Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: UI-2022-002518
[HU/50695/2020]; IA/01473/2021

THE IMMIGRATION ACTS

Heard at : Field House	**Decision & Reasons Promulgated**
On : 17 October 2022	**On : 25 November 2022**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

VIKRAM VASHIST

Respondent

Representation:
For the Appellant: Ms A Ahmed, Senior Home Office Presenting Officer
For the Respondent: Mr P Lewis, instructed by Sky Solicitors Ltd

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing Mr Vashist's appeal against the respondent's decision to refuse his human rights claim.

2. For the purposes of this decision, I shall hereinafter refer to the Secretary of State as the respondent and Mr Vashist as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

3. The appellant is a citizen of India, born on 25 May 1985. He initially entered the UK on 14 October 2010 with a visa valid until 30 March 2012 as a Tier 4

student. He applied on 30 March 2012 for leave to remain as a Tier 4 student, but his application was refused with a right of appeal. He appealed against the decision and his appeal was dismissed. He became appeal rights exhausted on 25 November 2013 and voluntarily departed from the UK on 10 February 2014. He re-entered the UK on 22 March 2014 as a Tier 2 migrant with leave valid until 31 December 2016. His leave was curtailed to expire on 30 June 2015 as a result of his sponsor's licence being revoked. On 29 June 2015 he applied for leave to remain on family and private life grounds and he subsequently varied that to an application for leave to remain as a Tier 2 migrant. His application was refused on 11 January 2016 and the refusal decision was maintained on 15 February 2016 following an administrative review. The application was subsequently reconsidered and refused again on 11 January 2016 and that decision was maintained on a further administrative review. The appellant then lodged a judicial review claim and was refused permission, but his claim was conceded in the Court of Appeal and he was given 28 days in which to submit a human rights claim. He made a human rights claim on 24 August 2020 on the basis of his family life with his partner and dependent child.

4. The appellant's human rights claim was refused on 21 October 2020. The respondent, in refusing the claim, considered that it fell for refusal on grounds of suitability under section S-LTR of Appendix FM of the immigration rules owing to the appellant having made false representations for the purposes of obtaining leave to remain through his fraudulent use of a TOEIC English language certificate in his application of 30 March 2012. As a result the respondent considered that paragraph S-LTR.4.2 applied. The respondent considered, in any event, that the appellant could not meet the eligibility relationship requirements in E-LTRP.1.1 to 1.12 as his partner was not British or settled in the UK and it was not accepted that he was in a genuine and subsisting relationship akin to marriage. The respondent considered that EX.1(a) of Appendix FM did not apply as the appellant's claimed child was not a British citizen and had not lived in the UK continuously for 7 years prior to the application, and there was insufficient evidence to confirm that he was the biological father of the child. The respondent considered further that the appellant could not meet the requirements of paragraph 276ADE(1) of the immigration rules as there were no very significant obstacles to his integration into India, and that there were no exceptional circumstances which would give rise to a breach of Article 8.

5. The appellant appealed against that decision and his appeal was heard on 2 March 2022 in the First-tier Tribunal by Judge Hanley. The respondent was not represented at the hearing but had filed a respondent's review in which the refusal decision was maintained. Judge Hanley accepted the appellant's explanation in regard to the deception allegation as credible and considered that there had been an administrative or technological breakdown in connection with record-keeping relating to the TOEIC test for which he was not in any way responsible. The judge concluded that the respondent had failed to discharge the legal burden of proving dishonesty and rejected the respondent's argument that the Article 8 appeal should be dismissed in any event. He found that the appellant was on route to settlement as a Tier 2 migrant, that he had suffered an historical injustice as a result of the false allegation of dishonesty

and that that weighed heavily in his favour and rendered the refusal decision disproportionate. He accordingly allowed the appeal on Article 8 human rights grounds.

6. Permission to appeal against that decision was sought by the respondent on five grounds. Firstly, that the judge's criticism of the respondent's evidence was wholly misdirected, given the findings in the case of the Upper Tribunal in the case of DK and RK (ETS: SSHD evidence, proof) India [2022] UKUT 112. Secondly, that the judge's finding that there was a mix-up in regard to the voice recordings from ETS was contrary to the conclusions reached in DK and RK. Thirdly, that the judge's credibility assessment was flawed as it was contrary to the findings in DK and RK and led to a conclusion which was misdirected in law. Fourthly, that the appellant's case was on all fours with the findings in DK and RK in that the judge sought to demonstrate that there were flaws in the Secretary of State's handling of the evidence which should result in a finding in the appellant's favour. Fifthly, that the judge's findings on Article 8 were infected by those errors.

7. Permission was granted in the First-tier Tribunal and the matter then came before me. Both parties made submissions.

Hearing and Submissions

8. Ms Ahmed accepted that the first three grounds were not the strongest and that the judge had given detailed reasons for his findings, and she therefore focussed on grounds four and five. With regard to ground four, she submitted that the judge's finding at [86], that the record-keeping relating to the TOEIC test was to blame for the false results, was inconsistent with the findings in DK and RK. Although she accepted that DK and RK was reported after the judge's decision was promulgated, she submitted that it was already known that the decision was in the pipeline because of the first case, DK and RK (Parliamentary privilege; evidence) [2021] UKUT 61, and further that DK and RK clarified the law and was therefore relevant. As for ground five, Ms Ahmed said that she was focussing on this ground of challenge which challenged the judge's decision to allow the appeal on Article 8 grounds simply on the basis that the fraud allegation had not been made out. She referred to the case of Khan & Ors v Secretary of State for the Home Department [2018] EWCA Civ 1684 where, at [37], the Secretary of State explained the effect of a finding that there had been no deception and submitted that none applied to the appellant since the allegation of deception had first been raised in 2020 at a time when the appellant's immigration status was already precarious and he was therefore not prejudiced by the allegation having the effect of curtailing his leave. There was therefore no historic injustice in the appellant's case and the judge had erred by allowing the Article 8 appeal on that basis.

