IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004186

First-tier Tribunal No:
HU/53744/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

9th January 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE JARVIS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

LAXMAN RAO SATTU
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr T. Lindsey, Senior Home Office Presenting Officer
For the Respondent: Ms V. Easty, Counsel instructed by David Benson Solicitors Ltd.

Heard at Field House on 18 December 2023

DECISION AND REASONS

Introduction

1. The Secretary of State appeals against the decision of First-tier Tribunal Judge S George (hereafter "the Judge") promulgated on 15 July 2023. In order to maintain consistency with the decision of the First-tier Tribunal I shall refer to the parties as they were at that hearing.

2. Permission was initially refused by First-tier Tribunal Judge Landes on 22 September 2023 before being granted by Upper Tribunal Judge Kamara on 30 November 2023. In the grant of permission there was no limitation on the grounds open to the Respondent.

Relevant background

3. On 8 June 2011, the Appellant entered the United Kingdom with a valid Tier 4 student Visa. There were further applications and decisions including a refusal which was successfully appealed by the Appellant to the Tribunal in 2013. It appears that there was a hiatus before the Respondent claimed to have served the refusal decision in respect of the outstanding application (dated 20 November 2012) on 19 November 2015.

4. The Appellant disputed ever receiving the decision and pointed to the fact that his representative at that time was struck off as a solicitor on 26 February 2015.

5. On 1 July 2021, the Appellant applied for Indefinite Leave to Remain on the basis of 10 years lawful long residence in the UK which was then refused by the Respondent in a decision dated 15 July 2021.

The Judge's decision

6. The Appellant appealed to the First-tier Tribunal and the appeal was heard by the Judge at Taylor House on 30 June 2023. At the hearing, the Appellant was represented by counsel and there was no representation on behalf of the Respondent.

7. The Judge decided to proceed in the absence of the Respondent, and it was only after the conclusion of the hearing that the Judge became aware of an email sent by the Respondent at 10:16 that morning asking for an adjournment.

8. At §17, the Judge considered that the decision of the earlier judge was her starting point. At §18, she recorded that the Appellant's CAS at that time had been revoked through no fault of the Appellant's and the previous judge had found that the Appellant had not been notified of this by the Respondent within the required period.

9. In the Respondent's decision, the Respondent asserted that the Appellant had practised deception by providing an ETS TOEIC certificate which had been obtained using fraud.

10. In dealing with the issues surrounding the alleged service of the refusal letter dated 19 November 2015, the Judge noted the Respondent's case that the letter was sent to Immigration and Work Permit Limited who were said to be the Appellant's representatives at that time. The Judge also recorded that Royal Mail had been unable to confirm the status of the item with the tracking number given by the Respondent, (§21).

11. At §23, the Judge concluded, on the totality of the evidence including the Appellant's later attempts to obtain a decision from the Respondent, that the Appellant did not receive the 19 November 2015 decision.

12. In respect of the TOEIC issue, the Judge recorded at §24 that the Appellant was notified of the Respondent's checks on the TOEIC certificate by email on 15 August 2015. On 22 May 2018, the Appellant's representatives at that time wrote to the Respondent and referred him to the Upper Tribunal's decision in SM and Qadir v SSHD (ETS – evidence – burden of proof) [2016] UKUT, ("SM"). At §26, the Judge also noted the Respondent's assertion that the Appellant's test in September 2012 was found to be invalid and confirmed by the lookup tool.

13. In assessing the Respondent's evidence, the Judge found variably that the Respondent's evidence did not deal with the Appellant's circumstances in a detailed way and did not specify exactly how he had been dishonest (§27); the Respondent's ETS evidence was generic (§29) and concluded that the Respondent had not met the first stage of the burden of proof in showing that the Appellant had been dishonest when obtaining his ETS certificate.

14. Bringing these findings together, the Judge found as a fact that the Appellant had been living in the UK since 8 June 2011 and that he had only been informed of the refusal of his 2012 application in the current refusal dated 15 July 2021 (at §30). The Judge then found that the Appellant had been residing continuously in the United Kingdom for more than 10 years and met the requirements of paragraph 276B(v) of the Immigration Rules - the Judge also found this was determinative of the Appellant's human rights appeal, (§33).

