appellant did not answer in detail about the test/essay or that he failed to give evidence about the length of the essay. This was a fundamental material error in law.

6. The second issue was the FTTJ failed to engage with his explanation why he could not give more evidence. The Appellant blamed the passage of time for his lack of memory and Mr Biggs submitted this was a reasonable explanation. In oral submissions in the lower court Counsel stated it was easier for the Appellant to remember how he had travelled to the test centre and the process itself rather than precisely what he had been asked in his test.
7. Thirdly, the FTTJ failed to provide a reasoned finding on the Appellant's credibility and simply concentrated on the lack of alleged detail about the test. The FTTJ had failed to take into account what the Appellant had done in campaigning against what was happening in TOEIC cases.
8. Fourthly, the FTTJ failed to engage with the fact the Appellant's solicitors had challenged the voice recording issue.
9. Finally, the FTTJ accepted he gave detailed evidence in some instances but failed to say why this did not address the Respondent's case.
10. A Rule 24 reply had been filed on 17 October 2023 and Mr Wain adopted this document and submitted the decision should be upheld. With regard to the first ground of appeal Mr Wain invited the Tribunal to consider the decision as a whole. The Court was bound by DK and that was what the FTTJ followed by finding burden lay on Respondent and then for Appellant to provide an explanation. Paragraphs [31]-[33] were consistent with case law and Mr Wain submitted the FTTJ's approach was consistent with paragraphs [128]-[129] of DK.
11. Mr Wain submitted that ground two was not material because of what was said about the APG evidence in DK. He referred me to paragraphs [87]-[92] of DK.
12. With regards to grounds 3-5 Mr Wain submitted the challenge was to paragraph [39] of the FTTJ's decision. Mr Wain submitted the FTTJ's finding made was open to him in light of the preceding paragraphs. He submitted the Tribunal should consider pages 11 and 14 of the First-tier Tribunal transcript. Mr Wain argued paragraph [39] was not inconsistent with what the FTTJ found at paragraphs [38] and [39] in his decision. Mr Wain submitted the grounds were a disagreement with the transcript only.

13. Secondly, the FTTJ noted the Appellant obtained the recording and this was not his voice. Thirdly, the FTTJ did consider the level of fraud at paragraph [25] of the decision. This appellant had invalid test score. The FTTJ was aware the Appellant attended demonstrations and he had considered the Appellant's character, history and actions. He submitted the FTTJ took all factors into account including factors at [26]-[29] and [46] of his decision. The FTTJ also considered the choice of test centre and motivation for a proxy. Finally, the grounds suggested there was an error at paragraphs [40]-[41] and the FTTJ had applied to high a burden. Mr Wain referred the Tribunal to paragraph [23], [35] to [39] of the decision and submitted the FTTJ followed a clear process and there was no error in law.
14. No anonymity direction was made.

DISCUSSION AND FINDINGS

15. Having heard detailed submission, I reserved my decision. For the reasons hereinafter given I am satisfied there was an error of law identified in the FTTJ's decision.
16. This appeals centred around the FTTJ's approach towards the Appellant's evidence both at his interview and oral hearing.
17. The grounds of appeal and skeleton argument, whilst lengthy, concerned specific areas.
18. Firstly, it was argued that the FTTJ had materially erred by stating at paragraph [49] of his decision that "... when I consider all of the evidence in the round then in my view there is nothing presented which causes me to depart from the findings in the case of DK".
19. Mr Biggs submitted that the case of DK cannot be the starting point in this case because the Appellant was not a party to that case. Mr Biggs argued that the facts of DK were different to the facts of the current case as there were no criminal prosecutions against this ETS centre whereas there were in the case of DK and the Respondent had not provided any project façade evidence in the current case whereas such evidence was adduced in DK. Moreover it was argued that when in paragraph [45] the FTTJ required the Appellant to adduce objective evidence that he was not one of the many who employed a proxy to assist with his test he was reversing the burden of proof so that it was the Appellant who had to prove his case whereas DK made clear no burden rested with the Appellant. Mr Wain had submitted the Court was bound by DK and the FTTJ clearly stated the burden lay on Respondent and if that burden was met then it was for the Appellant to provide an explanation.
20. Despite Mr Biggs' submissions I am satisfied the starting point when considering the law must be what the Upper Tribunal said in DK. It is a reported decision and consequently the principles of that case should be in the mind of any Judge dealing with a TOEIC appeal.

