IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003504

First-Tier Tribunal No: HU/50601/2021
IA/05404/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 21st March 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE BOWLER

Between

RUHUL AMIN KHAN
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Aslam, Counsel, instructed by City Heights Solicitors
For the Respondent: Ms S. Mckenzie, Senior Home Office Presenting Officer

Heard at Field House on 16 February 2024

DECISION AND REASONS

Background

1. The Appellant is a citizen of Bangladesh who has appealed a decision of the First-tier Tribunal ("the FtT") promulgated on 15 June 2022 ("the Decision"), dismissing his appeal of a decision of the Respondent to refuse his human rights claim. In refusing that claim the Respondent alleged that the Appellant had made false representations in an application for leave to remain by virtue of submitting an invalid ETS certificate which had been fraudulently obtained. The FtT decided that the Respondent had discharged the burden on her to prove deception.

2. Following a hearing on 13 November 2023 Judge Mandalia and I promulgated a decision in which we concluded that the FtT's decision, so far as it related to the allegation of deception, contained a material error of law. We directed that the appeal should be reheard in the Upper Tribunal, although various findings made by the FtT were to be retained and the conclusion that the Appellant is

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unsuccessful in seeking to rely upon his human rights (in particular his private life in the UK) is retained. The allegation of deception is relevant in relation to any further applications which the Appellant may make.

3. A copy of the decision of Judge Mandalia and I is annexed to this decision.

The Issue

4. The issue in dispute is whether the Respondent has shown (applying the usual civil standard of the balance of probabilities) that the Appellant submitted a false English language certificate for tests taken on 23 February 2012.

The Evidence

5. The Respondent continues to rely upon a generic bundle of evidence as is produced normally in appeals of this kind, together with specific evidence of the relevant entries said to relate to the Appellant in the look-up tool.

6. The Respondent has provided information regarding a separate test taken on 23 March 2012 explaining that as it was listening and reading there is no further evidence as those tests have not been audited or otherwise subjected to verification.

7. In addition, the Respondent provided a skeleton argument with Annexes attached showing more detailed information gleaned from the look-up tool. The skeleton argument explains that these entries are not produced as standard in cases such as this as they are additional matches against the data held by the Respondent. The additional evidence has been provided given the Appellant's challenge of the standard information in which he says that data identifying him as having taken the same test on 22 February 2012 and 23 February 2012 shows the evidence must be considered unreliable. The additional evidence shows the Appellant's passport number, CID personal ID, case ID and FCO application number.

8. Another part of the skeleton argument and attachments was challenged by Mr Aslam as providing new evidence which was not before the FtT and/or raising new allegations. Ms Mckenzie resisted the submission that new evidence or matters had been raised, maintaining that the evidence was no more than information about applications which the Appellant would already know, given that he had made the applications.

9. I invited Mr Aslam to identify the alleged new evidence. He identified concerns starting with paragraph 21 of the skeleton argument. Ms Mckenzie conceded that the description of a test taken on 19 September 2012 as questionable would not be pursued as it added little to the Respondent's case given that questionable tests are not usually challenged.

10. I decided that the evidence referred to in paragraphs 25 onwards was a response to a challenge at the hearing before Judge Mandalia and I to the reliability of the Respondent's evidence based on the Appellant's then counsel questioning why a person would take a third test in September 2012 when he already had a valid test from February 2012. The paragraphs and related evidence showed that just such a test took place in September 2012. If the Appellant conceded that the test took place, the evidence would not be

contentious. Mr Aslam confirmed that the Appellant now accepted that the test took place.

11. I decided that paragraphs 21-24 of the skeleton argument and the related materials were new evidence. Either those paragraphs should be treated as removed from the skeleton argument or there should be an application made under Rule 15(2A) of the Upper Tribunal Procedure Rules by the Respondent for the evidence to be admitted. If such an application was made I would be required to consider the nature of the evidence and the reason for it being produced so late (just one day before the hearing).

