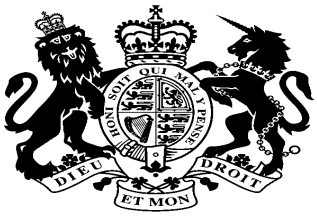

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/03308/2019

THE IMMIGRATION ACTS

Heard at Manchester by Skype	**Decision & Reasons Promulgated**
On 12 August 2020	**On 28 October 2020**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS KRUPALIBEN SANIKUMAR PATEL
(Anonymity direction not made)

Respondent

Representation:
For the Appellant: Mr C Bates Senior Home Office Presenting Officer.
For the Respondent: Mr Z Malik instructed by Law Lane Solicitors.

ERROR OF LAW FINDING AND REASONS

1. The Secretary of State appeals with permission a decision of First-tier Tribunal Judge Cockrell ('the Judge') promulgated on 23 August 2019 in which Mrs Patel's appeal was allowed on human rights grounds pursuant to Article 8 ECHR.

Background

2. Mrs Patel is a national of India born on 1 March 1985. The Judge records her immigration history noting that following service of IS151A form on 1 April 2015 a removal notice was served due to the fact the Secretary of State concluded that Mrs Patel had gained leave to remain in the United Kingdom by deception. Mrs Patel subsequently applied for leave to remain as the dependent spouse of her partner in his Tier 2 (Skilled Worker) application which was refused. In August 2016 Mrs Patel applied for leave to remain outside the Immigration Rules as the spouse of a settled person which was varied on 28 February 2017 to reliance upon her right to respect of family and private life (10-year route). The application was refused by the Secretary of State in a letter dated 11 February 2019. The appeal against that decision came before Judge Cockrill.
3. The decision-maker concluded Mrs Patel was not eligible to remain in the United Kingdom as a partner, parent or child under Appendix FM as her partner was not British, settled, or in the United Kingdom as a refugee or with humanitarian protection leave and because Mrs Patel lives as part of the family unit with her family member. Under the private life route the decision-maker concluded Mrs Patel fell for refusal on the grounds of suitability under section S – LTR 4.2 on the basis she had made false representations for the purpose of obtaining a previous variation of leave. A reference to an application of 31 May 2012 in which Mrs Patel submitted a TOEIC certificate from Educational Testing Service (ETS). The decision-maker states that Mrs Patel's scores taken from the test on 17 April 2012 at the Synergy Business College of London have been cancelled by ETS leading the decision-maker to be satisfied that Mrs Patel fraudulently obtained her certificate and used deception in the application of 31 May 2012.
4. The decision-maker considered paragraph 276ADE(1)(iii) but noted Mrs Patel had only lived in the United Kingdom for 8 years and 1 month at the date of the application and it was not made out she could satisfy the required minimum period of 20 years continuous residence. It is also not accepted Mrs Patel will face very significant obstacles to integration into India.
5. Thereafter the decision-maker considered whether exceptional circumstances had been made out sufficient to warrant a grant of leave pursuant to article 8 but found no such exceptional circumstances existed in her case for the reasons set out in the Refusal letter. The decision-maker took into account the appellant's child pursuant to section 55 Borders, Citizenship and Immigration Act 2009 noting the child was born in the UK on 8 January 2013 but was not a qualifying child. It was therefore found any interference with a protected right will not be contrary to the best interests of the child and was proportionate to any interference.
6. The matter came before Judge Cockrell sitting at Taylor House on 6 August 2019 who sets out findings of fact between [27 – 34] of the decision under challenge in the following terms:

27. This appellant faces the allegation that she had used deceptive means in order to gain a TOEIC. I have set out already the point that the burden of proof does lie upon the respondent and the 3 stage process that needs to be undertaken when analysing a case of this nature.

28. What is critically important in this appeal is that Mr Malik has made plain that this issue of whether or not the appellant submitted a fraudulently obtained TOEIC by using a proxy to sit the test has already been determined by this Tribunal. Reference in that regard is made to the decision of the First Judge in relation to the appellant's husband and the specific findings of fact made by that First Judge. What is also very important indeed to understand in the context of this appeal is that the findings were quite emphatic that the respondent had not discharged the burden and deception had not been shown.

29. The only point really made on behalf that the respondent by Mr Nath is that I should pay regard to the report of Professor French. Mr Malik responds to that by emphasising that that report predated the decision of the First Judge by a considerable degree and that no proper explanation has been provided as to why it was not forthcoming before that First Judge.

30. Already in this document I have set out in some detail the relevant authorities to which my attention was very helpfully drawn by Mr Malik. The conclusion that I reach is that those findings of fact made by the First Judge in relation to this appellant are a suitable and proper starting point for me on conventional **Devaseelan** principles. What is also important to stress is that nothing has really been added before me which would enable a different conclusion to be reached properly.

31. I am guided by the case law to which my attention was drawn, notably the decision in **Mubu**, and further then the Court of Appeal decision in **BK (Afghanistan).** In the light of those authorities it seems to me that the conclusion that has to be drawn in the circumstances is that the factual findings of that First Judge are to be maintained, as of course that means inevitably that the appellant succeeds in her appeal.

32. For the avoidance of any doubt, I was not provided with any explanation at all by Mr Nath as to why that report from Professor French had not been made available to the First Judge.

33. In this case there was no application made for an anonymity direction and no such direction was made by me in the circumstances.

34. In conclusion, therefore, I adopt the findings of fact made in relation to this appellant by that First Judge and in the circumstances her appeal is allowed. It is allowed on human rights grounds (Article 8).

