



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Number: UI-2022-002449

HU/50503/2021; IA/03995/2021

THE IMMIGRATION ACTS

**Heard at Field House
On: 21 September 2022**

**Decision & Reasons Promulgated
On: 20 November 2022**

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**JAGANNATH PURI
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Ms A Ahmed, Senior Home Office Presenting Officer

For the Respondent: Mr G Mavrantonis, counsel instructed by Farani Taylor
Solicitors

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Lucas, dated 25 March 2022. Permission to appeal was granted by First-tier Tribunal Judge Hatton on 12 May 2022.

Anonymity

2. No direction has been made previously, and there is no reason for one now.

Background

3. The respondent entered the UK as a Tier 4 migrant on 20 September 2009. He was granted periods of further leave in the same capacity until 30 November 2014. The respondent made no attempts to regularise his stay in the UK until 2 March 2020 when he made a human rights claim, based on his private life.
4. In a decision dated 10 February 2021, the Secretary of State refused the respondent's human rights claim. The application was refused on suitability grounds because in his application dated 18 December 2012, the respondent submitted a certificate from Educational Testing Service (ETS) in relation to a speaking test taken on 3 October 2012. ETS had informed the Secretary of State that there was 'significant evidence' to conclude that a proxy was used, and as such she was satisfied that the certificate was obtained fraudulently, and that deception was used. The application was refused under paragraphs S-LTR 4.2 as well as S-LTR 1.6 of the Immigration Rules. In addition, the application was refused on eligibility grounds as the respondent could not meet the requirements of paragraph 276ADE(1)(vi) of the Rules.

The decision of the First-tier Tribunal

5. The judge was not satisfied that deception had been proved, noting that the audio evidence did not relate to the respondent, that his tests were marked 'questionable' and that he had not been provided with the ETS certificate. The judge noted that the respondent was able to speak very good English and that he had taken an IELTS test in 2008 to enter the UK. The appeal was allowed on the basis that the Secretary of State had not proved deception.

The grounds of appeal

6. The Secretary of State appealed on the basis that the judge materially misdirected himself in law and failed to give adequate reasoning. Permission was sought to rely on the decision of *DK & RK (ETS: SSHD evidence; proof) India* [2022] UKUT 00112 (IAC) which was unreported at the time. The grounds note that the sole basis of allowing the appeal related to the TOEIC issue, there being no independent finding of 'insurmountable obstacles,' however permission was not granted on this basis.
7. Permission to appeal was granted on all grounds, with the judge granting permission making the following comment;

I am mindful that in the recent reported decision of DK & RK (ETS: SSHD evidence; proof) India [2022] UKUT 00112 IAC (referenced in the grounds at [13]) the Upper Tribunal found at [105] that there was no general reason to suspect that candidates' test recordings would be mixed up. Given the accompanying absence of any specific reason why the audio recordings provided did not contain the Appellant's voice, it is arguable the Judge erred in finding at [32] that the Appellant sat the examination himself.

8. The respondent's Rule 24 response, dated 12 June 2022, strongly opposed the Secretary of State's appeal.

The hearing

9. I heard submissions from both representatives which I have taken into consideration in reaching this decision. Ms Ahmed focused on the four matters raised in the only ground of appeal and submitted that the law had been clarified by *DK and RK*. She also made the following points. The judge did not make a clear finding regarding the voice recording, he gave insufficient reasons on the innocent explanation put forward, did not take into account that there was widescale fraud and allowed the appeal solely on the basis of the TOEIC issue. On the last point, Ms Ahmed accepted that there had been no criticism in the grounds of the judge's Article 8 assessment. Ms Ahmed contended that it was unclear whether the first stage was considered and this rendered the decision unsafe. Nonetheless, she accepted that if the judge had not been satisfied there would have been no need for an innocent explanation.
10. For his part, Mr Mavrantonis asked for judicial restraint. He accepted that the judge's decision was unclear on the first stage of the test, with regard to the generic evidence but that any error was saved by the consideration of the second stage. The judge addressed the issue of the audio recordings and was correct in making a holistic consideration of the respondent's circumstances, applying *SM and Qadir*. Counsel for the Secretary of State at the First-tier Tribunal had made limited submissions on credibility and there was no challenge to the respondent's evidence regarding the test process. It was open to the judge to find that the respondent had put forward an innocent explanation. The entirety of the judge's proportionality assessment went unchallenged in the grounds. He urged me to dismiss the appeal.
11. At the end of the hearing, I reserved my decision on the error of law.

Decision on error of law

12. I am satisfied that there was no material error of law by the First-tier Tribunal for the following reasons.
13. Firstly, while the decision in *DK and RK* has relevance to the first stage of the legal test it has limited bearing on the judge's finding in this case, that the respondent offered an innocent explanation. On the issue of voice recordings, the judge notes at [10] that it was not the respondent's voice

on the recording and nonetheless the judge found the respondent to be credible. There is no indication that even had *DK and RK* been before him, this would have led to a different outcome.

14. Secondly, while the judge did not clearly state that the generic evidence relied upon by the Secretary of State was sufficient to discharge the initial burden, it can be readily assumed from a reading of the decision as a whole, that he accepted that it did.
15. Indeed at [27-28], the experienced judge states that he is aware of the relevant issues and of the generic evidence. While for completeness, it might have been helpful for the judge to state that the Secretary of State had discharged the burden upon her, this would have made no difference to the outcome in this case. That the judge went on to carefully consider the respondent's explanation gives some indication that he accepted the initial burden had been met. Accordingly, any error here was immaterial.
16. It is contended that the judge's reasons for finding that an innocent explanation had been advanced, were inadequate. It is notable that the judge heard oral evidence regarding the tests from the respondent and that this evidence went largely unchallenged in cross-examination [32]; that no serious credibility issues were raised and there was no challenge to the respondent's account of having taken the tests on behalf of the Secretary of State [34]. In terms of the positive reasons for accepting the innocent explanation, at [32-34], the judge took account of the respondent's ability to pass an IELTS in 2008 which was needed for his entry to the UK, the qualifications he obtained in the UK, his ability to give his evidence in 'very good' English as well as the absence of any reason why he would be compelled to cheat. Indeed, no submission has been made by the Secretary of State as to what motivation there would have been for the respondent to cheat. I am satisfied that these reasons, while briefly expressed, were adequate.
17. Lastly, while it might have been somewhat generous for the judge to allow the respondent's human rights appeal solely on a consideration of the deception issue, the Secretary of State's grounds do not challenge the judge's proportionality assessment, or lack thereof. Furthermore, with reference to *AZ (error of law: jurisdiction; PTA practice) Iran* [2018] UKUT 245 (IAC), it is the case that permission to appeal was not granted on this ground. Given that the Secretary of State is a professional representative with ample resources, it follows that there is no basis for disturbing the judge's Article 8 decision.
18. The appeal is dismissed.

Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

The decision of the First-tier Tribunal is upheld.

No anonymity direction is made.

Signed: T Kamara

Date: 11 October 2022

Upper Tribunal Judge Kamara

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.
3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.
4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically)**.
5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.
6. The date when the decision is "sent" is that appearing on the covering letter or covering email