21. In considering whether ground one has any merit it is important, as Mr Wain submitted, to look at the FTTJ's decision as a whole because only by doing that can one tell what he considered and what he did not consider.
22. The FTTJ identified at paragraphs [12] to [14] all the evidence that was before him. This was an appeal where both parties provided additional evidence over and above their initial bundles that had been lodged with the Tribunal. The FTTJ identified from the outset that the conclusions of DK applied to this appeal and he referred at paragraph [32] to what the Upper Tribunal said in DK namely 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."
23. The evidence relied on by the Respondent was contained Respondent's bundles and included the witness statements of Peter Millington, Rebecca Collings and Adam Sewell, a report from Professor French dated 20 April 2016, the ETS SELT Source Data for this Appellant which recorded his test as invalid and the list of test results taken at that same centre on 20 June 2012 including a breakdown how many of the tests were questionable and how many were invalid.
24. It was this evidence and the Appellant's own admission that the voice on his test was not his which led the Respondent to submit that she had met her burden of proof and that it was up to the Appellant to present his explanation to rebut this claim.
25. Mr Biggs drew my attention to paragraphs [45] and [49] of the FTTJ's decision, but also of relevance must be what the FTTJ said in paragraph [32] of his decision when the FTTJ reminded himself of what the Upper Tribunal had said in Headnote 1 of DK. Mr Wain argued the FTTJ did follow DK correctly including the fact the Respondent had to demonstrate a case first and foremost before any burden passed to the Appellant.
26. Mr Biggs was counsel for the Appellant in DK and the Upper Tribunal in that appeal rejected his submission that in order to discharge her burden of proof the Secretary of State would need to offer "cogent evidence" (paragraph [55] of DK). The Upper Tribunal reiterated that the burden on the Respondent remains the same namely on the balance of probabilities.
27. The Upper Tribunal made it clear the test to start with is "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."

28. Mr Biggs argued that DK could not be the starting point because the facts were different and DK did not involve this Appellant. However, the Upper Tribunal did not just consider the appeals of the Appellants before them but also looked at the nature of the evidence presented to about fraudulent activity in a number of ETS centres. At paragraph [67] the Upper Tribunal concluded “It is clear beyond a doubt that these were institutions for the manufacture of fraudulent qualifications. This conclusion does not show that any individual certificate was obtained fraudulently. But it has an important part in the evaluation of the evidence as a whole, in that it provides the context.”
29. Whilst the Upper Tribunal made clear each allegation had to be assessed in the context of the whole of the background evidence and an individual case cannot be proved by evidence of generality unless the general is universal, but the general evidence does move the starting point and “any assessment of whether the burden of proof is discharged in an individual case falls to be determined against the background of the fact that there were many thousands of results obtained fraudulently. The assertion that an individual appellant cheated is not an unqualified assertion to be viewed against the background of general unlikelihood, but is a particular assertion that the appellant was one of the large number who certainly did cheat.”
30. In assessing whether the FTTJ erred as alleged by Mr Biggs it is necessary to consider whether the FTTJ was entitled to make the finding that the Respondent had met her burden of proof. The FTTJ reminded himself at paragraph [33] what the Upper Tribunal had said about the burden of proof. Having identified the test the FTTJ then set out relevant factors that led him to his final conclusion.
31. In determining whether the Respondent had met her burden of proof the FTTJ recorded that the Appellant accepted the recording he had obtained from ETS did not contain his voice and reliance was then placed on other evidence presented by the Respondent. The FTTJ also had regard to the evidence in relation to the test centre.
32. Mr Biggs submitted that the FTTJ erred by failing to specifically state the Respondent must produce evidence to meet her burden (on the balance of probabilities), but I am satisfied that the FTTJ not only had this in his mind when considering the case at this point but actually went on to apply it.
33. The FTTJ had before him the witness statements, the spreadsheet, the test results from that day demonstrating question marks about all the tests and the Appellant’s test was specifically marked as invalid. The FTTJ also had the Appellant admitting that the recording he had produced did not contain his voice. The FTTJ, in paragraph [32] was simply stating that the evidence being adduced by the Respondent in such cases was amply sufficient to discharge the burden of proof placed on her.

