Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/03044/2019**

THE IMMIGRATION ACTS

Heard at Manchester (via Skype)	**Decision & Reasons Promulgated**
On 18 February 2021	**On 03 March 2021**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

JACK JACOB GOMES
(Anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Paramjorthy instructed by ABN Solicitors.
For the Respondent: Mr Melvin Senior Home Office Presenting Officer.

DECISION AND REASONS

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Hendry ('the Judge') promulgated on the 23 March 2020 in which the Judge dismissed the appellant's appeal against the Secretary of State's refusal of his application for leave to remain in the United Kingdom on human rights grounds.

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2. Permission to appeal was granted by the Upper Tribunal on a renewed application the operative part of the grant being in the following terms:

1. At paragraph 97 of the decision the judge observed that the ETS SELT source data document adduced by the respondent identified the appellant as having taken a test on two dates: 23 January 2013 and 6 February 2013. At paragraph 98 the judge recorded that the Presenting Officer could not explain the apparent existence of a second test and the judge stated he would proceed by considering only the test dated 6 February 2013 (which is the date the appellant said he took the test).

2. It is arguable that the Judge erred by failing to consider whether ETS identifying the appellant as having taken two tests when it was common ground that he would only have taken one (and there was no need for a second test to be taken) is indicative of a mistake in the ETS data provided to the respondent. Arguably, a mistake in the data provided by ETS fundamentally undermines the respondent's claim that the appellant engaged a proxy test taker.

3. Secretary of States Rule 24 reply dated 17 February 2021 reads:

Respondent submissions

Firstly, the Respondent apologises for the lack of response to the Tribunal directions in this matter. There appear to be been some serious administrative difficulties over the summer/ autumn months with directions issued by the Tribunal.

Secondly, it will be respectfully submitted that First tier Tribunal (FtT) judge Hendry in a lengthy detailed determination has considered all aspects of this appellant's appeal.

The Respondent's position is that there is no material error in law in the decision of Judge Hendry.

Judge Hendry has found, giving lengthy sustainable reasons that this appellant did not take his TOEIC test on 6 February 2013.

In this case the allegation to be considered by the FtT is whether Mr G took the TOEIC test on 6 February 2013 and the certificate issued was fraudulently obtained.

It is clear that from the decision that the judge had considered, p98, the ETS evidence of a second test some days earlier. Given the extensive fraud that took place at Queensway College the Respondent cannot be expected to provide an explanation for the ETS data and any submission made on that evidence would be at best speculative given the fraud that was taking place at Queensway College.

The Respondent fails to see how ETS evidence of another test taken by this appellant, some days earlier, has any bearing on the issue in this appeal where there is no issue taken with that evidence.

The answer to the core question, did the appellant take the test on 6 February 2013, has been considered and emphatically answered in the negative by the FtT having considered all of the evidence and in considering the previous 2017 finding by the FtT that this appellant was not a credible witness which was qualified by the judge. The previous Judge (FtT Judge Roger) has considered the documents submitted by this appellant or his then representatives and found them be false/ unreliable and the appellant himself not credible on the evidence.

What is clear from the findings made by the judge was that she did not believe that Mr G actually took his English language test. No test certificate was produced by this appellant.

The evidence and findings relating to Queensway college are set down by the Judge between p93-98 of the decision.

Although the Presenting officer could not comment on the source data provided by ETS relating to the test of 23 January 2013 that evidence was not relied upon by the Respondent and in any event denied by the appellant.

The FtT found that that Mr G's appeal fails on suitability ref Appendix FM/276 ADE, and not 322(1A) as alleged in the Grounds of Appeal, and that the appellant showed an intention to use deception.

It is submitted that the challenges to the findings at 113, 114, 115, 117, 121 & 143 have no merit and are no more than an attempt to re-argue the case.

It will be argued that the findings of the FtT were open to her to make on the evidence before her having heard the appellant give evidence.