7. The Secretary of State sought permission to appeal asserting, inter alia, the Judge made a material error of law in allowing the appeal by default without fully considering any evidence from the appellant and in not allowing the Secretary of State to prove her case. The grounds assert the Judge failed to take into account witness statements provided in support of the allegation Mrs Patel had exercised deception by the use of a proxy to undertake the English language test. The grounds assert on the basis of the material provided the Secretary of State had discharged the requisite evidential burden which fell to the appellant to offer an innocent explanation which has not occurred in this case. It is

asserted the Judge erred in failing to appreciate that the evidential burden had been met. The application for permission also asserts there was no good reason to allow the appeal under article 8.

8. Permission to appeal was granted by another judge of the First-tier Tribunal on 17 December 2019 on the basis it is said to be arguable that the Judge has not considered in adequate detail the evidence submitted by the Secretary of State which was absent from the spouse's earlier appeal, and the Judge simply relied upon the earlier judgement which was based on the lack of documentation then produced.

The written submissions

9. The Secretary of States initial submissions:

WRITTEN SUBMISSIONS ON ERROR OF LAW INTRODUCTION:

1. The SSHD asks the Tribunal to admit this document as the SSHD's written submissions in response to the UT's directions.
2. The SSHD refers to Mrs. Patel as the Appellant ("A") for ease of reference with the FtT decision.

THE SSHD'S SUBMISSIONS ON THEGROUNDS OF APPEAL:

3. The SSHD has laid out two Grounds of Appeal in the document dated 2nd September 2019 relating to the FtT's application of Devaseelan and the later findings in respect of Article 8 ECHR.
4. In respect of Ground 1, the SSHD asks the UT to treat this document as laying out the particular ambit of that legal challenge.
5. The SSHD respectfully asserts that the FtJ did not lawfully apply the Court's decision in The Secretary of State for the Home Department v BK (Afghanistan) [2019] EWCA Civ 1358 ("BK")
6. The ratio of that decision is laid out at §39& §44: "There has been some discussion in the cases about the juridical basis for the Devaseelan guidelines. The authorities are clear that the guidelines are not based on any application of the principle of res judicata or issue estoppel. The Court of Appeal in Djebbar referred to the need for consistency of approach. The Court of Appeal in AA (Somalia) v SSHD [2007] EWCA Civ 1040 also referred to consistency as a principle of public law and the well-established principle of administrative law that persons should be treated uniformly unless there is some valid reason to treat them differently....I do not accept that in addressing the question of whether the finding of fact should be carried forward in that way, the tribunal is only entitled to look at material which either post-dates the earlier tribunal's decision or which was not relevant to the earlier tribunal's determination. To restrict the second tribunal in that way would be inconsistent with the recognition in the case law that every tribunal must conscientiously decide the case in front of them. The basis for the guidance is not estoppel or res judicata but fairness. A tribunal must be alive to the unfairness to the opposing party of having to relitigate a point on which they have previously succeeded particularly where the point was not then challenged on appeal."
7. In this particular appeal the SSHD adduced a conventional bundle of material supporting the SSHD's allegation that deception had been practiced by the A during the TOEIC test (17thApril 2012), see §8. The general jurisprudence has established that such a bundle of evidence will be enough to discharge the initial burden, upon the SSHD, in respect of that allegation which then leaves the A in question to provide an innocent explanation for the invalidity result.

8. It was right for the Judge to note the findings of the FtT in the A's husband's appeal, decided by the FtT on 17th January 2019. It is material to note that the FtT's findings in that appeal (which dismissed the A's husband's appeal) state explicitly that the SSHD did not produce a conventional evidence bundle in order to make out the initial burden against his wife, §20 quoting §36 of the 2019 judgment.
9. However, it was simply incorrect for the Judge to conclude at §30 that: "...What is also important to stress is that nothing has really been added before me which would enable a different conclusion to be reached properly."
10. The SSHD asserts that it is impossible to understand this finding –the Judge himself had already noted that the SSHD had not presented the formal bundle at the 2019 hearing but had in this. For completeness it is plain that the latter finding of the FtT in 2019 [§36 of that judgment] that the A had otherwise shown that deception had not been practiced by his wife was obiter and in any event could not possibly constitute a disposal of the issue where new evidence (recognised as sufficient to make a case of deception in principle) had been admitted in this hearing.
11. The decision of the Court in BK is clear that, contrary to Mr. Malik's argument (on behalf of the SSHD in that appeal), there was no mechanistic approach to the relevance or admission of evidence at a later appeal hearing, §44. As already quoted above but this time with emphasis: "I do not accept that in addressing the question of whether the finding of fact should be carried forward in that way, the tribunal is only entitled to look at material which either post-dates the earlier tribunal's decision or which was not relevant to the earlier tribunal's determination. To restrict the second tribunal in that way would be inconsistent with the recognition in the case law that every tribunal must conscientiously decide the case in front of them. The basis for the guidance is not estoppel or res judicata but fairness. A tribunal must be alive to the unfairness to the opposing party of having to relitigate a point on which they have previously succeeded particularly where the point was not then challenged on appeal."
12. The Judge simply says at §32 that the SSHD's Counsel did not advance an explanation for the evidence, which pre-dated the 2019 appeal hearing, being admitted now. The SSHD contends that this is not a lawful disposal of the issue as described in BK and reflects the kind of mechanistic assessment rejected by the Appeal Court.
13. On the face of that bare reference in the judgment, it is respectfully contended that the Judge should have enquired with the SSHD's representative as to why the evidence was not adduced before and/or sought to determine that explanation and the overall fairness of admitting that evidence in the current proceedings even without specific explanation.
14. As it stands there is simply no engagement by the FtT with the crucial issue of fairness, this is especially pertinent where the procedural facts of this case are, by analogy, almost identical to that in Ocampo, in which the Court admitted evidence which would otherwise have failed the Ladd & Marshall test, see§38 of BK:

"The ability of a tribunal to depart, after careful examination, from a previous conclusion on the facts does not always operate in favour of the appellant. For example in Ocampo v SSHD [2006] EWCA Civ 1276, [2007] Imm AR 1 the Court of Appeal upheld a decision by the tribunal rejecting the asylum claim of the claimant. This was despite the fact that before a different tribunal, his daughter had been granted asylum the basis of her father's flight from Colombia. The further evidence which the tribunal hearing the father's appeal had considered would not have met the Ladd v Marshall criteria because it could have been put before the adjudicator in the daughter's appeal. The Court held however that it was right that the tribunal as a matter of common sense and fairness took the evidence into account. Auld LJ (with whom Rix and Hooper LJJ agreed) stressed at paragraph 26 that the daughter's status as a refugee was not affected by any finding in reliance on new and cogent evidence that the father had lied in supporting her successful appeal against refusal of asylum. The flexibility for the tribunal to take a fresh decision allowed proper regard to be given to the public interest giving effect to a consistent and fair immigration

policy –the matter should be judged, Auld LJ said, "as one of fairness and maintenance of proper immigration control".”

15. Additionally, the Judge's findings are inconsistent with his duty under BK, for the failure to take into account the material fact that the decision of the Tribunal in 2019 dismissed the relevant appeal. In order to resolve the question of fairness lawfully, the Judge had to take into account(and express this matter in his reasons)that the previous decision in question related primarily to the A's husband and that it was dismissed with the incumbent fact that this would significantly reduce the SSHD's inclination to appeal bearing in mind the overall result favoured the SSHD and the cost to the public purse of pursuing the appeal further. The decision was also only obliquely relevant to this appellant –this was also a material, relevant factor. This was obviously relevant to the fairness of the evidence being adduced in this hearing and caused this appeal to differ materially from the circumstances generally dealt with in the jurisprudence and essentialised in BK at §44:"...A tribunal must be alive to the unfairness to the opposing party of having to relitigate a point on which they have previously succeeded particularly where the point was not then challenged on appeal."
16. In respect of Ground 2, the SSHD asserts that the Judge plainly erred in automatically allowing the A's Article 8 appeal without making any substantive findings, see §34. It is again difficult to understand how the Judge reached this conclusion with reference to the 2019 FtT judgment where the conclusion in that decision was that the appeal should be dismissed on Article 8 grounds. It is to be noted that Counsel for the A specifically did not call live evidence, that being the case the A was declining to be tested on her evidence overall.
17. The Judge has also materially erred in failing to carry out his duty to decide the material matters in dispute between the parties as per numerous authorities including South Bucks District Council v Porter(2) [2004] UKHL 33, [2004] 1 WLR 1953, at §26.
18. The SSHD pointed out in the refusal letter that the A could not take the benefit of Appendix FM of the IRs and that her claim for private life was nonetheless considered under 276ADE(1) (Part 7) and with reference to the exceptional circumstances test from caselaw as expressed in the SSHD's policy guidance for private life cases. The Judge erred by not considering this aspect of the Rules.
19. The A and her husband have not had Leave to Remain in the UK since 2015 and so are in the UK unlawfully, there is no engagement with this in the judgment nor any application of s. 117B of NIAA 2002. The Article 8 conclusion is wholly unlawful.
20. The SSHD asks that the decision of the FtT is set aside. The SSHD is content for this error of law appeal to be considered by way of written submissions only.

Ian Jarvis

10. Mr Malik's response:

Submissions on the issue of error of law

8. Mrs Patel respectfully submits that Judge Cockrill made no error of law in allowing her appeal.
9. In an earlier appeal (HU/14045/2018), Judge Hodgkinson, in his decision promulgated on 17 January 2019, made these findings: [36] In the present instance I reiterate that the respondent has produced no evidence at all, in terms of seeking to establish that Mrs Patel practised deception in the taking of her ETS TOEIC test in April 2012. He has not produced the bundle of documents normally produced in these cases which, it has been held, just discharges the initial evidential burden. Thus, neither the initial evidential burden nor the legal burden which lies upon the respondent has been discharged. Conversely, Mrs Patel has adduced statement evidence and other evidence contained in the appellant's bundle which is consistent with her indication that she did

not practice deception. [37] In the circumstances, I conclude that the alleged deception has not been established. I bear in mind that both the appellant and his wife had valid leave continuously until they were served with forms IS151A at the beginning of April 2015 which had the effect of revoking their previous leave. Those notices were served solely on the basis that the respondent considered that Mrs Patel had practised the indicated deception. As I have concluded that such deception has not been established, I conclude that those notices were wrongly served."

