



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/01569/2016
IA/01571/2016**

THE IMMIGRATION ACTS

**Heard at Field House
On the 7 June 2022**

**Decision & Reasons Promulgated
On the 14 October 2024**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MD IQBAL HOSSAIN

&

UMMAY SHARMINA

(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:

For the Appellant: Mr D Clarke, Senior Home Office Presenting Officer

For the Respondents: Mr P Turner, Counsel, instructed by Wilden Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of the First-tier Tribunal allowing on human rights grounds the appeal of the respondents, hereinafter “the claimants”, against decisions of the Secretary of State, in each case on 18 March 2016, refusing the second claimant, Mrs Sharmina, leave to remain as a Tier 2 (General) Migrant and refusing the first claimant, Mr Hossain, leave to remain as her dependant.
2. The first claimant was identified as someone who had supported an earlier application for leave with a TOEIC certificate from Educational Testing Services (ETS) that had been obtained improperly by cheating and he was held to be a person whose presence in the United Kingdom was not conducive to the public

good. The second claimant's application was refused as a consequence of her being awarded zero points in each relevant category. Essentially the Secretary of State took the view that the second claimant's application was not supported by any relevant evidence in any category.

3. The thrust of the Secretary of State's grounds of appeal is that the First-tier Tribunal gave unlawful weight to an All-Party Parliamentary Group Report (APPG) on TOEIC and in any event failed to carry out the necessary individual assessment. It followed that the First-tier Tribunal's conclusion that the first claimant was not a TOEIC cheat was unlawful and with that the decision of the First-tier Tribunal was unsustainable.
4. In order to consider this argument it is necessary to look with some care at exactly what the First-tier Tribunal decided.
5. The judge began by noting, correctly, that the claimants are married to each other and that the first claimant was given leave to enter the United Kingdom in 2010 and his leave was extended until 31 December 2014. The application leading to his leave being extended until 31 December 2014 is the application which, according to the Secretary of State, was supported by a fraudulently obtained TOEIC certificate. The second claimant entered the United Kingdom in October 2013 with leave as a Tier 4 (General) Dependent Partner and her leave expired on 31 December 2014.
6. On 30 December 2014 the claimants each applied for further leave to remain, the second claimant applied as a Tier 2 (General) Migrant and the first claimant as her dependant.
7. A child was born to the claimants in November 2016.
8. As indicated above, the applications were refused in letters dated 18 December 2016. In the case of the first claimant the application was refused because he was identified as a TOEIC cheat who had used a fraudulently obtained certificate in an earlier application and in the case of the second claimant because she had not produced the required documentation and so could not satisfy any of the mandatory categories relating to sponsorship, salary, English language ability and maintenance.
9. The claimants had prepared witness statements. The first claimant denied cheating and gave evidence in support of that contention. The second claimant accepted that her application could not succeed because she had not produced mandatory documents. They each maintained that their removal would be contrary to their human rights.
10. The first claimant relied particularly on extracts from the APPG on TOEIC dated 18 July 2019.
11. The Secretary of State relied on the standard generic material that is familiar to people who have had to decide cases of this kind.
12. The Decision and Reasons shows standard directions in law, including reliance on well-known cases. There was also a reference to **R (N) v Mental Health Review Tribunal (Northern Region) [2006] QB 468** which the judge relied upon to support the contention that the standard of proof, the balance of probabilities, is "flexible in its application" and "in particular the more serious

the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities.”

13. The judge began by looking at the second claimant’s case. At paragraph 12 of the Decision and Reasons the judge noted that the first claimant “conceded that she cannot meet those requirements and her case on appeal is not put on that basis.” The reference to “those requirements” is clearly a reference to the requirements of the Immigration Rules. At paragraph 25 the judge recorded that the second claimant had been “unable therefore to show compliance with any of the Tier 2 requirements”. The judge allowed the appeal because the judge decided to allow the first claimant’s appeal with the result that both the claimants had ten years’ lawful residence which enabled them to make a further application.
14. The grounds of appeal to the Upper Tribunal make it plain that the Secretary of State’s concern was that the decision to allow the first claimant’s appeal was wrong and as the second claimant’s case was dependant on his case the decision to allow the second claimant’s appeal was necessarily wrong too.
15. I consider now the decision in the case of the first claimant.
16. At paragraph 36 of the Decision and Reasons the judge asked herself, appropriately, if the generic evidence was sufficient to show:

