Neutral Citation Number: [2025] EWCA Civ 36

Case No: CA-2024-000551

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)
Upper Tribunal Judge Perkins

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 January 2025

Before :

LORD JUSTICE SINGH
LADY JUSTICE NICOLA DAVIES
and
MR JUSTICE COBB

- -

Between :

AMANAT HUSSAIN CHOWDHURY	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Zane Malik KC and Zeeshan Raza (instructed by **Lawmatic Solicitors**) for the **Appellant**
Michael Biggs (instructed by the **Treasury Solicitor**) for the **Respondent**

Hearing date: 18 December 2024

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Approved Judgment

This judgment was handed down remotely at 10 a.m. on Thursday, 23 January 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Singh:

Introduction

1. Mr Amanat Hussain Chowdhury ("the Appellant") is a Bangladeshi national, who was born on 10 November 1988. This appeal arises from the Secretary of State's refusal of the Appellant's application for leave to remain in the United Kingdom ("UK") on the ground that his English language certificate was considered to have been obtained dishonestly.

2. The First-tier Tribunal (Immigration and Asylum Chamber) ("FTT") allowed the Appellant's appeal but the Upper Tribunal (Immigration and Asylum Chamber) ("UT") set aside that decision and remitted the case to the FTT for further consideration of the facts. The Appellant now appeals to this Court with the permission of Andrews LJ, granted on 26 July 2024.

3. The Appellant is represented by Zane Malik KC and Zeeshan Raza and the Respondent by Michael Biggs. The Court is grateful to them all for their written and oral submissions.

Factual background

4. The Appellant entered the UK on 11 September 2011 on a Tier 4 (General) Student visa, valid from 30 August 2011 to 20 April 2014. He had previously had an application for such a visa refused on 13 January 2011.

5. The Appellant then successfully applied on 24 July 2013 for a further Tier 4 (General) Student visa, which was valid from 16 August 2013 to 19 April 2015.

6. On 3 April 2015 the Appellant made an application for further leave to remain, relying on the right to respect for private and family life in Article 8 of the European Convention on Human Rights ("ECHR"). The Respondent refused this application by a decision which at that time attracted an out-of-country right of appeal. The Appellant remained in the UK and, following the decision of this Court in *Ahsan v Secretary of State for the Home Department* [2017] EWCA Civ 2009; [2018] HRLR 5, made another application on human rights grounds, relying additionally on health grounds.

7. That application was refused by the Respondent in a letter dated 9 December 2021. In this decision, the Respondent found that the Appellant had made false representations when making his application of 24 July 2013 for the second Tier 4 visa. He was found to have relied on a fraudulently obtained Test of English for International Communication ("TOEIC") certificate dated 19 February 2013. The test centre was at Eden College International. The certificate was deemed invalid by the issuing body, the Educational Testing Service ("ETS"). The Respondent concluded that the Appellant did not meet the requirements of the Immigration Rules, and the refusal of his leave to remain would not breach Article 8 of the ECHR.

8. The Appellant has since obtained the voice recording associated with his language test, which does not show his voice. He claims that it has been "mixed up with others".

9. The Appellant appealed to the FTT. He submitted that he had a strong private life in the UK for the purposes of Article 8 and had not cheated in his English test.

The judgment of the FTT

10. FTT Judge Cohen handed down his decision on 28 December 2022, having heard oral evidence on 20 July 2022.

11. The issue of fact before the FTT was whether the Appellant had obtained his TOEIC certificate dishonestly. The FTT Judge concluded that the Appellant was a credible witness: see paras 9-13. He was satisfied on the facts that the Appellant had taken the test himself and allowed the appeal. I will return to the FTT's reasoning in more detail below. For now, it will suffice to note that the only authority to which the FTT referred was the decision of the UT in *SM and Qadir v Secretary of State for the Home Department (ETS – Evidence – Burden of Proof)* [2016] UKUT 229 (IAC), although it was referred to simply as "*Qadeer*".

12. I should also mention that, at para 14, the FTT Judge said that he had had regard to the report of the All-Party Parliamentary Group on TOEIC. He said:

> "I further have regard to the APPG report on TOEIC submitted to me. It was indicated therein that students were just given 6 short clips taken from a longer recording and that many of the students reported that the recordings were not of them. There was no chain of custody for the voice files rendering them unreliable. There were no checking systems at ETS."

