IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006499
First-tier Tribunal No:
HU/50053/2021
IA/03136/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 17 July 2023

Before

UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

IFTAKHAR AHMED MANNA

Respondent

Representation:
For the Appellant: Mr S Whitwell, Senior Home Office Presenting Officer
For the Respondent: Mr S Karim, Counsel instructed by Liberty Legal Solicitors

Heard at Field House on 7 July 2023

DECISION AND REASONS

BACKGROUND

1. This is an appeal brought by the Secretary of State. For ease of reference, I refer to the parties as they were before the First-tier Tribunal. The Respondent appeals against the decision of First-tier Tribunal Judge Davey dated 2 November 2022 ("the Decision") allowing the Appellant's appeal against the Respondent's decision dated 11 January 2021 refusing his human rights claim.

2. The Appellant is a national of Bangladesh. He came to the UK as a student in February 2008. His leave to remain in that capacity was

extended until August 2013. Thereafter, he sought further leave to remain which application was refused, with a right of appeal which he exercised. Following reconsideration and the maintaining of that decision, and an unsuccessful appeal, the Appellant became appeal rights exhausted on 9 November 2015.

3. On 21 November 2015, the Appellant made an application to remain in the UK on grounds of long residence based on his family and private life (and not I note because he claimed to have been continuously lawfully resident by that date for ten years). This was refused on 14 May 2016 and the application was rejected as a fresh claim. This decision raised an issue on suitability grounds regarding the use of a TOEIC certificate which it was asserted was used when making an application on 28 September 2012. As such, this decision raised what has come to be known as an "ETS issue".

4. Since the decision refused to treat the application as a fresh claim, the Appellant had no right of appeal against the decision. He does not appear to have applied to judicially review that decision. Since there was no appeal against that decision, it is also the case that the Appellant has had no leave to remain in the UK since 9 November 2015. The Appellant's appeal prior to that date was dismissed by First-tier Tribunal Judge Nightingale by a decision promulgated on 25 June 2015 in which the Judge dismissed the Appellant's appeal on human rights grounds under Article 8 ECHR. As already noted, he exhausted that right of appeal on 9 November 2015 and his leave to remain came to an end on that date.

5. On 3 August 2020, the Appellant made a further application to remain on the ten years' family and private life route. That led to the refusal which is here under appeal. Of course, the only decision which gives rise to the appeal is the refusal of a human rights claim made on the basis of Article 8 ECHR. That is relevant to an issue which I raise below.

6. In the decision under appeal, the Respondent once again relied (on suitability grounds) on what she said was a TOEIC certificate which had been fraudulently obtained. That was therefore an issue which the Judge was required to consider.

7. The Respondent produced evidence relating to the ETS issue consisting of the ETS look-up tool relating to the Appellant, a Project Façade report setting out the criminal inquiry into the abuse of TOEIC by the college at which the Appellant said he sat his test, reports by Mr Richard Heighway of Kroll Ontrack Legal Technologies Ltd and Professor Peter French of JP French Associates, both commissioned by the Respondent and dealing with the evidence and methodology used in the ETS investigation generally. The Respondent also relied in that regard on the witness statements of Peter Millington and Rebecca Collings and on a further witness statement of Adam Sewell producing the Project Façade report.

8. The Appellant in turn provided evidence in the form of a witness statement, correspondence he had with ETS (via their solicitors Leigh Day) concerning disclosure of the voice recording said by the Respondent to relate to his test, documents relating to his qualifications and case-law concerning the ETS issue. I should make clear that at the time of the hearing before Judge Davey, the Presidential panel decision in DK & RK (ETS: SSHD evidence; proof) India [2022] UKUT 00112 IAC ("DK & RK") to which I refer below had not been promulgated or reported. It was promulgated on 25 March 2022 and reported in April 2022. Both dates however precede the Decision by several months.

9. There was some dispute at the hearing before me as to what the Judge decided and so I will simply say neutrally at this stage that the Judge accepted the Appellant's case about the TOEIC certificate. I deal below with what the Judge decided on my reading of the Decision. However, as I will also come to below, the Judge came to the conclusion that the Appellant could not succeed on Article 8 ECHR either within or outside the Immigration Rules ("the Rules"). Nonetheless, he purported to allow the appeal.

10. The Respondent appealed the Decision on one ground namely that the Judge made a material misdirection in law by failing to refer to DK & RK and had therefore failed properly to deal with the substance of the Respondent's evidence. Again, I will come below to what is said in DK & RK when dealing with the parties' submissions.

11. Permission to appeal was granted by First-tier Tribunal Judge Parkes on 3 January 2023 in the following terms:

> "..2. The grounds argue that the Judge erred in the approach the evidence [sic] from the Respondent in ETS cases. The grounds cite extensively from the case of DK & RK. It is arguable that the observations made by the Judge in paragraph 8 of the decision are erroneous having regard to the guidance cited by the Respondent in the grounds.
> 3. The grounds disclose arguable errors of law and permission to appeal is granted."