12. Ms Mckenzie sought instructions and confirmed that an application under Rule 15(2A) would be made. However, she was unable to explain why the evidence was admitted so late. Mr Aslam submitted that the evidence had been produced too late and failed to recognise that this was a continuation hearing with a clear remit set out in the directions of Judge Mandalia and I.

13. I refused the application to admit the new evidence for the following reasons:

    a. Rules 15(2A) specifically requires that a party seeking to rely upon new evidence must explain why it was not submitted to the First-tier Tribunal. Ms Mckennzie was unable to provide such an explanation;
    b. While Nottinghamshire and City of Nottingham Fire Authority & Anor v Nottingham CC [2011] EWHC 1918 (Ch) makes clear that the fact material is served late does not preclude its admission, the Upper Tribunal Procedure rules require me to have regard to whether there has been unreasonable delay in producing that evidence. Given its very late production with no explanation for the delay there was little basis for me to conclude that the delay was anything other than unreasonable;
    c. Caselaw generally considering the admission of late evidence has concluded that the longer the delay the more likely there will be procedural injustice and the greater the procedural injustice the less likely late evidence will be admitted. In this case the late evidence did not directly relate to the alleged use of a proxy to take the test of 23 February 2012, but to the courses he attended and applied for, the timing of such applications and the revocation of the license at a college which the Appellant had attended. It was not directly related to the test at the heart of the Respondent's allegations.

14. For all these reasons I was therefore satisfied that the overriding objective to deal with cases justly and fairly meant that the application should be denied.

15. The Appellant continues to rely upon the evidence adduced before the FtT. The evidence has not been updated or amended. I also heard oral evidence from the Appellant.

The Respondent's case

16. The Respondent says that the Appellant used an ETS certificate later found to be invalid in his application dated 28 February 2012 for leave to remain as a student. The Respondent alleges that the certificate was fraudulently obtained and the Appellant used deception in his application.

17. The Respondent relies upon more detailed look-up data than would normally be produced in such cases and notes that the Appellant has an unusual three barrel name that matches each test, as does his date of birth, passport number and other ID numbers. All of the tests taken at the centre on 23 February 2012 have been identified as invalid.

18. The Respondent's position regarding the test of 22 February 22 is that it is arguably an anomaly and that those organising the procurement of the fraudulent test result of 23 February 2012 may have administered the fraudulent test in his name twice on 22 February 2012 and 23 February 2012. The location where he undertook his test has been identified as a "fraud factory" so it is not improbable that they processed a test for him twice, not keeping proper audits of their criminal enterprise for obvious reasons. The certificate entry of 22 February 2012 therefore does not undermine the Respondent's evidence that the test of 23 February 2012 was obtained by way of proxy.

19. Ms Mckenzie submitted that account should be taken of the fact that the Appellant arrived in the UK in 2009 but had achieved no qualifications by 2012. The Appellant had his sponsorship revoked in February 2012 and just a few days later he made the application challenged by the Respondent. Given that he had had his sponsorship revoked he had no other way to extend his leave beyond making the new application for which he needed the test result. It is not credible that a person who says he was unable to sit a university exam because of kidney stone related pain could sit the English test very soon thereafter with no problem. He was unclear about the agent he says he used to assist him in booking the test and it is not credible that he would have used an agent given that he says that the college was advising him about where to sit the English tests.

The Appellants' case

20. Mr Aslam relied on the skeleton argument prepared for the FtT hearing. He agreed that the error of law decision had correctly encapsulated the case of DK & RK (ETS: SSHD evidence; proof) India [2022] UKUT 00112 IAC and maintains that that there are anomalies in the Respondent's evidence arising from the unique situation of there being two tests shown as having been taken on two consecutive days. The Appellant denies taking the test on 22 February 2012 and maintains that he took the test on 23 February 2012.

21. The Appellant had previously challenged the Respondent's evidence on the basis not only of the two consecutive tests in February 2012 but also a third test in September 2012. However, it was now accepted that he had taken the test in September 2012 and he had explained why this was necessary (in short the T1 Entrepreneur application made by him in September 2012 required a higher level of English).