“on balance a reasonable suspicion that there was corruption in the TOEIC test at the centre in question and at the time when [the first claimant] took his test.”
17. At paragraph 49 the judge concluded that the “Secretary of State has failed to meet the initial evidential burden upon her in relation to this allegation of fraud.”
18. As I will explain below, this conclusion was reached particularly after reading the APPG Report and at paragraph 43 the judge quoted approvingly key findings in that report, including a finding that there was no “chain of custody” for the voice files so, by implication, there was no basis for concluding that what was identified as a recording of an impersonator was in any way connected to a particular applicant. There was also some concern that a false positive rate, thought to be as low as one percent, was insufficiently low for the evidence that an impersonator was used to be reliable.
19. The judge made a further finding at paragraph 50 which I set out below because this has become particularly important. The judge said, after saying at paragraph 49 that the Secretary of State had failed to meet the initial evidential burden that:

“I am reinforced in this by an obvious error which appears on the face of the SOURCE DATA record produced by ETS, noting his test result was invalid, and relied upon to make the allegation. In this record [the first claimant] is said to be a citizen of the UK. This is the same error which appears in the SOURCE DATA record of the witnesses to the APPG – clearly this error infected many of these records, and no ‘innocent’ explanation of this error is forthcoming.”
20. I am happy to confirm that the judge described accurately the datasheet which does identify the first claimant as a citizen of the UK.

21. At paragraph 53 of the Decision and Reasons the judge went on to explain how her finding that the first claimant was not dishonest means that the claimant could rebut any suggestion of dishonesty made by the Secretary of State and, with some confidence, make a further application.
22. Before me, the Secretary of State before me relied particularly on the decision of this Tribunal, by the president Mr Justice Lane and the Vice President Mr C M G Ockelton in **DK and RK (ETS: SSHD evidence; proof) India [2022] UKUT 00112 (IAC)**.
23. Mr Turner supported his arguments with a document entitled "Written Submissions Following Promulgation of **DK and RK**".
24. The short point is that **DK and RK** set out to be a very thorough examination of the evidence generally available in ETS cases and particularly the All-Party Parliamentary Group Report.
25. According to that decision the APPG material was not particularly helpful. There was little if anything in it that was new. It was an overview of the available evidence and relevant only to the extent that it set out in a convenient form evidence that had been recorded elsewhere. The decision also emphasised that the burdens of proof do not switch and, rather than the courts adopting a consciously swinging burden of proof which might have been suggested by earlier decisions **DK and RK** made clear that the burden of proving dishonesty is on the Secretary of State on the balance of probabilities and no more needs to be said. The point is that the generic evidence establishes the prima facie case. Further evidence raised in reply is capable of dislodging the inference to be drawn without such evidence and it must be considered.
26. The problem in the present appeal is that the judge misunderstood the nature of the APPG Report and gave it weight that is just incompatible with the analysis of its value determined by this Tribunal in **DK and RK**. I appreciate that the decision in **DK and RK** was not promulgated until well after the First-tier Tribunal made its decision. It came out on 25 March 2022, but that is not the point. It is a very thorough analysis by a very senior division of this Tribunal and where the judge in the First-tier Tribunal disagrees in the analysis of the same facts the First-tier Tribunal Judge is simply wrong. The reasons for the decision in **DK and RK** existed when the judge heard the case even though were not set out in a decision of the Upper Tribunal.
27. Mr Turner realised that in order to his assist his client he had to undermine the decision in **DK and RK**.
28. A particular point he took is that the decision was wrong because it did not have regard for the decision of the Court of Appeal in **Alam v SSHD [2021] EWCA 1538**. In his note he said
"it is alarming that the UT's determination of **DK and RK** contains no reference to **Alam**, despite it being a decision which is binding on the Upper Tribunal."
29. Given that he appeared in **DK and RK** one must wonder why he did not draw it to the Upper Tribunal's attention but he did not and neither did anyone else. I agree with Mr Clarke that reliance on the decision in **Alam** to somehow undermine the decision in **DK and RK** is entirely misconceived. There the

Court of Appeal was considering an appeal against a decision in judicial review proceedings and neither the Court of Appeal nor the Upper Tribunal was concerned there with the detailed analysis of the value of the APPG Report. There the Tribunal (Dove J) referred to a decision of William Davis J (as he then was) where William Davis J had accepted evidence from a Professor French that the overall number of “false positives” was likely to be less than one percent. This has no impact on subsequent findings of the Tribunal about the value of the APPG Report. I suspected no mention of it was made in **DK and RK** because it was not thought to be relevant.