The judgment of the UT

13. Permission to appeal to the UT was granted by FTT Judge Adio on 12 May 2023, who noted that the FTT did not appear to have been aware of the decision of the UT in *DK and RK (ETS: SSHD evidence, proof) India (No 2)* [2022] UKUT 112 (IAC). The Respondent appealed to the UT on the basis that failure to follow that judgment was a material misdirection in law.

14. The decision under appeal to this Court is that of UT Judge Perkins dated 16 July 2023. The UT set aside the FTT's decision as wrong in law and remitted the appeal for a fresh hearing.

15. The UT found that the FTT had failed to substantiate its finding that the Appellant had not cheated on the TOEIC test. While the parties accepted that *DK and RK* was drawn to FTT Judge Cohen's attention, the UT found that due regard had not been had to the guidance provided in that case.

16. UT Judge Perkins recognised that the FTJ had had the decision in *DK and RK* drawn to his attention: see para 23. UT Judge Perkins was aware that he should be slow to conclude that it was ignored. He also recognised that the decision in *DK and RK* was not intended to be conclusive or determinative: see para 26. Each case has to be decided on its own facts. Nevertheless, UT Judge Perkins concluded that the FTT "was obliged not only to make clear conclusions but give some indication of how those conclusions were reached": see para 26.

17. UT Judge Perkins noted, at para 27, that "there is a formidable hurdle in the path of someone wishing to dislodge the *prima facie* presumption of dishonesty." The FTT Judge had not explained how he reached the conclusion that he did. UT Judge Perkins said that the fact that the Appellant had no need to cheat is something to consider in the mix but cannot, on its own, support a finding that the Appellant was not a cheat any more than being a person of good character is a defence to a criminal charge. Further, the finding that there was a plausible explanation for taking the test at a particular test centre is not conclusive or even sufficient on its own to dislodge the *prima facie* case established in *DK and RK*.

18. At para 28, UT Judge Perkins said that the problem is that the Appellant's test result is unreliable and, in the absence of a persuasive explanation consistent with the reasoning in *DK and RK*, the conclusion that the certificate was obtained dishonestly is very hard to avoid and a proper explanation has to be given for avoiding it. That had not happened here.

19. Nevertheless, UT Judge Perkins did not decide to substitute his own findings of fact for those of the FTT. Rather he decided to remit the case to the FTT. This is because he acknowledged that there may be a good explanation but it did not emerge from the FTT decision before him.

The Appellant's Submissions

20. The Appellant's sole ground of appeal is that there was no error of law in the FTT's decision and that it was therefore not open to the UT to set aside that decision.

21. In support of that ground of appeal Mr Malik submits that:

    (1) The FTT is a specialist fact-finding tribunal; it is not open to the UT to overrule it on the facts.

    (2) Where a point is not expressly mentioned by the FTT, the UT should, on well-established authority, be slow to infer that it has not been taken into account.

    (3) The UT should exercise judicial restraint, and should not assume that the FTT misdirected itself just because not every step in its reasoning is fully set out.

    (4) The issues decided by the FTT and the basis for its decisions may be set out "directly or by inference", citing *UT (Sri Lanka) v Secretary of State for the Home Department* [2019] EWCA Civ 1095, at para 27.

(5) Judges in the FTT are taken to be aware of the relevant authorities without needing to refer to them specifically.

(6) Different tribunals may reach different conclusions on the same case without one being irrational or wrong in law; where one tribunal has reached a more generous view of the facts, that does not mean that it has made an error of law.

22. On this basis, the Appellant submits that the FTT's findings of fact were "rational and reasoned", and available to it on the evidence.

23. In response to the UT's analysis, the Appellant submits that:

(1) The FTT did explain how it reached its conclusions, and that it was not obliged to expressly refer to all matters in its decision.

(2) The absence of a need for the Appellant to cheat was one of multiple factors contributing to its conclusion, and in any case the FTT was entitled to afford weight to this.

(3) The burden of proof was on the Respondent, and the Appellant provided a credible explanation in any case.

24. The Appellant submits that the FTT was aware of *DK and RK* and that its decision is entirely consistent with the following principles which are to be derived from the judicially approved headnote in that decision:

(1) The evidence brought by the Secretary of State in ETS cases is sufficient to discharge the burden of proof on her, and as such it requires a response from the Appellant.