22. If it was decided that the Appellant did have a case to answer, the Appellant's evidence provided a credible explanation. He had understood questions put to him and had given honest and candid answers, despite the tests having taken place more than 10 years ago, such that he should be found to be a witness of truth.

23. Ms Mckenzie had challenged the Appellant regarding his ability to take the test on 23 February 2012 given his explanation in his Witness Statement that he had been unable to sit a college exam around that time as a result of pain. However,

the medical evidence provided by the Appellant supported the Appellant's account. The Respondent has not disputed the Appellant's educational history including a five year degree course studied in Bangladesh in English.

The Law

24. As recognised by both parties, the case of DK and RK as described by Judge Mandalia and I has set out the approach to be taken in cases such as this.

25. The headnote of DK and RK provides that:

> *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.*

26. These principles are more fully articulated in paragraph 127 in particular:

> "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 in our judgment amply sufficient to prove that fact on the balance of probabilities… 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."

Findings and Reasons

27. The Appellant has challenged the reliability of the Respondent's evidence given that it shows him to have taken the same tests on both 22 and 23 February 2012.

28. It is no longer the case that the Appellant challenges the evidence that he took tests in September 2012. The only potential anomaly now therefore is the taking of the tests on two consecutive days. Clearly it would be inexplicable for a person to incur the cost of genuinely attending and taking the same test on two consecutive days. To be clear, the Appellant does not say he did. He says that he only attended on 23 February 2012 and the data relating to 22 February 2012 brings the reliability of the data into question.

29. The reliability of the data was precisely the matter addressed in DK and RK. The Upper Tribunal considered samples of data entries and evidence of how the identification is generated. The Tribunal relied on expert evidence that it was very unlikely that there were accidental errors in the production or transmission of results. If there were errors, they were very probably deliberate; for example, the expert hypothesised that a test centre might want to improve its own record of results by substituting false entries for those actually put in by the candidate. The Upper Tribunal concluded that the evidence was not infallible but it was very likely to be accurate.

30. The evidence before me includes extended data from the lookup tool records showing that: all four entries for speaking and writing tests were taken at the same centre (the London College of Social Studies); the Appellant's date of birth; his full three barrelled name and his passport number. The Appellant has not challenged the Respondent's assertion that the Appellant's name is unusual.

31. The extended data evidence bolsters the strength of the evidence provided by the Respondent.

32. In addition, the Respondent says that all tests dated 23 February 2012 at the centre were found invalid and that the centre was identified as a "fraud factory". The Appellant has not challenged these assertions. I am satisfied that the Respondent's evidence, bolstered as it is by the further data, is sufficient to mean that the Appellant has a case to answer.

33. I now turn to the Appellant's evidence.

34. The Appellant provided inconsistent and vague evidence numerous times in the hearing. For example, when asked in cross-examination about the agent he said he used to book the tests at one point he said that the agent had an office in Aldgate station but when asked further he said that the office was between Whitechapel and Aldgate. He could not describe the office further. When asked about taking the test he was at times surprisingly specific given that the test took place more than 10 years ago (for example that people sat 2m apart), but was wholly unable to provide more than a vague response when asked to describe how he completed questions. The Appellant claimed that there were 20 to 25 people in the test room but when Ms McKenzie put to him that the Respondent had identified that there were only nine people supposed to have taken the test on that day, the Appellant's evidence changed to say that he could not remember.

35. When asked how he could take the English tests apparently a short while after being prevented by kidney/back pain from sitting university exam his answers were evasive. When Mr Aslam sought to clarify the position in re-examination he said that his health was much better at the time of the 23 February 2012 exam. He initially claimed that the university exam was in December 2011 before I asked for Mr Aslam to clarify that in the context of his Witness Statement which put the exam after having started his second semester in February 2012. The Appellant then changed his evidence to say that the university exam was in February 2012.