9. Mr Lewis pointed out that the allegation of cheating had been made for the first time in the decision of 11 January 2016 and therefore there had been an historic injustice. Further, ground five had not challenged the judge's decision to allow the appeal on Article 8 grounds other than in relation to the deception and it was therefore not open to the respondent to raise such a challenge now.

The real focus of the challenge related to the case of DK and RK, but that case was not before the judge at the time of the decision and was not reported until after the decision was promulgated. The judge had followed the correct approach as set out in the relevant authorities at the time and had given full reasons for concluding that the appellant had provided an innocent explanation. The reasons given for allowing the appeal were open to the judge.

10. Ms Ahmed, in response, applied to amend the fifth ground of appeal to include a challenge to the judge's Article 8 findings, to which Mr Lewis objected. She confirmed that Mr Lewis was correct in stating that the allegation of cheating had been made for the first time in the decision of 11 January 2016 and she withdrew her submission that it had first been made in 2020.

Discussion

11. The respondent's first to fourth grounds essentially raise the same challenge, namely that the judge's decision was inconsistent with the findings and conclusions in DK and RK, particularly with respect to the issue of the 'chain of custody' in regard to the voice recordings produced by ETS. In so far as ground three challenges specific findings made by the judge at [85], where he provided reasons for concluding that the appellant did not cheat, the challenges are simply disagreements with the judge's positive credibility findings. As Ms Ahmed accepted, the judge gave detailed reasons for his findings at [85] and grounds one to three were not the strongest.

12. In so far as the respondent submits that the judge misdirected himself, the grounds assert that the judge's finding at [86], that the appellant was "*not in any way responsible for whatever administrative or technological breakdown has occurred in connection with record-keeping relating to the TOEIC test…*", is inconsistent with the conclusion in DK and RK that there was no reason to doubt the reliability of the chain of custody. However, as Mr Lewis submitted, the decision in DK and RK was not clarifying points of law but was making findings of fact and, as such, the judge cannot be considered to have erred in law by failing to follow a decision which had not yet been reported at the time he promulgated his own decision. On the contrary Judge Hanbury's decision was entirely consistent with the relevant binding authorities at the time, including the leading case of SM and Qadir (ETS - Evidence - Burden of Proof) [2016] UKUT 229, and he therefore cannot be criticised for the approach he followed, the self-directions that he made and the conclusions he reached.

13. It was Mr Lewis's submission that the judge was not, in any event, precluded by the conclusions in DK and RK from making the findings that he did. Indeed, that is consistent with the findings of the Tribunal in DK and RK, where it was found at [103] that, whilst the voice recognition process was "*clearly and overwhelmingly reliable in pointing to an individual test entry as the product of a repeated voice*", that was qualified by the finding that "*By* "*overwhelmingly reliable*" *we do not mean conclusive…*" and at [107] that "*we would not say that the evidence has to be regarded as determinative. There may be room for error…*". Further, the Tribunal held at [131] that:

> *"The appellants' cases are that there must have been a "chain of custody" error. They rely on their own assertions about the tests. If credible, and sufficiently comprehensive, such assertions might perhaps, in an individual case, suffice to prevent the Secretary of State establishing dishonesty on the balance of probabilities. In the present cases, however, there are good reasons to disbelieve the appellants' evidence."*

14. That was the point made by Mr Lewis at [9] of his skeleton argument, namely that DK and RK continued to require an assessment of an appellant's individual credibility. Whilst the appellants in DK and RK were found not to be credible, Judge Hanbury gave various reasons at [85] of his decision for finding the appellant to be an honest and credible witness. The reasons that he gave were entirely open to him on the evidence and followed a full examination of the appellant at a hearing where the respondent chose not to attend and conduct any cross-examination. As Mr Lewis submitted, the judge's reasons did not rely solely on the absence of metadata and the chain of custody argument but were based on various additional aspects of the appellant's evidence. It seems to me that, for all of those reasons, the judge was perfectly entitled to reach the decision that he did and made no errors of law.

15. As for Ms Ahmed's challenge to the judge's decision on Article 8, I agree with Mr Lewis that her submission was not consistent with the substance of ground five. The sole challenge in the written grounds was premised upon a finding that the judge had erred in law in his decision relating to the deception issue, asserting that such an erroneous finding had infected his conclusion on Article 8. There was otherwise no challenge to the judge's decision to allow the appeal on Article 8 grounds. Ms Ahmed accepted that she may have mis-read the challenge in the grounds and that if that was the case she was applying to amend the grounds, but I have to agree with Mr Lewis that it was too late to do so. The judge had given full reasons at [88] and [89] for rejecting the respondent's position in the 'respondent's review', and that had not been challenged in the written grounds. He was entitled to conclude as he did in regard to the historical injustice. As Mr Lewis rightly pointed out, it was for the respondent to decide what period of leave to grant the appellant to reflect the judge's decision, but the judge was entitled to allow the appeal on the basis that he did.

DECISION

16. The Secretary of State's appeal is accordingly dismissed. The making of the decision of the First-tier Tribunal did not involve a material error on a point of law requiring it to be set aside. I do not set aside the decision. The decision to allow Mr Vashist's appeal therefore stands.

Signed: S Kebede
Upper Tribunal Judge Kebede Dated: 18 October 2022