(2) The burden of proof is on the Secretary of State to prove fraud or dishonesty.

(3) That burden of proof does not switch between the parties, but is rather "assigned by law".

The Respondent's Submissions

25. On behalf of the Respondent Mr Biggs submits that the UT was correct to find that the FTT's reasoning was incomplete in light of the guidance in *DK and RK*. He emphasises the following conclusions of the UT in *DK and RK*:

(1) Strong evidence is required to displace the Respondent's generic evidence that there was cheating at centres such as the one used by the Appellant here.

(2) There is no "reason to suppose" that the voice recognition processes used to detect TOEIC fraud were defective.

(3) The ultimate question in a TOEIC fraud case is whether the Respondent has proven TOEIC cheating on the totality of the evidence, and without a shifting burden of proof.

(4) Incompetence in English is a "possible source of corroboration" for cheating but "it must not be thought that the converse applies […] there are numerous reasons why a person who could pass a test might nevertheless decide to cheat".

26. In a Respondent's Notice, upon which he relies only if he needs it, Mr Biggs makes the following additional points:

(1) There was no indication that the FTT appreciated the guidance in *DK and RK*, where similar evidence was deemed "amply sufficient" to prove fraud, instead citing the earlier case of *SM and Qadir*, where it was given considerably less weight.

(2) The FTT relied on the burden of proof shifting back to the Respondent as the Appellant had obtained the TOEIC voice recordings linked to his test, but claimed that they did not concern his test. The FTT did not recognise the fact that the TOEIC voice recordings of another voice supported the allegation that a proxy had taken the exam.

(3) The FTT did not recognise that other evidence of proficiency in English did not support the authenticity of his TOEIC test, and did not have due regard to *DK and RK* on this point.

(4) The FTT erred in relying on the views of the APPG at para 14 of its decision.

(5) The FTT erred in failing to recognise that the Appellant's "credible and logical explanation" as to why he chose his test centre did not answer the Respondent's evidence.

(6) The FTT did not make "any, or any adequately reasoned" finding as to the credibility of the Appellant's account.

The burden of proof

27. I take the following summary of the relevant principles largely from Phipson on Evidence (20th edition, 2022; Second Supplement, 2024).

28. The burden of proof governs which party to litigation has to prove a particular fact and may fall on different parties depending on what the issue is.

29. In civil cases the general rule is that the legal or "persuasive" burden of proof lies upon the party who substantially asserts the affirmative of the issue: see Phipson, para 6-06. As the same passage goes on to state, the question where the burden of proof lies on an issue is settled as a question of law, it remains unchanged and does not shift during the course of a trial.

30. The legal or persuasive burden is to be contrasted with the "evidential" burden. This obliges the party on whom the burden rests to adduce sufficient evidence for the issue to go before the tribunal of fact: see Phipson, at para 6-02 (in the Second Supplement to the 20th edition, 2024). At para 6-03, Phipson states that it is wrong to speak of the

persuasive burden "shifting" during the course of a trial but notes that writers sometimes speak of the evidential burden shifting as evidence is led.

31. As Phipson states, at para 6-02, the evidential burden may have significance where, by statute, presumption or otherwise, a presumption arises in favour of one party, or certain facts are treated as being *prima facie* evidence.

32. Furthermore, as Phipson states at para 6-17, presumptions may be presumptions of law or of fact and may be either rebuttable or irrebuttable. Where a presumption operates, the court may or must draw a certain conclusion. On most occasions this will be in the absence of evidence in rebuttal, thus assisting the party who bears the burden of proof on that issue. As Phipson states at para 6-18, a rebuttable presumption of fact, unlike a rebuttable presumption of law, does not shift the persuasive or evidential burden. It simply describes the readiness of the court to draw certain repeated inferences as a result of common human experience.

33. In the specific context with which cases of the present kind are concerned, where it is alleged by the Secretary of State that an applicant has acted dishonestly, I should note what was said by Green LJ in *Ullah v Secretary of State for the Home Department* [2024] EWCA Civ 201; [2024] 1 WLR 4055, at para 22:

> "The legal burden of proving that the appellant acted dishonestly lies upon the SSHD. There is a three-stage process: (i) the SSHD first must adduce *prima facie* evidence of deception (the first stage); (ii) the appellant then has a burden of raising an innocent explanation which satisfies the minimum level of plausibility (the second stage); and (iii) if that burden is discharged, the SSHD must establish on a balance of probabilities that this explanation is to be rejected (the third stage). …"

The early history of the TOEIC litigation

34. The history of the TOEIC litigation up to 2017 was helpfully set out by Underhill LJ in *Ahsan*, at paras 22-33. For present purposes it is only necessary to give a very brief outline of that history.

