Neutral Citation Number: [2023] EWCA Civ 1323

Case No: CA-2022-001867

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE UPPER TRIBUNAL**
**(IMMIGRATION AND ASYLUM CHAMBER)**

The Royal Courts of Justice
Strand, London, WC2A 2LL

Wednesday, 11 October 2023

**Before:**

**LORD JUSTICE UNDERHILL**
**(Vice-President of the Court of Appeal (Civil Division))**
**LORD JUSTICE COULSON**
**SIR LAUNCELOT HENDERSON**

**Between:**

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| **JAGTAR RAM** | **Claimant/ Applicant** |
| **- and -** | |
| **SECRETARY OF STATE FOR THE HOME DEPARTMENT** | **Defendant/ Respondent** |

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**SUSHEEL BELLARA** appeared on behalf of the **Applicant**

**COLIN THOMANN** appeared on behalf of the **Respondent**

# Judgment

**(Approved)**

**LORD JUSTICE UNDERHILL:**

1. The appellant is a national of India, now aged 33. He first came to this country on 19 September 2011 on a student visa, and in June 2013 he was granted a Tier 1 entrepreneur visa. His immigration history thereafter is a little complicated, but what matters for present purposes is that on 13 January 2020 the Secretary of State refused an application by him for further leave to remain on suitability grounds. What she alleged was that for the purpose of the application for the entrepreneur visa, which was eventually granted in 2013, he had submitted a certificate of proficiency in English (the so-called TOEIC certificate) which he had obtained by having the oral part of the test taken for him by a proxy. The test was administered by Educational Testing Services ("ETS") and taken by the appellant at New London College ("NLC") on 18 July 2012.

2. The appellant appealed against that decision. His appeal was initially dismissed by the First-tier Tribunal ("FTT"), on appeal to the Upper Tribunal ("UT"). The decision of the FTT was set aside, and it was directed that the decision should be remade following a *de novo* hearing before the UT itself. On 21 July 2022, UT Judge O'Callaghan dismissed the appeal. On 19 August 2022, he refused permission to appeal.

3. On 27 March 2023, Snowden LJ granted permission to appeal to this Court on two grounds, which he summarised as follows:

> (1) that the UT placed excessive reliance on the decision and findings in *DK and RK v Secretary of State for the Home Department* [2022] UKUT 00112 (IAC); the UT was wrong and did not give sufficient reasons for its conclusion that the entirety of the tests taken on 18 July 2012 at the NLC were fraudulent; and the UT did not properly analyse the appellant's written and oral evidence that he had personally taken his test or give reasons for rejecting that evidence; and
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> (2) that the UT did not properly take into account the evidence as to the appellant's proficiency in English as evidenced by his

> IELTS certificate in 2009 and his proficiency in English at the UT hearing in 2022.

Snowden LJ accepted that ground 1 had a realistic prospect of success. He doubted whether the same was true of ground 2, but he granted permission on it so that the case could be considered in the round.

4. The appellant has been represented before us by Mr Susheel Bellara of counsel, who also appeared for him in the UT and indeed the FTT. The Secretary of State has been represented by Mr Colin Thomann of counsel, although in the UT she was represented by a senior presenting officer.

5. I need not recapitulate the history of the TOEIC litigation, which has generated a great deal of case law. The correct approach for a tribunal which has to determine whether an applicant for leave to remain used a proxy in the spoken English part of the ETS test was most recently set out by a panel of the UT comprising the President, Lane J, and the Vice President, Mr Mark Ockelton, in *DK and RK*, being the decision referred to in ground 1. It carried out a careful review of the evidence about both the reliability of the method by which ETS determined particular results to be invalid and of its system for matching results to individual candidates (the so-called chain of custody). It also noted the evidence that some ETS test centres were "fraud factories", where organised cheating was widespread, if not universal. One of those centres was NLC, where the appellant took his test. The organisers at NLC had been convicted of conspiracy to facilitate breaches of immigration law, and the UT quotes extensively from the judge's sentencing remarks. At paragraphs 119 to 125 of its reasons the panel examined what it called two strands of the evidence about such fraud factories. At paragraphs 126 to 129, under the heading "General Conclusions", it said:

> 126. 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 the test centres and the candidates working in collusion.

> 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.
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> 128. 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 SSHD*. 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.
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> 129. 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.

6. Turning to the present case, the Secretary of State's case in the UT that the appellant had cheated in taking the TOEIC test was based partly on the evidence of the ETS audit results and look-up tool but also on the fact that NLC was established in *DK and RK* to have been a fraud factory. More particularly, the evidence showed that in 12 of the 16 spoken English tests taken at NLC on 18 July 2012, including the appellant's, a proxy had been used, with the tests in the remaining four cases being "questionable". Likewise, over the period between March 2012 and May 2013, 74% of TOEIC speaking and writing tests were found to be invalid, with the remainder being questionable. The presenting officer also submitted that the appellant's failure to ask ETS for a copy of the tape of his test was indicative of guilt; but, to anticipate, that was a matter to which the judge said he did not intend to attach weight in his decision.