36. Mr Aslam referred me to medical evidence in the Appellant's bundle to support the Appellant's description of having back pain and kidney pain. However, I find that evidence undermines the Appellant's claims further. The medical evidence shows that the Appellant attended hospital on 2 August 2012 "with 24 hours left iliac fossa episodic pain…CT …3mm left stone." The Appellant told me in re-examination that he had managed to undertake the English test in February 2012 because he had been admitted to hospital after the problems with the university test. There is no indication in the August 2012 discharge papers that this was a pre-existing condition. Moreover, if the Appellant has been able to provide medical evidence relating to his hospital attendance in August 2012 there is no reason why he would not have been able to provide evidence for his claimed attendance in February 2012, but no such evidence has been provided.

37. I therefore did not find the Appellant to be a credible witness.

38. Consequently, the Respondent has discharged the burden of proof on him to show that the Appellant's English test certificate for 23 February 2012 was fraudulently obtained and the Appellant used deception in his application.

39. The findings leading to the conclusion that the Appellant has not shown that there would be very significant obstacles to his reintegration in Bangladesh and the consequent rejection of his human rights appeal relying on his private life in the UK are preserved from the FtT's decision.

40. Therefore, I dismiss the appeal.

Notice of Decision

1. The appeal is dismissed.
2. As I have dismissed the appeals a fee award is not appropriate.

T Bowler

Judge of the Upper Tribunal
Immigration and Asylum Chamber

15/03/2024

Annex

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003504

First-tier Tribunal No: HU/50601/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

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Before

UPPER TRIBUNAL JUDGE MANDALIA
and
DEPUTY UPPER TRIBUNAL JUDGE BOWLER

Between

MOHAMMED RUHUL AMIN KHAN
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Murphy instructed by City Heights Solicitors
For the Respondent: Mr M Parvar, Senior Home Office Presenting Officer

Heard at Field House on 13 November 2023

DECISION AND REASONS

1. This is an appeal against a decision of First-tier Tribunal Judge Ruth ("the Judge") promulgated on 15 June 2022 ("the Decision"), dismissing an appeal by the Appellant, against a decision of the Respondent to refuse his human rights claim. In refusing that claim the Respondent alleged that the Appellant had made false representations in an application for leave to remain by virtue of submitting an invalid ETS certificate which had been fraudulently obtained. The Judge decided that the Respondent had discharged the burden on her to prove deception. It is that part of the Decision which the Appellant challenges.

2. At the heart of the appeal before us is the ETS look up tool evidence provided by the Respondent which is said to show that the Appellant had undertaken tests at the London College of Social Studies on 22 and 23 February 2012 and at Elizabeth College on 19 September 2012. All of the tests taken on 22 and 23 February 2012 were said to be invalid.

3. Permission to appeal was granted by First-tier Tribunal Judge Adio on 18 July 2022. Judge Adio decided that it was arguable that the Judge failed to follow the correct approach in dealing with the issue of the Respondent discharging the burden of proof.

4. We are grateful to the parties' representatives for their focussed and succinct submissions.

The FTT Decision

5. The Judge started the Decision by making notably strong adverse credibility findings in relation to the Appellant. The Judge found the Appellant to be a "plainly incredible witness" and to have given his account in an "implausible and materially incoherent manner" such that in relation to some parts of his evidence he had been seeking to mislead the Judge. The Judge found that parts of the Appellant's evidence completely collapsed under cross examination and he became evasive and incoherent. Other elements of his evidence were found to be incoherent and manifestly absurd or incoherent and untrue. The Judge also took into account that the Appellant had some considerable difficulty understanding quite simple questions put to him in English. His precise recollection of matters such as when he had breakfast on the day of his tests and the time taken for his journey to the tests was found to be a negative indicator of his credibility.