30. I do not consider it to be anything that undermines the decision in **DK and RK**.

31. I set out below paragraphs 84 and 85 of **DK and RK**. the Tribunal said:

“84 The process of checking the linking of results to candidates has been described as using a spreadsheet – the ‘lookup tool’. That system was devised by Mr Green who gave oral evidence. He did not claim to know very much about the contents of the data, and accepted that he had not traced any material through the system from test entry to spreadsheet entry. His clear evidence, however, was that the lookup tool is reliable, and that no erroneous entry has been identified. Mr Turner cross-examined, and did not make any progress against that assertion. Mr Sewell explained in his evidence how the unique number used throughout the investigation process is generated by the candidate logging in for the test.

85. The important thing is not the way the information is tabulated, but its source. We have before us samples of data entries and evidence of how the identification is generated. First, a candidate’s name and other details are registered with ETS by the test centre. Then, when the candidate attends for the test and enters the personal information demanded, a unique registration number is generated by the system automatically: this number identifies not merely the candidate but also the session and location and the part of the test being undertaken. The accuracy of the number can be checked by seeing that it falls within the range of consecutive numbers allocated automatically to the tests in the session in question. As Ms Giovanetti put it in written submissions, a candidate generates his or her own unique ID/test number, which should appear on the audio files, the test certificates, and all other documentation relating to the test. She also observes that there is no evidence of any error in this regard in relation to either of the appellants. Professor Sommer has made extensive suggestions about what else could have been done to identify test entries with candidates, but those suggestions have to be understood in this context.”

32. The Upper Tribunal, unlike the First-tier Tribunal, was assisted by leading Counsel for the Secretary of State, and concluded that, ordinarily, the lookup tool will establish the “prima facie case”, although it is not determinative of the final outcome. It follows that in this case the First-tier Tribunal’s decision, made without the assistance of **DK and RK**, is so wrong that it is unsustainable. Properly understood the APPG Report just did not support the conclusion that the Tribunal reached.

33. Paragraph 50 of the Decision and Reasons is interesting. The reliability of the look up tool is reinforced by findings I **DK and RK** made on evidence that was not before the First-tier Tribunal in this case. If the judge had allowed the appeal *because* the look up tool wrongly indicated that the first claimant was a UK citizen then this appeal might have taken a different course but that is not

what the First-tier Tribunal Judge did. We do not know how the Secretary of State might have challenged such a finding. The point did not arise. For my part it is by no means obvious that an error in describing a person's nationality necessarily infects the value of the lookup tool, especially when it is remembered that there is a computer generated continuity mechanism which is outlined in the quotation from **DK and RK** above. However that is a point that will be considered if it arises. What is quite plain here, as Mr Clarke correctly pointed out, is that the judge did not decide that the Secretary of State did not discharge the initial burden because of any error in identity and nationality. The judge made it plain that the Secretary of State's case failed without reference to the false nationality because that is what the judge said clearly at paragraph 49.

34. This really is sufficient. I have considered Mr Turner's submissions as a whole which are fresh in my mind because I only heard them yesterday, but nothing can get round the fact that the judge has given the All-Party Parliamentary Group Report weight it does not deserve in law. This is a case that has to be redetermined and although the first claimant might face a difficult task, it is absolutely clear that he is entitled to consideration of the case he chooses to make and this has really not happened.

Notice of Decision

35. The Secretary of State's appeals are allowed.
36. I find that First-tier Tribunal erred in law. I set aside its decision and I direct that the cases be redetermined in the First-tier Tribunal.

Jonathan Perkins

Signed
Jonathan Perkins
Judge of the Upper Tribunal

Dated 16 June 2022