7. The appellant's evidence in rebuttal consisted of a witness statement, initially prepared for the FTT hearing but used again in the UT, in which he asserted in terms that he took every component of the test himself and that he was deeply aggrieved and upset by the allegation that he had cheated. He said that he had no motive to cheat, because his level of spoken English was always very good, referring among other things to the fact that he had been educated in English in India and that he had had to demonstrate proficiency

in English when he applied for his student visa. He also referred to the fact that he had to use English in his business, but that of course was a business which had not been started at the time that he took his test because it was dependent on the grant of his visa.

8. The appellant gave oral evidence to the UT confirming the contents of his statement and was cross-examined by the presenting officer. We have been supplied with the appellant's solicitor's note of his evidence, which Mr Thomann confirmed was agreed as far as it went. Though it is by no means a perfect note, it is sufficient to make the points which Mr Bellara sought to draw from it. It shows that the appellant amplified his witness statement to a limited extent, among other things by referring to the test which he used for the purpose of his initial application for admission as a student, which was a so-called IELTS test taken in 2009. On that test he scored 5.5, which corresponds, to quote from the official notes, to what is described as being a "modest user" who "… has partial command of the language, coping with overall meaning in most situations, though is likely to make many mistakes … should be able to have basic communication in his own field."

9. The judge gave a full and careful summary of both parties' evidence at paragraphs 14 to 18 and 19 to 27 of his reasons respectively, and of their submissions at paragraphs 28 to 35. His analysis and conclusions appear at paragraphs 36 to 45. He begins by referring to the approach to the burden of proof established in *DK and RK*. In that connection, he notes that Mr Bellara conceded that the Secretary of State had a strong *prima facie* case. That concession was in truth inevitable in view of the passage from the judgment in *DK and RK* which I have already quoted.

10. The judge then goes on at paragraph 37 to say:

> "I am entitled to observe that the appellant secured an IELTS certificate in 2009 and it was not disputed by Mr Lindsay that the appellant had been taught in the English language up to the equivalent of A level. I observe that the appellant gave evidence in the English language and appeared to me to be proficient when doing so. However, the weight which can be given to that fact is extremely limited, on account of the passage of time since the disputed test in July 2012 and the fact that there might be any number of reasons why

> a person who can speak English would have chosen to use a proxy: *MA (ETS – TOEIC testing)* [2016] UKUT 450(IAC) [2016] UKUT 450 (IAC), at [57]."

11. At paragraphs 38 to 41 the judge summarises in very broad terms the background to the TOEIC cases and the conclusions in *DK and RK*. At paragraph 42 he summarises the evidence supporting the Secretary of State's case that the appellant was guilty of fraud, namely both the result of the ETS audit in his own case and the pattern of cheating at NLC. He continues at paragraphs 42 to 45 as follows:

> "42. Returning to this appeal, the Look Up tool establishes that the appellant's speaking and writing scores were deemed to be invalid by ETS. The evidence confirms that 75% of the tests undertaken on 18 July 2012 were found to be invalid and 25% were considered questionable. Further, the *Project Façade* document confirms that within the fourteen months running from March 2012 to May 2013, during which time the appellant took his tests, 74% of the 1,423 TOEIC speaking and writing tests were considered invalid and the rest questionable. Not a single test was identified as establishing no evidence of invalidity and so not withdrawn. I again note the criminal convictions arising from the police investigation into New London College.
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> 43. I do not lose sight of the fact that the appellant contests the allegation of fraud and has done so since at least 2016. He explained with care his personal circumstances, both as to attending the test centre, taking the required tests and the subsequent impact the allegation of fraud has had upon him. I have considered his evidence with care. The high point of his case, as accepted by Mr Bellara, is that he came to the United Kingdom having studied the English language until twelfth standard in India and having secured his IELTS certificate in 2009. However, the IELTS certificate relied upon simply confirms that prior to his arrival in the United Kingdom in September 2011 his level of English was modest and not of the high standard he has sought to subsequently assert. It is not his case that he undertook further study of the English language, such as by means of diploma studies, from the date he secured his IELTS certificate to his arrival in this country in September 2011. Consequently, on his arrival in this country some 10 months prior to his attendance at New London College' test centre, his command of the English language was no higher than 'partial command', being able to cope with overall meaning in most situations, though 'likely to make many mistakes'. Whilst there may have been an improvement during the ten months in this country, I note that there may be many reasons as to why somebody with a reasonable command of the English language might