6. The Judge then turned to the evidence provided by the Respondent which the Judge found to be "very strange and unusual". The Judge commented:

> "I have never come across a look-up tool which asserts an appellant took multiple tests over multiple days and passed every time. It is indeed very difficult to understand why any appellant, even if they were trying to cheat, would arrange for a proxy to take a test on one day, pass that test and then arrange for proxy to take the same test on the next day, passing again. It is even stranger to suppose that a cheater would then pay for a proxy to take the test months later, the results of which could provide no useful evidence to that appellant because he had submitted his application to the respondent before the test was even undertaken. I consider these difficulties do undermine the weight I attach to the evidence relied upon by the respondent in this case."

7. The Judge turned to consider guidance in *MS (ETC _ TOEIC testing)* [2016] UKUT 00450 and concluded that the fact that the results provided by ETS appeared to be very strange indeed was not sufficient in itself to conclude that they must be entirely wrong and completely unreliable.

8. The Judge then turned to consider *DK & RK (ETS: SSHD evidence; proof) India* [2022] UKUT 00112 IAC and the guidance therein about the technical difficulties involved in substituting a fake recording for a real recording at the test centre. The Judge concluded that this made it very hard to see how the Appellant could have behaved properly on 23 February 2012 when the ETS evidence stated that all of the other tests on that day were also invalid.

9. The Judge recognised that *DK and RK* made clear that it would be possible in principle for a credible appellant to succeed in establishing in their particular case that there was no fraud, but concluded that that was not the case in this appeal.

10. As a result, the Judge concluded that:

    a. the weight attached to the evidence of the Respondent was reduced but not so far reduced that it did not satisfy the legal burden which fell upon the Respondent; and
    b. the Appellant had failed to provide credible evidence and consequently he had not taken the test as he claimed. The evidence of the Respondent was not so seriously affected by error, as the Appellant claimed, that it was unreliable.

The Appellant's Grounds of Appeal

11. In summary, the Appellant's grounds of appeal are as follows:

    a. the FtT erred in evaluating the legal burden on the Respondent in relation to the allegation of TOEIC cheating by failing to reasonably consider its findings as to the implausibility of the Respondent's evidence when assessing the totality of the evidence;
    b. the FtT irrationally relied upon the observations of the Upper Tribunal in the case of *MS (ETS – TOEIC testing)* [2016] UKUT 00450;
    c. the FtT erred in relying upon the Upper Tribunal's evaluation in *DK and RK* (where the evidence was different) or erred by failing to acknowledge findings in that case as to the strength of the Respondent's evidence were not applicable in this case in the light of the FtT's findings about multiple tests;
    d. the conclusion that the Respondent had proven the allegation of TOEIC cheating was not open to it in light of the findings made regarding the multiple tests;
    e. the FtT's assessment of the Appellant's evidence was undermined by its consideration of immaterial matters and/or by irrationality. The Judge had decided that an additional 23 March 2012 TOEIC certificate produced by the Appellant for the hearing should damage the Appellant's credibility when the Respondent had not alleged there was problem with that certificate. The Respondent

only advances evidence regarding alleged cheating and not genuine tests;

f. the FtT failed to consider a material matter and erred in principle by failing to consider why the Appellant might have given false or unreliable evidence. An appellant may embellish or exaggerate what is at the core a truthful account and the Judge failed to recognise this when deciding that implausible levels of detail counted against the Appellant.

12. Mr Murphy submitted at the hearing that the Decision indicated tunnel vision of the Judge who had started by considering the credibility of the Appellant and with that in mind had then failed to correctly consider the flaws in the Respondents evidence. The Judge had approached the consideration of whether the Respondent had discharged the burden of proof on her from the wrong starting point. This was particularly evidenced by paragraphs 55-56 of the Decision in saying that the fact that there may be a reason why the Appellant had taken the multiple tests meant that the existence of the strange ETS results was not sufficient to conclude that they must be entirely wrong and completely unreliable.

13. Furthermore, Mr Murphy submitted that in paragraph 62 of the Decision the Judge confused the legal and evidential burdens.