10. Judge Hodgkinson, thus, resolved the issue of dishonestly in favour of Mrs Patel and held that she had not cheated in her TOIEC test.
11. The Secretary of State did not appeal Judge Hodgkinson's decision but, despite that clear decision, again, alleged that Mrs Patel had cheated in her TOEIC test. Judge Cockrill, with respect, was plainly right to make his decision by reference to the findings made by Judge Hodgkinson on this issue in the earlier appeal.
12. The Upper Tribunal's decision in Mubu and others (immigration appeals – res judicata) [2012] UKUT 00398 (IAC) provides an answer to the Secretary of State's appeal. In that case, Mr Mubu's application was refused by the Secretary of State on the basis that he had relied on a false birth certificate. His appeal, however, was allowed by the First Tier Tribunal, and the Secretary of State decided not appeal that decision to the Upper Tribunal. Subsequently, the Secretary of State refused Mr Mubu's application on the same grounds, namely, that he had relied on a false birth certificate. There was then a further appeal and the matter came before the Upper Tribunal. The Secretary of State, just like the present case, had submitted further evidence that was not before the earlier First Tier Tribunal that had decided the issue in Mr Mubu's favour. The Secretary of State sought to rely on that fresh evidence and asked the Upper Tribunal to depart from the earlier judicial findings. The Upper Tribunal flatly rejected the Secretary of State's position.
13. The Upper Tribunal, at [49], cited Devaseelan principles, including, particularly, principle 7, namely:"(7) The force of the reasoning underlying guidelines (4) and (6) is greatly reduced if there is some very good reason why the Appellant's failure to adduce relevant evidence before the first Adjudicator should not be, as it were, held against him. We think such reasons will be rare..."
14. The Upper Tribunal allowed Mr Mubu's appeal and declined to permit issue to be re-litigated holding, at [64], that there was no explanation as to why the new evidence adduced by the Secretary of State was not made available during the earlier First Tier Tribunal proceedings. The Upper Tribunal, at [64], held: "We are well aware that, in the field of public law, finality of litigation is subject always to the discretion of the Court if wider interests of justice so require. We bear in mind, however, that the nature of the issue now in dispute between the parties was the same issue that was determinative of the appeal before Judge Tipping. We also bear in mind the failure of the Secretary of State to produce all of the relevant evidence to Judge Tipping that ought to have been, or could have been with reasonable diligence, made available to him. In light of these considerations we conclude that the determination of Judge Tipping should be treated as settling the issue of the relationship between the first claimant and Mr Ernest Alletson."
15. This applies here with equal cogency.
16. Judge Cockrill was obliged to consider whether there was "some very good reason" (adopting the words in principle 7 of Devaseelan) for the Secretary of State not to have provided all the evidence before Judge Hodgkinson in the earlier appeal. In this case (adopting the words used in Mubu), there was a "failure of the Secretary of State to produce all of the relevant evidence to Judge [Hodgkinson] that ought to have been, or could have been with reasonable diligence, made available to him".
17. The Secretary of State, before Judge Cockrill, provided no explanation whatsoever as to why all the relevant evidence was not produced before Judge Hodgkinson. Judge Cockrill was obliged, in these circumstances, to allow Mrs Patel's appeal by adopting Judge Hodgkinson's findings.
18. The Upper Tribunal's decision in Mubu and Devaseelan principles, including principle 7, as set out above, were approved by the Court of Appeal in Secretary of State for the Home Department v BK (Afghanistan) [2019] EWCA Civ 1358.

19. In Ullah v Secretary of State for the Home Department [2019] EWCA Civ 550, the Court of Appeal reviewed this area. Ullah was a case where the First Tier Tribunal found that Mr Ullah had lived in the United Kingdom continuously for 14 years and allowed his appeal on that basis. The Secretary of State, subsequently, received fresh evidence showing that that was not true and sought to depart from the earlier judicial findings. The Court of Appeal reconciled all earlier authorities on the subject and held that the Secretary of State can rely on the fresh evidence and seek to depart from the earlier judicial findings only if the Ladd v Marshall test is met: see [25], [26], [43] and [44]. The Ladd v Marshall test, as it well-know, is three-fold, namely, first, that the fresh evidence could not have been obtained with reasonable diligence for use at the trial, secondly, that if given, it probably would have had an important influence on the result, and, thirdly, that it is apparently credible although not necessarily incontrovertible. The first limb of the Ladd v Marshall test reflects the language in principle 7 of Devaseelan, as elucidated and applied in Mubu.
20. In the circumstances, Judge Cockrill made no error of law in finding that Mrs Patel had not cheated in her TOEIC test by following Judge Hodgkinson's findings.
21. Judge Cockrill's decision to allow Mrs Patel's appeal on Article 8 grounds was plainly correct and consistent with Ahsan v Secretary of State for the Home Department [2017] EWCA Civ 2009. In Ahsan, at [120], the Court of Appeal held:"... it seems to me clear that if on a human rights appeal an appellant were found not to have cheated, which inevitably means that the section 10 decision had been wrong, the Secretary of State would be obliged to deal with him or her thereafter so far as possible as if that error had not been made, i.e. as if their leave to remain had not been invalidated. In a straightforward case, for example, she could and should make a fresh grant of leave to remain equivalent to that which had been invalidated. She could also, and other things being equal should, exercise any relevant future discretion, if necessary "outside the Rules", on the basis that the appellant had in fact had leave to remain in the relevant period notwithstanding that formally that leave remained invalidated ..."
22. Accordingly, the Secretary of State is obliged put Mrs Patel into the position she would have been in had the cheating allegation and earlier decision based upon it not been made. This will result in "a fresh grant of leave to remain equivalent to that which had been invalidated", and an opportunity to apply for further leave to remain on the premise that Mrs Patel had not overstayed. This had a material bearing on the assessment of proportionality under Article 8. On Ahsan, the public interest does not require Mrs Patel's removal from the United Kingdom at this stage. She is in the present position because the Secretary of State made the unfounded allegation of TOEIC fraud against her and issued a removal decision on that basis on 1 April 2015. It is obvious that Mrs Patel's removal from the United Kingdom, at this stage, would not be justified or proportionate.

Conclusion

23. For all these reasons, the Upper Tribunal is respectfully invited to dismiss the Secretary of State's appeal.

Zane Malik

11. The Secretary of States reply:

FURTHER WRITTEN SUBMISSIONS ON ERROR OF LAW

INTRODUCTION:

1. The SSHD asks the Tribunal to admit this document as the SSHD's written submissions in response to Mrs. Patel's written response on error. The SSHD continues to rely upon the existing Grounds of Appeal and the earlier written submissions dated 1st May 2020.
2. The SSHD refers to Mrs. Patel as the Appellant ("A") for ease of reference with the FtT decision.