35. The evidence supplied by the Secretary of State in TOEIC cases developed over time. In the earlier cases she had sought to rely on generic evidence which was found to be unsatisfactory in certain respects. Nevertheless, in *SM and Qadir* (a decision of McCloskey P and UTJ Saini), it was held by the UT to be (just) sufficient to transfer the evidential burden to the appellant to show that they had not cheated. At para 102 of its judgment, the UT re-emphasised that every case in this context would inevitably be fact-sensitive.

36. The Secretary of State appealed against the decision in *SM and Qadir*, which was heard by this Court under the title *Majumder and Qadir v Secretary of State for the Home Department* [2016] EWCA Civ 1167, in which Beatson LJ endorsed the observation that every such case is fact-sensitive: see para 27.

37. Subsequently, the available evidence before the UT was fuller than it had been in *SM and Qadir*. At para 33 of his judgment in *Ahsan*, Underhill LJ accepted a submission for the Secretary of State that the forensic landscape had changed since the Secretary of State's initial and "frankly stumbling" steps in this litigation. Accordingly, the observations of the UT in *SM and Qadir* "should not be regarded as the last word." In accepting the Secretary of State's submission to that effect, Underhill LJ was not, however, prepared to accept that, even in such specially strong cases, the observations in the earlier case law to the effect that a decision where the applicant has cheated is fact-specific are no longer applicable or that there is no prospect of their oral evidence affecting the outcome.

The judgment of the UT in *DK and RK*

38. In *DK and RK* the President of the UT (IAC), Lane J, sat with the Vice-President, Mr C M G Ockelton.

39. The judicially approved headnote in *DK and RK* states the following:

> "*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.*"

40. At para 47, the UT said that 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.

41. As the UT noted at para 50, difficulties arise because the phrase "the evidential burden" appears to be used in two different senses. Where it is used of a burden on a party who does not have the legal burden of proof, it means that a matter that might otherwise come into consideration in discharging that burden does not fall for consideration at all unless the party with the evidential burden adduces sufficient evidence to raise the matter. The UT took an example from the criminal law: provocation as a defence to a charge of murder (before the common law on this was changed by Parliament by introducing the defence of loss of control). As the UT observed, the burden of disproving provocation rests on the Crown but no disproof of it is necessary unless there is sufficient evidence to raise the defence as an issue.

42. At para 51, the UT said that where, however, an evidential burden is said to lie on the party that does have the legal burden of proof on an issue, it cannot be a matter of

making that an issue, because it already is an issue. As it went on to say at para 52, what is identified here is a test of whether the party with the burden of proof has adduced sufficient evidence to enable a finding of fact in that party's favour. To put this another way, might the tribunal of fact find the matter proved on the basis of the evidence if that evidence were uncontroverted?

43. At para 53, by reference to the decision of the Privy Council in *Jayasena v The Queen* [1970] AC 618, at 624 (Lord Devlin), the UT said that it would be better not to call the evidential burden in either sense a burden *of proof*, because an evidential burden can be discharged by evidence falling far short of proof. Evidential burdens have, however, this in common with the burden of proof: "they do not really shift".

44. Having considered much fuller evidence than had been available at the time of *SM and Qadir*, the UT then conducted a detailed analysis of TOEIC cases at paras 103-129. The UT considered particular aspects of this kind of case, for example the significance of voice recognition results. It was of the view that "there are numerous reasons why a person who could pass a test might nevertheless decide to cheat": see para 108. It observed that, in the context of the test centres as "fraud factories", it was "overwhelmingly likely that those to whom the proxy results are now attributed are those who took their tests by that method": see para 119.

45. In its "General conclusions", the UT said that where the evidence derived from ETS (i) was uncontradicted by credible evidence, (ii) was unexplained, and (iii) was not the subject of any material which undermined its effect in the individual case, it was "amply sufficient to prove that fact on the balance of probabilities": see para 127. In using the phrase "amply sufficient", the UT expressly differed from the conclusion of the UT in *SM and Qadir*, which it considered had been on evidence which was different and which had been explored in a less detailed way. The UT now said, at para 128:

> "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."