14. There was a further strand of concern about the evidence before the FtT: the test said by the Respondent's evidence to have been taken on 19 September 2012 was after the Appellant had made his application for leave to remain relying upon the February tests. There is no rational explanation for why a person should take a further test when they had passed the previous ones and had submitted those with their application.

15. Mr Murphy confirmed that the Appellant was not seeking to challenge the Decision in relation to the findings made about the application of paragraph 276 ADE of the Immigration Rules.

The Response of the Respondent

16. A Rule 24 response had not been provided by the Respondent. At the hearing Mr Parvar submitted that the Judge had made very detailed findings and the weight given to evidence was a matter for the Judge. *DK and RK* make clear that the Respondent's evidence is highly reliable and the lookup tool has identified a test on 23 February 2012. The fact that there are other dates identified as well does not mean that the Respondent's evidence regarding the 23 February 2012 test is unreliable. The Judge reduces the weight given to the Respondent's evidence and was right to consider various concerns such as the provision by the Appellant of a certificate relating to a test said to taken place on 23 March 2012 which the lookup tool had not identified as having taken place; as well as the various matters relating to delay and implausibility of evidence identified by the Judge.

Our decision

17. The core contention of the grounds of appeal is that the Judge's assessment of the discharge of the burden of proof by the Respondent was flawed. In *DK and RK* the approach to be taken in TOEIC appeals to consideration of the burden of proof was set out by the Upper Tribunal President and Vice President. The head note to that case states clearly that: *"The burden of proving the fraud or dishonesty is on the Secretary of State and the standard of proof is the balance of probabilities."*

18. The approach to applying that burden of proof is at the heart of this appeal and we therefore address it in some detail.

19. At [47] of the decision the Upper Tribunal Panel made clear that what had previously been considered by some to be a "pendulum" approach to the burden of proof in TOEIC cases was incorrect saying:

> "There is no sense in which procedurally a case passes backwards and forwards between the parties, giving either of them new chances or even tactical obligations to meet the evidence so far adduced by their opponent: on the contrary, each side has one opportunity only to produce all the evidence it considers relevant to the case. Further, the burden of proof does not shift from one side to the other during the course of a trial. The burden of proof is fixed by law according to the issue under examination. If it were not so, parties would not know in advance what evidence would or might be necessary to establish their cases."

20. Then at [60] the Upper Tribunal set out what it was considering in that case: was the evidence provided by the Respondent sufficient to support a finding that the matter of alleged deception was proved on the balance of probabilities. If not that was an end of the matter and the appellants would succeed. If it was then the evidence as a whole fell for consideration in order to decide whether the appeals succeeded or failed. In other words, was the evidence sufficient for it to be concluded that the Appellant had a case to answer.

21. The Upper Tribunal went on to consider the standard evidence provided by the Respondent in TOEIC cases. The Upper Tribunal made clear that the evidence should not be regarded as determinative. There may be room for error (although none of the experts involved had detected any error, as distinct from showing that there was room for error). What was clear was that there was every reason to suppose that the evidence is likely to be accurate.

22. However, that is addressing the standard evidence provided in TOEIC cases, i.e. the generic ETC Witness Statements and the usual results from the ETS look up tool.

23. With that context in mind we note further that the Up[per Tribunal went on to conclude as follows at [127-128]:

> "127. 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 in our judgment amply sufficient to prove that fact on the balance of probabilities… … 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." [underlining added]

24. In this case the evidence relied upon by the Respondent was, as the Judge identified, very unusual in showing that the Appellant had taken the same tests on two consecutive days. It was not the standard evidence which *DK and RK* found amply sufficient to discharge the burden on the Respondent to show that there was a case to answer.

25. The Judge clearly had in mind that the Respondent's evidence was "very strange and unusual". Applying the approach set out in *DK and RK* the first question should therefore have been whether that very strange and unusual evidence was such that the Appellant had a case to answer. The Judge stated at [51] that the difficulties with the Respondent's evidence undermined the weight attached to it, but then moved on to consider matters such as the Appellant's possible motives for completing multiple tests as well as the technical difficulties identified in *DK and RK* in substituting a fake recording for a real recording in the context of widespread cheating at the test centres. The Judge then notes that it was very hard to see how the Appellant could have behaved properly on 23 February 2012 when the ETS evidence stated that all of the other tests on that day were also invalid. Finally, the Judge turned to the *DK and RK* decision itself and the conclusions therein about the strength of the evidence provided.