THE SSHD'S SUBMISSIONS ON MRS PATEL'S RESPONSE:

3. The SSHD respectfully asserts that the A's submissions on the core legal issues arising in the SSHD's Grounds of Appeal are misconceived and should not cause the UT to dismiss the SSHD's appeal.
4. The SSHD asserts that neither Mubu nor Ullah provide a direct answer to the issues which arose in this appeal. It is very clear that the procedural circumstances in Mubu and Ullah, as well as those in the underlying cases such as TB are materially different to those in this case. This is why the SSHD did not refer to them in the original written submissions and possibly why the A did not rely upon them at the FtT(as far as can be understood from the FtT decision).
5. In Ullah, the Court of Appeal cite a number of authorities which deal with situations in which the SSHD had taken decisions after an unappealed decision of the Tribunal (of the same person) which was contrary to the allowed decision itself, for instance at §31:"This case is, therefore, High Court authority to the effect that, in cases where there has been an antecedent Tribunal decision that an immigrant is entitled to ILR, in considering whether to take action which has the effect of revoking the leave, the SSHD must give proper attention to principles akin to those identified for the admission of fresh evidence on appeals in legal proceedings, as set out in Ladd v Marshall. If he does not do so, his decision is liable to be set aside on judicial review."
6. And at §36, in respect of the Court's decision in Secretary of State for the Home Department v TB [2008] EWCA Civ 997at §36: "This court dismissed the SSHD's appeal. Stanley Burnton LJ (in a judgment with which Rix and Thorpe LJJ agreed) said at paragraph 32 this: "32. As a matter of principle, it cannot be right for the Home Secretary to be able to circumvent the decision of the IAT by administrative decision. If she could do so, the statutory appeal system would be undermined; indeed, in a case such as the present, the decision of the Immigration Judge on the application of the Refugee Convention would be made irrelevant. That would be inconsistent with the statutory scheme. "He then referred to R (Mersin) v SSHD [2000] EWHC 348 (Admin) and to Boafo (from the latter: "...an unappealed decision of an adjudicator is binding on the parties"). He also quoted the judgment of Moses J in Saribal (supra) at paragraph 17 (quoted above) where "the principle" was that the SSHD is not entitled to disregard an adjudicator's decision "unless he can set aside that determination by appropriate procedure founded on appropriate evidence"."
7. It is important to note that the Court do not refer to the decision of the Court of Appeal in The Secretary of State for the Home Department v BK (Afghanistan)[2019] EWCA Civ 1358("BK") which, by its reliance upon Ocampo, has direct relevance to the circumstances of this appeal– this has already been argued by the SSHD in the written submissions document at para. 14 and won't be repeated here.
8. The SSHD reiterates that the finding made by Judge Hodgkinson was in a dismissed appeal of the A's husband, it was therefore not a decision which led to either the A or her husband (the appellant) gaining Leave to Remain or any other substantive benefit in the UK. There was therefore no later decision by the SSHD which sought to undo the substantive benefit of a previous positive and unappealed decision of the Tribunal. The circumstances are entirely different to those in Ullah and the underpinning authorities.
9. The SSHD has already argued that there were significant reasons why the SSHD would not have appealed a decision which was in her favour – the A's husband's appeal was dismissed. Not only would there have been significant reason for the SSHD not seeking to appeal because the Tribunal decision nonetheless meant that the A and her husband could not remain in the UK (or could be removed) and that such an appeal would have led to further, unnecessary public expense but it is fairly clear that permission would never have, in principle, been given.