46. The judgment in *DK and RK* was approved by this Court in *Secretary of State for the Home Department v Akter and Others* [2022] EWCA Civ 741, at para 29, where Macur LJ said:

> "I do not accept Mr Wilcox's initial submission that *DK and RK (2)* has no precedential authority in establishing that the 'generic' evidence relied upon by SSHD in the 'fraud factory' cases is sufficient to satisfy the evidential burden, because it is neither a 'starred' nor a Countries Guidance case. The cases arise from the same factual matrix, 'such as the same relationship or the same event or series of events.' (See *AA (Somalia) and SSHD* [2007] EWCA Civ 1040, [69]). The judgment in *DK and RK (2)* includes a comprehensive account of the evidence which the UT heard and its analysis of the same

> and upon which it based its decision. That is, the UT in *DK and RK (2)* demonstrably undertook the forensic examination and reached the definitive conclusions that were not open to Dove J upon the evidence before him in *Alam*. There would need to be good reason, which would inevitably mean substantial fresh evidence, for another UT to revisit and overturn the determination. This is not a situation, as Mr Wilcox suggested on behalf of HA, in which different Tribunals could reasonably reach different conclusions upon the same factual matrix."

47. The doctrine of precedent in the strict sense applies to questions of law, and indeed the notion of a factual precedent has been described as "exotic": see *S and Others v Secretary of State for the Home Department* [2002] EWCA Civ 539; [2002] INLR 416, at paras 28-29 (Laws LJ). The concept of a factual precedent has nevertheless come to be regarded as having some utility, in particular in the immigration context: see *S and Others* itself, and the above decision of this Court in *Akter*, which is of particular importance in the present appeal, because it was directly concerned with the status of the UT's decision in *DK and RK*.

Analysis

48. On behalf of the Appellant Mr Malik advances one ground of appeal: that there was no error of law in the FTT's decision allowing the Appellant's appeal and therefore it was not open to the UT to set aside that decision. He reminds us that the jurisdiction of the UT is confined to considering points of law: see section 11(1) and section 12(1) of the Tribunals, Courts and Enforcement Act 2007.

49. Mr Malik also relies on the summary of the relevant principles set out by Green LJ in *Ullah*, at para 26:

> "Sections 11 and 12 of the TCEA 2007 restrict the UT's jurisdiction to errors of law. It is settled that:
>
> (i) The FTT is a specialist fact-finding tribunal. The UT should not rush to find an error of law simply because it might have reached a different conclusion on the facts or expressed themselves differently: see *AH (Sudan) v Secretary of State for the Home Department* [2008] AC 678 at para 30;
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> (ii) Where a relevant point was not expressly mentioned by the FTT, the UT should be slow to infer that it had not been taken into account: e.g. *MA (Somalia) v Secretary of State for the Home Department* [2011] 2 All ER 65 at para 45;
>
> (iii) When it comes to the reasons given by the FTT, the UT should exercise judicial restraint and not assume that the FTT

> misdirected itself just because not every step in its reasoning was fully set out: see *R (Jones) v First-tier Tribunal (Social Entitlement Chamber)* [2013] 2 AC 48 at para 25;
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> (iv) The issues for decision and the basis upon which the FTT reaches its decision on those issues may be set out directly or by inference: see *UT (Sri Lanka) v Secretary of State for the Home Department* [2019] EWCA Civ 1095 at [27];
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> (v) Judges sitting in the FTT are to be taken to be aware of the relevant authorities and to be seeking to apply them. There is no need for them to be referred to specifically, unless it was clear from their language that they had failed to do so: see *AA (Nigeria) v Secretary of State for the Home Department* [2020] 4 WLR 145 at para 34;
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> (vi) It is of the nature of assessment that different tribunals, without illegality or irrationality, may reach different conclusions on the same case. The mere fact that one tribunal has reached what might appear to be an unusually generous view of the facts does not mean that it has made an error of law: *see R (MM (Lebanon)) v Secretary of State for the Home Department* [2017] 1 WLR 771 at para 107."

50. On behalf of the Respondent Mr Biggs does not take issue with that summary of the relevant principles. His core submission, however, is that the fundamental deficiency in the reasoning of the FTT was a failure to grapple at all with the guidance given by the UT in *DK and RK*. As will become apparent, in essence I accept that core submission. I do not think that Mr Biggs needs the additional points he makes in the Respondent's Notice (summarised above) to succeed in this appeal.