26. The Judge has clearly taken considerable care in the Decision to make detailed findings and consider the relevant authorities. It is therefore not without hesitation that we reach our conclusion that the Judge's approach to consideration of whether the Appellant had a case to answer was flawed as we now explain.

27. While we recognise the relevance of the evidence that all of the tests taken at the particular centre on 23 February 2012 were found to be invalid, the position is different for the other matters relied upon by the Judge.

28. The first of those other matters is the Judge's consideration of a reason for the multiple tests. The Judge set out clearly that it was found very difficult to understand why any appellant would have arranged for a proxy to take a test on one day, pass it and then arrange for a proxy to take the same test on the next day. Yet later in the Decision the Judge states that there may be some good reason why an appellant would do just that. The

Judge then takes into account the possible unidentified good reason in assessing the Respondent's evidence. This appears inconsistent with the Judge's earlier statements that it was difficult to understand why that would happen.

29. The other of the matters is the reference to the conclusions from *DK and RK* about evidence which was the standard evidence unaffected by the unusual characteristics of that in this case. The statements in *DK and RK* as to the strength of the evidence in that case should not have been taken to determine the weight to be given to evidence of a different quality in this case. Here there is "material undermining the effect of the evidence" which the statement in *DK and RK* specifically excludes from the general principle of "amply sufficient" evidence.

30. These concerns in the approach adopted by the Judge are reinforced by paragraph 62 of the Decision where it appears that the Judge has taken into account the adverse credibility findings not only to conclude that the Appellant did not take the test as he claimed, but also that the evidence of the Respondent was so seriously affected by error that it was unreliable. While it is generally a matter for each judge to decide upon the order in which they set out any particular decision it is notable in this case that the Judge started by assessing the credibility of the Appellant rather than by deciding whether the Appellant had a case to answer. That in itself would not have been determinative if we were satisfied that the approach to the Respondent's evidence ultimately was not flawed. However, we are unable to reach that conclusion given the identified errors and the overall presentation of this Decision starting with consideration of the Appellant's evidence. We are concerned that such a starting point tainted the Judge's approach such that the starting point was not whether the Appellant had a case to answer.

31. We therefore conclude that the Decision must be set aside. However, the error of law in the Decision does not undermine the findings made in paragraphs 66-76 thereof which are retained. Given those retained findings we are satisfied that the remaking should take place at the resumed hearing in the Upper Tribunal.

32. The Appellant should be aware, however, that the resumed hearing will solely be considering the alleged deception (which is of relevance for any future immigration applications he wishes to make). The resumed hearing will not alter the conclusion that his appeal on human rights grounds is dismissed.

Notice of Decision

33. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside.

34. The decision will be re-made at a resumed hearing on a date to be notified to the parties. This will take place in the Upper Tribunal.

35. In the circumstances, full and detailed skeleton arguments need to be produced for the resumed hearing setting out the case for each party. In addition, given the production at the hearing before the FtT of evidence regarding a test taken on 23 March 2012 and the submission from the Appellant that the Respondent only identifies alleged invalid tests, the Respondent should provide any ETS evidence regarding that test.

36. We therefore DIRECT that:

a. No later than 28 days before the hearing the Respondent shall file and serve a copy of any ETS record regarding the test which the Appellant claims to have taken on 23 March 2012.
b. No later than 7 days before the hearing, the parties shall file and serve skeleton arguments setting out in full their legal submissions in relation to the ability of the Appellant to qualify for protection.
c. The parties are at liberty to apply.

T. Bowler

Judge of the Upper Tribunal
Immigration and Asylum Chamber

05/01/2024