The error of law hearing

15. I heard oral submissions from Mr Lindsey who spoke to the two grounds of challenge as fleshed out in the Respondent's renewed application for permission to appeal to the Upper Tribunal and argued that the Judge had materially erred in: 1) not having sight of the Upper Tribunal's reported decision in respect of ETS/credibility issues in DK and RK (ETS: SSHD evidence, proof) India [2022] UKUT 112 (IAC), ("DK") and 2) not applying the Upper Tribunal's earlier decision in respect of the assessment of credibility and the motivation for cheating in SSHD v MA [2016] UKUT 450 (IAC), ("MA").

16. Mr Lindsey also argued that the reason given by the Tribunal for granting permission amounted to a third point, that being that the Judge erred by placing too much reliance upon the positive credibility findings in the Appellant's earlier appeal which did not involve any ETS issues.

17. I then heard helpful rebuttal submissions from Ms Easty who, in my view, quite correctly acknowledged that the Respondent's strongest point related to the failure of the Judge to apply DK. She nonetheless argued that the

Judge had made sufficient findings for the decision to otherwise be compliant with the Upper Tribunal's reported decision.

Findings and reasons

18. Having heard the oral submissions at the error of law hearing, I indicated to the representatives that I was persuaded that the Respondent had established that the Judge materially erred.

19. The simple point is that, despite the detailed representations of the Respondent in his review and in the Appellant's written submissions in response, the Judge nonetheless applied only the much earlier reported decision of the Upper Tribunal in SM.

20. It is patently clear from the head note of the Upper Tribunal's decision in DK that the evidence and issues involved in the consideration of ETS cases have significantly evolved since the Upper Tribunal's decision in SM.

21. The presidential panel in DK, provided the following general guidance:

> *"108. As Professor Sommer said to the APPG, one of the features of evidence that one would look for is corroboration. He said "it might have been different if there was corroboration, but very often in circumstances there wasn't". We are unable to comment on "very often", but there are two sources of possible corroboration that may well be present when individual cases are examined: the individual's own account of the test and the evidence (if any) of fraud in the session at which that individual's test was taken. A further possible source of corroboration may be incompetence in English (i.e. English at a lower level than that required for the test); but it must not be thought that the converse applies: as the then President pointed out in SSHD v MA [2016] UKUT 450 (IAC) at [57], there are numerous reasons why a person who could pass a test might nevertheless decide to cheat. This is a point that seems to have escaped Professor Sommer in his comments to the APPG."*
>
> *"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.*

> *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."*

22. In my view, the Judge plainly materially erred by failing to have any regard to the Upper Tribunal's guidance. The Judge's failure to have sight of the most recent reported decision also means that she materially erred in finding that the Respondent's evidence was insufficient to establish the initial allegation of deception on the basis of the look up tool evidence being too generic.

23. The Judge also entirely failed to have sight of the Upper Tribunal's re-emphasis in DK of the observations made by the earlier presidential panel in MA in respect of the motivations for cheating, as per §108 of DK above.

Notice of Decision

24. On the basis of my findings so far, the Judge's conclusions in respect of the ETS deception element are unsustainable and must be set aside in their entirety.

Remittal to the First-tier Tribunal

25. I have ultimately decided that the matter should be remitted to the First-tier Tribunal on the basis that full deception findings need to be made in accordance with the current guidance from the Upper Tribunal.

Preserved findings

26. I do not however conclude that the entirety of the decision should be set aside. The Respondent did not challenge the Judge's conclusion that the Respondent had failed to serve the 19 November 2015 decision upon the Appellant in response to his application made on 28 November 2012.

27. I therefore preserve the Judge's finding that the Respondent did not lawfully serve the notice of the 2015 decision on the Appellant meaning that his 2012 application remained outstanding and that his current application for Indefinite Leave to Remain (made in 2021) effectively stands as an application to vary the 2012 application.

28. The remaking appeal shall be heard in the First-tier Tribunal by a judge other than Judge S George.

I P Jarvis

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

2 January 2024