51. Since the ground of appeal concerns whether the FTT made an error of law, and so the issue of its nature is one to which there can only be one right answer, it is for this Court to reach its own conclusion on whether the FTT did err in law, rather than to consider whether the UT was entitled to interfere with the decision of the FTT: see *Yalcin v Secretary of State for the Home Department* [2024] EWCA Civ 74; [2024] 1 WLR 1626, at para 52 (Underhill LJ).

52. It is telling that *SM and Qadir* was referred to by the FTT but no reference at all was made to the decision in *DK and RK*. This was not simply a question of omitting reference to that decision but a failure to grapple with the main points of principle made by the UT in that case. As Mr Biggs fairly accepts, it was not necessarily incumbent on the FTT simply to follow what had been said in *DK and RK*. But, if the FTT was to depart from what was said there, it had to grapple with the issues and explain why it was taking a different view.

53. Mr Malik submits that the skeleton argument on behalf of the Appellant (not drafted by him) which was before the FTT had expressly drawn attention to the decision in *DK and RK*: see e.g. para 6. Significantly, however, in my view, the submission

made on behalf of the Appellant at that time was that there were a number of clear errors in that decision: see para 8 of Annex 2, which was a summary of the relevant law.

54. Furthermore, as Mr Biggs submits, the reasoning of the FTT in the present case discloses a number of propositions which are inconsistent with what the UT had said in *DK and RK*.

55. The entirety of the reasoning of the FTT Judge in the present case can be found at paras 7-14 of the decision. For present purposes it will suffice if I set out paras 7-8 in full:

> "7. The burden of proving that the decision of the respondent was not in accordance with the law and the relevant Immigration Rules rests upon the appellant. The standard of that proof is the balance of probabilities. The relevant date for the purposes of this appeal is the date of the hearing. In relation to the allegation of having relied on false representations, the burden of proof moves to the respondent. If this is met, the burden of proof reverts to the appellant.
>
> 8. I have regard to the case of *Qadeer*. I find that the evidence produced by the respondent is sufficient to meet the initial burden. However, I find it highly significant that the appellant contacted the Home Office and the administrator for ETS in order to request the voice recording of the test taker. I find that the appellant has acted in the way that would be expected of an innocent individual who has taken the test himself. I find that the respondent in failing to address or respond to the same has failed to meet the burden reverting to him. I find that the appellant has met the evidential burden of demonstrating that he took the test himself and I find that the appellant's appeal falls to be allowed accordingly."

56. In my judgment, the FTT fell into legal error in two fundamental respects.

57. The first error is that the reasoning at paras 7-8 is confused as to the burden of proof. The reasoning of the FTT does not appear to appreciate the distinction between the legal or persuasive burden of proof and an evidential burden. It is also wrong as a matter of law, because it states that the burden of proof "moved" as between the Appellant and the Respondent. The correct legal analysis is that the burden of proof on the issue of dishonesty was at all times upon the Respondent but there was an evidential burden on the Appellant to respond to the *prima facie* satisfaction of that burden by the Respondent's evidence.

58. The second fundamental error into which the FTT Judge fell is that there was a failure to engage with the reasoning of the UT in *DK and RK* at all. It is not simply that the decision is not referred to, because that would not by itself demonstrate that the FTT had had no regard to it. The problem is a more fundamental one: the reasoning of the

FTT is on its face inconsistent with that of the UT in *DK and RK*, for example on the sufficiency of the generic evidence adduced by the Respondent in cases of this kind, and in relation to the question of whether an appellant may have acted dishonestly even though his English was of sufficient quality that he did not need to have a proxy attend the test centre for him. As UT Judge Perkins concluded in the present case, there may be good reasons on the particular facts of this case why the Appellant is nevertheless to be believed but the FTT had to grapple with the implications of the UT judgment in *DK and RK*. Rather than grappling with it, it simply ignored it. That was an error of law.

59. Accordingly, the UT was correct in the present case to conclude that there was an error of law in the decision of the FTT, and to remit the matter to the FTT, so that factual findings can be made on a correct legal basis.

Conclusion

60. For the reasons I have given I would dismiss this appeal.

Lady Justice Nicola Davies:

61. I agree.

Mr Justice Cobb:

62. I also agree.