10. The SSHD wishes to add that, in light of the recent decision of the Court of Appeal in The Secretary of State for the Home Department v Devani [2020] EWCA Civ 612("Devani"), there was in fact no power for the SSHD, as the winning party at the FtT, to appeal under the statutory scheme (SSHD's underlining): "27. I start with the alleged failure by the Secretary of State herself to appeal. I agree with Mr Chapman that there was no such failure. In my view Mr Tufan was quite right in his submission to DUTJ Latter (see para. 16 above) that that course was not open to her because she was (ostensibly) the winning party. As appears from para. 17 of his decision, the Judge acknowledged that that had once been the law, but he said that the position was changed by section 11 (2) of the Tribunals, Courts and Enforcement Act 2007, which reads "Any party has a right of appeal, subject to subsection (8)[3]." Subsection (1) defines a right of appeal, so far as relevant, as a right of appeal to the UT on a point of law. I accept that on a literal reading subsection (2) could be construed as giving a right of appeal not only to a party against whom an order has been made but also to a party who has obtained, as regards that order, the exact outcome that they sought: although usually the winning party would have no wish to appeal, occasionally they may be dissatisfied with particular findings made by the Court or with aspects of its reasoning (the present case, if the slip rule were unavailable, would be an example albeit of a very specific kind). But for the winning party to have a right of appeal in such a case would be contrary to well-established case-law governing the position in the common law courts, which reflects important policy considerations; the authorities are well-known, and I need only refer to the commentary in para. 9A-59.3 of the White Book. It was not suggested to us that there was any reason why Parliament should have intended a different approach in the case of appeals to the Upper Tribunal. Ms Broadfoot sought to support DUTJ Latter's conclusion by reference to the decision of the UT in EG and NG (Ethiopia) [2013] UKUT 000143 (IAC), but that was not concerned with the present point at all. I am sure that section 11(2) of the 2007 Act is intended to confer a right of appeal only against some aspect of the actual order of the FTT, and that the phrase "any party" must be read as referring only to a party who has in that sense lost.[4]"
11. The SSHD has already argued that the FtT failed in even considering the issue as relevant to the fairness of admitting the deception bundle of evidence. The SSHD now adds that the Tribunal was obliged to take into account that the SSHD had no statutory avenue to contest the finding that there was no deception.
12. The SSHD therefore adds that the decision in Devani further emphasises the material difference between the procedural circumstances in cases such as Mersin and TB.
13. Ultimately, whether viewed through the prism of the SSHD's argument in this case or the A's, the Judge did not engage with this kind of nuanced assessment of fairness at all. He simply treated the question of the admission of the deception evidence as being a simplistic, binary question – the procedural and qualitative context has been ignored and fairness therefore not applied.
14. The SSHD state further contends that the A's assertion in the written submissions that the FtJ was obliged to allow the appeal because the Presenting Officer was said not have offered an explanation for the absence of the deception evidence in the previous FtT hearing (of the husband)(para. 17) is plainly incompatible with the holistic fairness assessment described in BK, Ocampo and in the general authorities in respect of the flexibility to be applied by the Tribunal to the Ladd v Marshall [1954] 1 WLR 1489test, see BK but also JG (Jamaica) v Secretary of State for the Home Department[2015] EWCA Civ 215 at §9: "Mr Dunlop, on behalf of the Secretary of State, submits that the Ladd v Marshall principles should be applied less strictly in public law cases such as this. In support of that proposition he relies upon the decision of the Court of Appeal in E and R v Secretary of State for the Home Department [2004] EWCA Civ 49; [2004] QB 1044 at paragraphs 79 to 81. For my part I accept the proposition that the Ladd v Marshall principles are applied less strictly in public law cases. Indeed Mr Gill, who appears for the appellant and opposes this part of the Secretary of State's application, also accepts that the Ladd v Marshall principles are applied less strictly in public law cases..."
15. This is reflected in the highly flexible nature of the evidence Rules in the FtT Procedure Rules.

16. In respect of Ground2, in light of Mr. Malik's arguments in his written submissions by reference to §120 of Ahsan, and the fact that the A was not called to give evidence at the FtT, the SSHD proceeds on the basis that the A is not arguing that she or her husband have any other reason under the Article 8 IRs to gain Leave to Remain in the UK.
17. If that is correct then the SSHD accepts that in light of the decision of the Court in Ahsan, and later, in the form of relief given in Khan & Ors v Secretary of State for the Home Department [2018] EWCA Civ 1684, that if the UT reject the SSHD's challenge to the FtT's approach to the deception evidence, then the A will be given not less than 60 days to make a further application for Leave to Remain. The Article 8 decision by the FtT is therefore, in that sense, sustainable.

DISPOSAL OF THE APPEAL:

18. The SSHD respectfully contends that the authorities cited by Mr. Malik about the importance of oral argument in the English and Welsh legal system are not in dispute, the question remains, under the current circumstances, and bearing in mind the particular circumstances thrown up by the current pandemic, is there a particular potential unfairness caused by the error of law hearing being considered on the papers? The SSHD contends that no reason has been given which indicates that there would be any unfairness to the A. Both parties have been given the opportunity to provide detailed written submissions and there is flexibility inherent in the system and timelines should there be a need to exercise it.
19. The SSHD asks the UT to allow the SSHD's appeal and set aside the decision of the Tribunal for a remote hearing at the FtT.

Ian Jarvis

Error of law

12. It is necessary when determining the merits of the Secretary of State's claim to step back to the decision of First-tier Tribunal Judge Hodgkinson promulgated on 17 January 2019 which dismissed the appeal of Mrs Patel's husband, Mr Sanikumar Patel, on human rights grounds. That is the decision considered by the Judge to be the starting point in determining Mrs Patel's appeal.
13. Judge Hodgkinson set out the relevant history of Mr Patel between [2 – 13] noting at [6 - 7]:

> 6. Mrs Patel claims to have taken the took an Educational Testing Service (ETS) TOEIC English speaking and writing test and, on 20 April 2012, she claims to have taken a reading and listening tests. The respondent now asserts that she used a proxy test taker and that, as a result, the application referred to in the following paragraph of my decision was based on deception.
>
> 7. On 31 May 2012, the appellant was again included as the dependent on his wife's in time application for leave to remain as a student. Leave was granted to both of them on 1 August 2012, valid until 10 April 2015.

14. Judge Hodgkinson records an adjournment application having been made by Mr Williams the Home Office Presenting Officer appearing before him which was opposed by Mr Gajjar who represented Mr Patel. Judge Hodgkinson notes at [29 – 33]:

> 29. At the commencement of the hearing, Mr Williams requested an adjournment, for the reason that Mrs Patel was varied application of January 2017 remained outstanding. Mr

Williams indicated that it would be sensible for both appeals to be heard together and to await the outcome of Mrs Patel's application accordingly. However, Mr Williams acknowledged that it was unclear as to when any decision might be made by the respondent in relation to Mrs Patel and I noted, and was aware, that are varied application was made nearly 2 years ago; in January 2017.

30. I noted with Mr Williams that the respondent had not filed his usual bundle of documents, relating to generic and specific evidence of relevance to Mrs Patel's alleged deception in the taking of the ETC TOEIC test in April 2012. Mr Williams acknowledged that no evidence had been lodged to support the allegation of deception but contended that this was another reason why it was important for Mrs Patel's application to be determined by the respondent, and for any appeal made by her then to be linked to that of the appellant. Mr Williams noted that the alleged deception related to Mrs Patel, and not to the appellant, he appearing to indicate that this was by no "ETS bundle" had been filed in relation to the current appeal.