12. The matter comes before me to decide whether the Decision does contain an error of law. If I conclude that it does, I must then decide whether the Decision should be set aside in consequence. If the Decision is set aside, I must then either re-make the decision in this Tribunal or remit the appeal to the First-tier Tribunal for re-determination.

13. I had before me a core bundle of documents relating to the appeal to this Tribunal, the Appellant's and Respondent's bundles before Judge Davey ([AB/xx] and [RB/xx] respectively) and also the Appellant's skeleton argument before the First-tier Tribunal. The Appellant did not file a Rule 24 Reply.

14. Having heard from Mr Whitwell and Mr Karim, I indicated that I found an error of law in the Decision, that I would therefore set it aside and remit

the appeal to the First-tier Tribunal. I indicated that I would provide my reasons in writing which I now turn to do.

DISCUSSION

15. I begin with the paragraph of the Decision referred to in the grant of permission to appeal which forms the basis of the Judge's finding on the ETS issue as follows:

> "8. Having re-read and considered the ETS evidence statements provided within the Respondent's bundle and the extent of the printout of the outcome and its inadequacies which are identified, I concluded that the Appellant had, by dint of his material, really raised doubts as to the reliability of that relied upon by the Respondent. It therefore left me in the position where on the evidence before me, particularly provided by the Respondent and the Appellant, I found that the Appellant was likely to have undertaken the TOEIC test and did not obtain certificate by deception. It was therefore appropriate in accordance with caseworker instructions for the Appellant to be granted leave to remain so that he could decide to choose what route of study, if any, he wished to continue on in the United Kingdom."

16. I observe in passing that, rather unusually in such cases, the Appellant was not seeking any further course of study at the time when the ETS issue was raised nor was he relying on the earlier decision refusing him leave and raising the ETS issue as prejudicing his ability to meet the requirements of paragraph 276B of the Rules (on the basis that absent that decision he could have acquired ten years' continuous lawful residence). True it is that the ETS issue related to an application made at a time when he was a student, but it was raised only in response to an application to remain on Article 8 grounds (see the Respondent's decision at [AB/65-73]). Although that decision did not give rise to an appeal, that was because the Appellant had already had an appeal on Article 8 grounds (see appeal decision at [RB/106-114]). It is fair to record that the ETS allegation had not been made against the Appellant at that stage. However, First-tier Tribunal Judge Nightingale found at that point in time (June 2015) that removal would not breach the Appellant's Article 8 rights irrespective of the ETS issue.

17. Moving on then to the Respondent's ground as argued before me, the guidance in DK & RK reads as follows:

> "1. The evidence currently being tendered on behalf of the Secretary of State in ETS cases is amply sufficient to discharge the burden of proof and so requires a response from any appellant whose test entry is attributed to a proxy.
> 2. The burden of proving the fraud or dishonesty is on the Secretary of State and the standard of proof is the balance of probabilities.
> 3. The burdens of proof do not switch between parties but are those assigned by law."

18. Before turning to deal with the competing arguments about the Decision and the Judge's failure to have regard to DK & RK, I record that the Tribunal heard those appeals in March and November 2021 but reached its decision at much the same time as the hearing in this appeal (a few days after the hearing). Furthermore, in making its findings, the Tribunal had before it and considered evidence which is, if not identical to the evidence tendered by the Respondent in this appeal, then very similar. The Tribunal not only had written evidence from Mr Sewell; it heard oral evidence from him. It considered Professor French's evidence. It took into account evidence about "false positives". It concluded that the "voice recognition process is clearly and overwhelmingly reliable in pointing to an individual test entry as the product of a repeated voice" ([103]). It also considered the criticisms based on continuity of records ([104] to [106]) before concluding at [107] that "there is every reason to suppose that the evidence is likely to be accurate".

19. I understood Mr Karim to accept that DK & RK was not referred to by the Judge. As he submitted, that decision was promulgated and reported after the hearing in this case and therefore it cannot be suggested that either party should have brought it to the attention of the Judge at the hearing. However, DK & RK was a decision of a Presidential panel giving guidance for the benefit of First-tier Tribunal Judges which was both promulgated and reported prior to the Decision in this appeal being made and promulgated. It considered in some detail the evidence produced by the Respondent in such appeals.

20. Mr Karim asked rhetorically what the Judge was supposed to do in these circumstances. The answer to that question is clear. He should have considered the guidance. If he intended to depart from what was there said, he might have wished to seek the parties' submissions before doing so. He might have wished to give the Appellant the opportunity to make submissions about how the guidance applied to his case if at all or why it should be departed from. What he could not do was ignore it and reach an opposite finding.

21. Mr Karim submitted that the Judge's error (if error it was) made by failing to refer to DK & RK was immaterial because the Judge had reached his finding based on all the evidence and not simply that of the Respondent. He made the point that in this case the Respondent had not cross-examined the Appellant. Whilst I have no Rule 24 reply making that point nor any witness statement from Mr Karim (who could not then have acted as advocate before me), I permitted Mr Karim to give what was in effect evidence about what had occurred at the hearing. He said that the lack of cross-examination was alluded to at [6] of the Decision. The point is not expressed in precisely those terms.