34. The remainder of the FTTJ's assessment was to consider the Appellant's response to the allegation and his finding at paragraph [45] was simply his way of saying the Appellant had not satisfied the burden placed on him and that he saw no reason to reach a different conclusion to that reached in DK. I accept the wording in paragraph [49] could have been phrased better but that is not the same as saying the FTTJ materially erred on this specific issue.
35. The second ground was not specifically advanced by Mr Biggs and he just relied on what was contained in the skeleton argument. It was argued that the FTTJ did not engage with an make findings in respect of the APPG evidence Reliance was placed on an unreported decision, but as the permission grant stated an unreported decision cannot trump the reported guidance of DK which also considered the APPG material.
36. I see no basis to depart from what the Upper Tribunal said at paragraph [92] of DK namely "... we cannot find anything in the way of facts in the transcript substantially to undermine the existing evidence adduced by the Secretary of State. The conversation really only expands on the possibility that the evidence could have been different. Professor French and Dr Harrison adhere to their previous assessments. Professor Sommer strengthens his opposition to the Home Office, but without adducing any factual or evidential basis justifying what appears to be a change of opinion about the general reliability of the evidence: and even if it is not a change of opinion, it would be clearly wrong for us to regard what he said there as in any way contradicting or superseding his evidence before us."
37. This takes me to the remaining grounds of appeal in which reference was made to the transcript of the original hearing before the First-tier Tribunal.
38. Mr Biggs submitted that there was a material error in the way the FTTJ considered the Appellant's response to the Respondent's case. The transcript was circulated to all the parties in this case and I have considered this in deciding whether the remaining grounds identified a material error in law. In granting permission Judge Dainty concluded this case was finely balanced and would depend on whether the FTTJ accepted the Appellant's evidence that he did not cheat and whether he did in fact go to the centre to take the test.
39. Mr Biggs submitted that the FTTJ's record of the evidence was inconsistent with the actual transcript of the hearing. Whereas the FTTJ concluded the Appellant had not provided sufficient detail about the tests taken, he submitted this was an understatement of what had been said by the Appellant and the understatement amounted to a material error because the FTTJ found the Appellant's explanation lacked credibility because he had been unable to answer questions in detail about what his written test comprised of or the actual length of his essay or what pictures had been used in the speaking test.

40. Mr Biggs submitted the Appellant had been able to answer how he travelled to the centre and what happened when he arrived because these were straightforward matters whereas the actual test itself was something he could not recall as much detail about because it was over ten years ago. Mr Wain argued that taking the decision as a whole there was no material error pointing to the general test scores at the centre, the fact his test was recorded as invalid and the Appellant's own admission it was not his voice. He submitted the FTTJ applied a clear process.
41. Before rejecting the Appellant's claim the FTTJ set out a number of findings including what the Appellant had been able to tell his solicitors in his detailed witness statement. However, the difficulty I find with his decision is the FTTJ's specific findings at paragraph [39] when he recorded the Appellant had been unable to answer in detail what his written test comprised of or the length of his essay he had been asked to write.
42. Looking at the transcript on page 14 the FTTJ asked him what his essay was about and contrary to what was recorded in the FTTJ's decision at paragraph [39] the Appellant stated, "The essay was about the impact and influence of part-time worker on the leadership management. It was related time, related like this. It was, like, impact and influence of part-time worker on the leadership, something like this." He later went on to say the essay was possibly 100-200 words.
43. Whilst I accept the findings made by the FTTJ about the Appellant's credibility were open to him those findings must be made from the correct starting point otherwise the assessment will itself be flawed. By approaching his assessment from the incorrect starting point I have concluded the final decision that the Appellant did not rebut the case against him is flawed. I do not specifically address the remaining grounds as I have accepted there was a material error on this first part of the remaining grounds.
44. I have considered whether this would be a case best kept in the Upper Tribunal or whether it should be remitted back to the First-tier Tribunal for a full hearing. Clearly, the decision in this case will be based on credibility and consequently evidence will be necessary as the deciding Judge may wish to probe his answers further.
45. Whilst I do not intend to preserve any specific findings as I make the following observation that based on what I have read and seen it seems the Respondent are able to meet the burden placed on her in DK and the key issue in this appeal will be whether the Appellant is able to meet the burden of proof placed on him-ultimately that would of course be a matter for any future Judge.
46. Paragraph 7.2 of the Practice Statements for the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal (the "Practice Statements") recognises that it may not be possible for the Upper Tribunal to proceed to re-make the decision when it is satisfied that:

- a. the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
- b. the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

47. In my judgment, given that it is necessary for the above issues in this case to be considered afresh on the merits, this case falls within para 7.2 (a) and (b) because further evidence, including oral evidence is likely, and findings of fact on the above issues will need to be made.

Notice of Decision

The decision of the First-tier Tribunal involved the making of errors on points of law such that the decision is set aside in its entirety.

This case is remitted to the First-tier Tribunal for a fresh hearing on all issues on the merits by a Judge other than Judge of the First-tier Tribunal Latta.

Deputy Judge of the Upper Tribunal Alis
Immigration and Asylum Chamber
20 November 2023