31. I indicated to Mr Williams that there was no good reason why a relevant evidential ETS bundle had not been filed, bearing in mind that the appellant's application had been refused, and his leave revoked in 2015, because of his wife's alleged deception. I note that the deception was relied upon in the RFRL. Consequently, I took the view that there was no good reason why a relevant evidential bundle, concerning Mrs Patel's alleged deception, had not been produced.

32. In the circumstances, and also bearing in mind that Mr Gijjar oppose the requested adjournment, I was satisfied that there was no good reason to adjourn the appeal and that the respondent had an obligation to produce relevant evidence upon which he intended to rely, and yet had failed to do so. I also bought in mind that, to adjourn the current appeal, could potentially be for an indefinite period of time, bearing in mind that the respondent had already been in possession of Mrs Patel's outstanding application for nearly 2 years, there being no indication as to when that application might be determined.

33. In the circumstances, I was satisfied that no unfairness resulted from my refusal of the adjournment application.

15. Judge Hodgkinson set out findings of fact from [34] of the decision under challenge dealing with the issues concerning Mrs Patel between [36 – 37] in the following terms:

36. In the present instances, I reiterate that the respondent has produced no evidence at all, in terms of seeking to establish that Mrs Patel practice deception in the taking of her ETS TOEIC test in April 2012. He has not produced the bundle of documents normally produced in these cases which, *just* discharges the ineffectual evidential burden. Thus, neither the initial evidential burden, nor the legal burden, which lies upon the respondent has been discharged. Conversely, Mrs Patel has reduced statement evidence, and other evidence contained in the appellant's bundle, which is consistent with her indication that she did not practice deception.

37. In the circumstances, I conclude that the alleged deception is not been established. I bear in mind that both the appellant and his wife had valid leave continuously until they were served with forms IS151A at the beginning of April 2015, which had the effect of revoking their previous leave. Those notices were served solely on the basis that the respondent considered that Mrs Patel had practised the indicated deception. As I have concluded that such deception has not been established, I conclude that those notice notices were wrongly served. Nevertheless, the fact is that those notices remain valid, even though I

conclude that they should not have been served in the first place, and they had the effect of revoking the leave of the appellant and his wife.

16. The Judge Hodgkinson dismissed Mr Patel's appeal on human rights grounds, notwithstanding the above findings appertaining to Mrs Patel, on the basis that having taken into account the totality of the evidence there were no exceptional and/or compelling circumstances which warranted a grant of leave to Mr Patel under Article 8 outside the Rules.
17. Judge Hodgkinson's decision was not successfully appealed by either party, and there is merit in the submission by Mr Bates that as the successful party the Secretary of State had no right of appeal against the decision in any event.
18. Although Judge Hodgkinson claims the Secretary of State did not provide any reasons for not providing the evidence a reason was given, namely that the appeal before that tribunal related to Mr Patel and not Mrs Patel although there was clearly an evidential relationship between the assertion Mrs Patel has used a proxy to take English language test and the reasons for the rejection of Mr Patel's application, but that explanation was not accepted by Judge Hodgkinson.
19. It also does not appear from the decision that Judge Hodgkinson gave any consideration to the developing jurisprudence in relation to ETS cases which would have impacted upon any application made in 2017 and may have explained the delay in making a decision on a 2017 application.
20. R (on the application of Gazi) v SSHD (ETS-JR) was decided in 2015 (2015 UKUT 00327). SM and Qadir (ETS - Evidence - Burden of Proof) in 2016 ([2016] UKUT 229 (IAC). Qadir on appeal to the Court of Appeal in 2016 ([2016] EWCA Civ 1167). KS (India) v SSHD in 2018 ([2018] EWCA Civ 836). Shehzad and Chowdhury in 2016 ([2016] EWCA Civ 615). R (on the application of Mohibullah) v Secretary of State for the Home Department (TOEIC - ETS - judicial review principles) in 2016 ([2016] UKUT 561 (IAC)). Khan and others in 2018 ([2018] EWCA Civ 1684).
21. The ever changing jurisdictional landscape in relation to ETS cases at the time did arguably support the Secretary of States delay in making a decision, which was not specifically found by Judge Hodgkinson to be a period of delay that was unlawful, between 2017 and the date of the hearing before the judge.
22. The approach to be taken by a tribunal to earlier findings of fact made in a determination relating to a different party, such as a family member, but arising out of the same factual matrix is now established. In AA (Somalia) v SSHD and AH (Iran) v SSHD [2007] EWCA Civ 1040 the Court of Appeal said that the Devaseelan guidelines extended to cases where the earlier decision involved different parties and where there was "a material overlap of evidence" in the sense of matters arising out of the same factual matrix. The first Adjudicator's decision was not binding in the sense of issue estoppel but was the starting point and, in the interest of good administration, should be followed unless a good reason was advanced to the contrary. The Court of Appeal said that there must be a material overlap of evidence, rather than just an overlap; that the second Tribunal should have regard to the factual conclusions of the first Tribunal; but that the second Tribunal still had to evaluate the evidence as it would in any other case and independently decide the second case on its own

merits. (See Ocampo v SSHD [2006] EWCA Civ 1276). However, the Court of Appeal also said that in applying the guidelines to such cases involving different claimants, there could be a valid distinction depending on whether the previous decision was in favour of or against the SSHD. In the former case the SSHD would have been a direct party to the first decision whereas the litigant would not. It would be unfair to impose a restriction on re-litigating an issue on someone who, although involved in the previous case, perhaps as a witness, had not formally been a party. In AA(Somalia) v SSHD 2007 EWCA Civ 1040 the litigant had not produced the earlier decision or specifically sought to rely on it and the Court of Appeal said that the IJ had not erred in law in failing to take account of the contents of a decision not before him.