22. Even assuming however that the Appellant was not cross-examined, on my reading of [8] of the Decision, the Judge's finding was not based on what the Appellant said but on the lack of reliability of the Respondent's evidence. Although Mr Karim eloquently sought to persuade me otherwise, it is impossible to read what is said in that paragraph other

than as a finding that the Respondent's evidence was unreliable. That is why the Judge reached the conclusion he did about the Appellant sitting the test.

23. I accept that the guidance in DK & RK does additionally make the point that there is only one burden of proof and the "boomerang" of burdens which it is suggested applied in earlier case-law is no longer considered to be the legal position. The issue for the Judge was I accept whether on the balance of probabilities the Appellant had sat the test himself. I also accept that the Judge did refer to the Appellant's evidence about his individual circumstances at [6] of the Decision.

24. However, the finding at [8] is reached predominantly on the basis of the Respondent's evidence and the doubts which the Appellant had cast on that evidence. That follows from the reference to the lack of reliability of the Respondent's evidence and the Judge's reference to it being, in particular, the Respondent's evidence which gave rise to his conclusion. Even if the Judge did have regard to the Appellant's evidence about his individual circumstances, his failure to refer to the guidance about the Respondent's evidence still gives rise to an error which impacts or at least may well affect the outcome.

25. Again, I accept Mr Karim's submission that it was open to the Judge to find that the Respondent's evidence was not reliable if there were something which caused him to depart from DK & RK. However, first, that raises the obvious point that the Judge would first have to have regard to the guidance in DK & RK which he has not done. However, second, it is difficult to see what it was that was new in terms of criticism in this appeal. Mr Karim referred to the correspondence which the Appellant had with ETS' solicitors (Leigh Day) recorded at [4] of the Decision and the silence which the Appellant faced in that regard. That correspondence is at [AB/12-19]. That does not show any failure to respond. The Appellant's solicitors made the point (as in all these cases) that the voice recordings were not of their client's voice. Concerns were raised (as the Judge notes) about that and the continuity and sufficiency of the evidence about the voice recordings (see [4] and [5] of the Decision). However, those were all issues raised, and dealt with in DK & RK. None of those concerns was new. The guidance in DK & RK post-dated all the case law to which the Judge relied at [5] of the Decision.

26. Whilst I accept therefore that another Judge could reach the same conclusion on full and lawful consideration of all the evidence on both sides in this appeal, for the foregoing reasons, I cannot accept that the error made by Judge Davey was immaterial.

27. I turn finally to an additional point made by Mr Whitwell in his oral submissions concerning the outcome of this appeal. This might potentially have arisen for determination if I had accepted Mr Karim's submission regarding materiality. As it is, I do not need to determine what the outcome would have been. However, I mention the point for completeness.

28. As Mr Whitwell pointed out, having made the finding he did at [8] of the Decision, the Judge proceeded to consider Article 8 ECHR. He found at [9] to [13] of the Decision that there were no very significant obstacles to the Appellant's reintegration in Bangladesh. He also concluded that interference with the Appellant's private life would not outweigh the public interest and therefore removal would be proportionate.

29. Under the heading of "DECISION", the Judge then said this:

> "The appeal is allowed on the issue arising upon the ETS system test and my finding that the Appellant did not cheat in taking the TOEIC test, as alleged. On other grounds the appeal is dismissed."

30. That statement itself involves an error of law. There is only one ground in an appeal on human rights grounds and that is that removal would be contrary to section 6 Human Rights Act 1998 (see section 84, Nationality, Immigration and Asylum Act 2002). There is no longer a ground that the decision under appeal is not in accordance with the law or that the Respondent should have exercised her discretion differently.

31. Mr Karim, when arguing that any error made was not material, and when his attention was drawn to this point invited me to re-make the decision by allowing the appeal on Article 8 grounds. As Mr Whitwell pointed out, though, if one were re-making the decision based on this error, the probable outcome given the findings made at [9] to [13] of the Decision would be that the appeal should be dismissed. Mr Karim countered that in those circumstances, I would have no jurisdiction to do anything as the Respondent could not appeal an outcome dismissing the appeal.

32. Fortunately, I do not need to decide that issue as I am satisfied that the error made by the Judge when reaching the finding he did on the ETS issue contains an error of law based on his failure to have regard to the guidance in DK & RK. I have concluded that this error is material. Accordingly, I set aside the Decision in its entirety. Since the appeal and the ETS issue in particular turns on the Appellant's credibility, it is appropriate to remit the appeal to the First-tier Tribunal for re-hearing before a Judge other than Judge Davey or Judge Nightingale (who dismissed the Appellant's earlier appeal).

NOTICE OF DECISION

The decision of Judge Davey dated 2 November 2022 contains errors of law which are material. I set that decision aside and remit the appeal to the First-tier Tribunal for re-hearing before a Judge other than Judge Davey or Judge Nightingale (who dismissed the Appellant's earlier appeal).

L K Smith

Upper Tribunal Judge Lesley Smith
Judge of the Upper Tribunal
Immigration and Asylum Chamber

10 July 2023