Error of law

4. The appellant sought to challenge the conclusion of the Judge that he had used the services of a proxy to undertake an English language test. The submission at [5] of the grounds that the Judge had erred in assessing whether the appellant's application fell to be refused pursuant to paragraph 322(1A) of the Immigration Rules is noted, but the appellant was not refused on that basis but rather pursuant to suitability requirements of Appendix FM.

5. Whilst Mr Paramjorthy is critical of the decision maker that is not the issue under appeal which is that of the Judge. The Judge clearly took all the available evidence into account noting that the material relied upon by the Secretary of State provided by ETS included two test results. The Judge deals with this issue at [97 – 98] in the following terms:

> 97. The ETS Test analysis showed that the appellant had taken the test on 6 February 2013 at Queensway College, which was not in dispute. The ETS SELT source data confirmed that the appellant's test was deemed invalid. His scores were 200 for speaking and 190 for writing. The certificate number given was 0044202939005005. The appellant did not produce a copy of his certificate which would have confirmed that number, but he did not deny that he had taken the test on that day, and that the test data produced did relate to him. The Source Data also referred to a test taken by a person with the same name, nationality and date of birth as the appellant, on 23 January 2013. That test was determined by ETS to be 'questionable'.
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> 98. The appellant was insistent that he had only taken one test, namely that on 6 February 2013. Mr Walter was unable to clarify the apparent existence of a second test, and, I conclude that I could draw no meaningful conclusions from this, and my findings have been made on the basis that the appellant took only the test on 6 February.

6. The Judge was aware of applicable case law and assessed the material provided by the Secretary of State to discharge the initial evidential burden, concluding having done so at [107] that the evidence was sufficient to discharge that burden.

7. The burden then moved to the appellant to provide a reasonable explanation for the discrepancy. The Judge identified in the evidence the extent of the systematic abuse by those at Queensway College in producing fraudulent results. The Judge also noted an earlier determination by a differently constituted First-tier Tribunal together with the appellant's evidence and submissions made on his behalf. Between [119 – 121] the Judge wrote:

> 119. The appellant has produced a number of arguments against reliance on the Home Office evidence, but has not given any real explanation which would support him in his claim to have taken the test honestly. On the other hand, the SSHD seemed to have clear evidence that the appellant's test had been determined as invalid, together with many others taken at that Centre on that day.
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> 120. I noted that Judge Roger had not found the appellant to be a credible witness, albeit that she had heard no oral evidence from him. I did have the benefit of such evidence, but found the appellant, overall, to be a poor historian, and I did not find his evidence persuasive or credible.
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> 121. On balance, and taking account of the shifting burden of proof in such an appeal, I consider that the SSHD has made out his case that the appellant did obtain the test certificate by deception, and that he then used fraud to seek leave to remain in 2013. The SSHD had by the time of the hearing produced evidence which went well beyond the original generic evidence, with information specific to this appellant, and appeared to meet the criteria required in **SM & Qadir** to satisfy the relatively low evidential burden required of the SSHD.

8. In addition to considering the evidence with the required degree of anxious scrutiny the Judge gives adequate reasons in support of not only the findings set out above but also the overall finding that the appellant was unable to succeed under the Immigration Rules and that the respondent's decision is proportionate. The weight to be given to the evidence was a matter for the Judge. It is not made out the Judge erred in law in a manner material to the decisions by arriving at conclusions that are either irrational or outside the range of those reasonably available to the Judge on the evidence. Whilst the appellant may not like the outcome and seeks a more favourable resolution to enable him to stay in United Kingdom, that does not establish material legal error sufficient to warrant the Upper Tribunal interfering any further in this matter.

Decision

9. There is no material error of law in the Immigration Judge's decision. The determination shall stand.

Anonymity.

10. The First-tier Tribunal made no order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed……………………………………………….
Upper Tribunal Judge Hanson

Dated 22 February 2020