23. Mrs Patel was not a party to the appeal before Judge Hodgkinson.

24. In Mubu and others (immigration appeals – res judicata) [2012] UKUT 00398(IAC) the Tribunal stated that the principle of res judicata does not operate in immigration appeals. The guidelines set out in Devaseelan [2002] UKIAT 00702; [2003] Imm AR 1 are always to be applied to the determination of a factual issue, the dispute as to which has already been the subject of judicial determination in an appeal against an earlier immigration decision involving the same parties. This is so whether the finding in the earlier determination was in favour, or against, the Secretary of State.

25. The Court of Appeal in Ullah v SSHD [2019] EWCA Civ 550 discussed the principles in TB [2008] EWCA Civ 997 that as a matter of principle it could not be right for the SSHD to subvert the tribunal's decision by administrative action. Different considerations might apply where there was fresh evidence which had not been available at the hearing, or a change in the law and the principle was of no application where there was a change in circumstances or new events after the date of the hearing. In discussing those principles the Court of Appeal considered that Ladd v Marshall principles would have to apply to the fresh evidence.

26. In SSHD v BK (Afghanistan) [2019] EWCA Civ 1358 the Court of Appeal went through the Devaseelan principles again, explaining the cases and stressing the importance of not allowing the guidance to place unacceptable restrictions on the second adjudicator's ability to determine the appeal in front of him. As a matter of practice, the tribunal must address its mind to the reasons put forward by the party which is seeking to depart from the previous findings as to why that finding is unreliable so that it should not in effect be carried forward into the determination of the appeal now before it. In addressing the question whether the finding of fact should be carried forward in that way, the second tribunal could not be restricted to material post-dating the first tribunal's decision or which was not relevant to the decision. To restrict the second tribunal in that way would be inconsistent with the recognition in the case law that every tribunal must conscientiously decide the case in front of them. The basis for the guidance is not estoppel or res judicata but fairness. A tribunal must be alive to the unfairness to the opposing party of having to relitigate a point on which they have previously succeeded particularly where the point was not then challenged on appeal. On the particular facts, the Court of Appeal

found that the "procedural features" of the first decision (there had been no asylum interview, or a witness statement, the grounds for refusing asylum had been non-attendance at interview) coupled with the difficulty of identifying the evidence on which the first adjudicator's finding was based, entitled the Upper Tribunal to depart from the starting point of the first decision and make their own assessment of the evidence before them.

27. I also note that in AL (Albania) v SSHD [2019] EWCA Civ 950 the Court of Appeal held that the approach to be taken by a tribunal to earlier findings of fact made in a determination relating to a different party, such as a family member, but arising out of the same factual matrix is now established. In AA (Somalia) Carnwath and Ward LJJ (Hooper LJ dissenting) held, applying Ocampo, that in such a case the guidelines given by the Immigration Appeal Tribunal in Devaseelan apply. Those guidelines begin with the premise that the first tribunal's determination should be the starting point. Evidence contradicting a core aspect of the appellant's claim was a good reason for departing from that determination.

28. In the current case there does not appear to have been a proper evaluation by Judge Cockrill of the above stated case law or proper application of the principle of fairness in the decision under challenge.

29. The material provided by the Secretary of State in the current appeal included not only the generic evidence in the form of witness statements by Peter Millington and Rebecca Collings but also the Lookup tool relating to Synergy Business College of London showing for the relevant period 4894 tests having been taken of which 51%, 2484, were questionable and 49%, 2410, were invalid with a specific printout showing that the test results for Mrs Patel have all been adjudged to be invalid. There is also a report specifically relating to the Synergy Business College.

30. In Shehzad and Chowdhury [2016] EWCA Civ 615 it was held that where the Secretary of State provided prima facie evidence of deception, the burden shifted onto the individual to provide a plausible innocent explanation, and if the individual did so the burden shifted back to the Secretary of State. In effect it was held that a screenshot of the results which stated that that was the position and included the "ETS Lookup Tool" which showed the tests that were categorised as "invalid" sufficed to discharge the initial burden.

31. There was clearly evidence before Judge Cockrill to show that the Secretary of State could discharge the initial evidential burden which contradicted the core aspect of Mrs Patel's claim and the finding of Judge Hodgkinson, that she had not employed a proxy or used deception in the obtaining of the earlier English language tests.

32. I find in all the circumstances the Secretary of State has established error of law material to the decision of Judge Cockrill to allow the appeal on article 8 grounds as it has not been shown the correct test was properly applied in relation to the consideration of the evidence, namely that of fairness, by the Judge. As the findings in relation to ETS certificate has been shown to be infected by material legal error the failure of the Judge to examine article 8 ECHR in sufficient detail is also material.

33. In light of the lack of fairness in the decision of Judge Cockrill resulting in procedural errors in the manner in which the appeal was considered I find it appropriate in all the circumstances, as discussed at the hearing, to remit the appeal to the First-tier Tribunal sitting at Taylor House to enable another judge of that Tribunal to consider the merits of the ETS issue and how that impacts, upon the appeal pursuant to article 8 ECHR on the facts and in law. There shall be no preserved findings.

Decision

34. **The First-tier Judge materially erred in law. I set aside the decision of the original Judge. I remit the appeal to the First-tier Tribunal sitting at Taylor House to be heard by a judge other than Judge Cockrill.**

Anonymity.

35. The First-tier Tribunal did not make an 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 the 17 August 2020