> use a proxy taker, for example fear of the adverse impact of failure, or a concern as to failure consequent to nerves.
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> 44. The evidence relating to New London College is significant in that it establishes that there was a high level of fraud, and criminality, being exercised at its test centre. Even accepting that the appellant may have improved his command of the English language in the short time he was present in this country, I am satisfied that on the day in question, the 18 July 2012, the entirety of the test centre was devoted to fraudulent testing.
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> 45. I find on the balance of probabilities that the respondent has established that the appellant used a fraudulently obtained TOEIC certificate in support of his September 2012 application and so exercised deception in his application for leave to remain in this country"

12. I have already quoted the grounds on which Snowden LJ gave permission to appeal. As developed by Mr Bellara in his skeleton argument and more particularly in his oral submissions before us, ground 1 can be summarised as follows. It is clear from paragraph 127 of the judgment in *DK and RK* that the strong *prima facie* case established by the generic evidence can be rebutted by "credible evidence" adduced by the applicant. The appellant in this case had given clear and explicit evidence both in his witness statement, and more importantly, in his oral evidence asserting that he had taken the test himself. That evidence had been consistent, both in the original hearing in the FTT and in the UT, and had not been shaken in cross-examination. The judge had not in his reasons addressed that evidence with any specificity or said why he rejected it. In the absence of reasons for rejecting it, the judge should in fact have found that it was sufficient to discharge the evidential burden of proof resulting from the generic evidence; or, even if that were not the case, the appeal should still be allowed for inadequacy of reasons.

13. I cannot accept that submission, which does not fairly reflect the approach taken by the judge. He was entitled to, and did, take as his starting-point in paragraph 42 both the fact that the appellant's result was found to be invalid by ETS – that is, on the basis that the voice was that of a proxy – and the fact that NLC was an established fraud factory. Those findings, as the UT makes clear in *DK and RK*, make it not only probable but highly probable that he had in fact cheated. He was nevertheless obliged to consider the appellant's evidence to the contrary. He recognised that and considered it fully at

paragraph 43, focusing on the main point which had been made before him by Mr Bellara related to the standard of the appellant's English. But it is one thing to say that the appellant's evidence had to be considered; it is another to say that it was obliged to be accepted. It was the judge's task to decide whether that evidence outweighed the effect of the generic evidence; and the message of *DK and RK* is that a mere denial is very unlikely to do so.

14. Mr Bellara says that the appellant's evidence amounted to more than a mere denial, but except in the most literal sense I cannot accept that. It is true that he adds a few details to his account of having taken the test himself - about how he chose NLC as the college to take his test, how he travelled there, and the numbers of people present and the like. He also (a point to which I will return) gives evidence about his proficiency in English. But none of that very limited amplification of the bare assertion that he took the test was capable of casting serious doubt on the reliability of the results. The fact that the oral evidence was given consistently and with apparent conviction, and thus was credible if viewed in isolation, is not enough. The question for the judge was whether it was sufficient to discharge the evidential burden of proof created by the generic evidence, and he was fully entitled to reach the conclusion that it did not.

15. As regards the evidence about the appellant's standard of English at the time that he took the test, which is the subject of ground 2, I can see nothing wrong with the judge's reasoning in paragraph 43 and, certainly nothing amounting to an error of law with which the court could interfere. Mr Bellara effectively acknowledged that this was very much a secondary point in his grounds of appeal, as Snowden LJ had already observed.

16. One other point which was initially relied on by Mr Bellara was that there was no evidence to support the judge's finding at the end of paragraph 44 that all the tests taken at the NLC on 8 July 2012 were fraudulent. It is not clear to me that by the end of his oral submissions Mr Bellara was persisting in this point, but in any event I do not accept it. It was a finding which the judge was fully entitled to make on the basis of the evidence that 12 out of the 16 results were invalid, and the remaining four were questionable.

17. Finally, and very much as a footnote, I should note that Mr Thomann drew attention to what he said was a typographical error in paragraph 100 of the judgment in *DK and RK*, where the figure of 80 in the eighth line of the paragraph should, he says, be 18. The paragraph in question relates to Mr Thomann's own cross-examination in that case, so he is in a good position to help on this. I only mention this because in his written submissions Mr Bellara had sought to make a point about the difference between the numbers being tested in *RK*'s case and the numbers in the present case, though that was not in fact a point that he adopted in his oral submissions. I find it hard to see how the error in question could be relevant in another case, but out of abundance of caution I am happy to record what Mr Thomann told us.

18. For those reasons, I would dismiss this appeal.

**LORD JUSTICE COULSON**:

19. I agree. It seems to me that the judge dealt fully and fairly with the evidence, as my Lord has said, and that any attempt by this court to go behind that evidence would be contrary to principle, see in particular paragraphs 114 to 115 of *FAGE v Chobani* [2014] EWCA Civ 5, and *Volpi & Delta Ltd v Volpi* [2021] EWCA Civ 464, in particular paragraph 2.

**SIR LAUNCELOT HENDERSON:**

20. I agree with both judgments.

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