IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001159
First-tier Tribunal No:
HU/58236/2021
IA/17989/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 25 June 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

v

MR ABDUL REHMAN KHAN
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr Arif Rehman of Counsel, Connaught Law Limited
For the Respondent: Mr Lindsay, Home Office Presenting Officer

Heard at Field House on 31 May 2023

DECISION AND REASONS

1. The Claimant is a national of Pakistan born on 1 July 1979. He arrived in the UK on 21 September 2007 with entry clearance as a student valid from 28 August 2007 until 31 October 2008. He was subsequently granted further leave to remain as a Tier 4 student until 22 February 2010. On 18 February 2010, the Claimant applied for leave to remain as a Tier 4 General Student which was refused with the right of appeal on 28 April 2010. The appeal was allowed on 16 September 2010 and he was subsequently granted leave to

remain valid from 17 November 2010 until 17 February 2011 and this was subsequently extended until 22 December 2011.

2. On 12 December 2011, the Claimant submitted a Tier 4 General Student application which was refused with the right of appeal on 17 January 2012. He appealed against this refusal but his appeal was dismissed by a First-tier Tribunal Judge and subsequent applications for permission to appeal were all refused and the Claimant became appeal rights exhausted on 4 December 2012. On 27 June 2013 and 29 July 2013 the Claimant submitted a family/private life application which was rejected. On 11 December 2013 he submitted a family life/private life application which was refused with no right of appeal on 28 January 2014. On 31 October 2016, the Claimant applied for leave to remain on the basis of family/private life which was refused on 22 August 2017 and the subsequent appeal was dismissed on 22 October 2019. Leave to appeal was refused and the Claimant again became appeal rights exhausted on 18 June 2020.

3. On 10 September 2020, the Claimant applied for leave to remain on the basis of family/private life, which was refused on 24 February 2021. On 29 March 2021 a Pre-Action Protocol letter was sent and the SSHD agreed to reconsider the decision, which was re-refused on 13 July 2021 with no right of appeal. On 24 July 2013, the Claimant sent a further Pre-Action Protocol letter and the SSHD agreed to re-consider the decision dated 24 February 2021. That was refused in a decision dated 9 December 2021.

4. The Claimant appealed against that decision and his appeal came before First-tier Tribunal Judge Cohen for a hearing on 1 December 2022. In a decision and reasons dated 10 February 2023 the judge allowed the appeal on human rights grounds.

5. The Secretary of State sought permission to appeal in time on 15 February 2023 on the basis that:

5.1. The FtTJ had erred in failing to appreciate a previous decision of First tier Tribunal Judge Louveaux dated 22 October 2019, which had been relied on in the Respondent's refusal letter and was contained in the hearing bundle. This was material because that judge had not accepted the Claimant's innocent explanation in relation to his TOEIC/ETS test. Therefore, First-tier Tribunal Judge Cohen failed to apply Devaseelan as the previous decision and reasons contains the same evidence as was before him;

5.2. The Home Office had no record of the Claimant contacting them on 22 November 2022 requesting the voice recording of his English language test and there was no evidence of this in the hearing bundle;

5.3. FtTJ Cohen failed to apply the most recent presidential guidance in DK and RK (ETS: SSHD evidence proof India) [2022] UKUT 112 (IAC) when finding that the Secretary of State had failed to meet the reverting burden. The onus was on the Claimant to show the evidence against him was flawed, which had not been done. The FtTJ took into consideration the Claimant's other qualifications and English language proficiency without applying the judgement in DK which refuted the argument that an appellant's standard of English is sufficiently good to mean there is no need to cheat. It was not clear why the evidence relied upon at [13] would preclude the Claimant's use of a proxy test taker.

6. Permission to appeal was granted by First-tier Tribunal Judge J Grant-Hutchison on 3 April 2023 in the following terms:

> *"It is arguable that the Judge has erred in law (a) by failing to take into account that the Appellant has had his appeal dismissed twice both in 2012 and 2019. In terms of Devaseelan (Second Appeals) Sri Lanka* [2002] UKIAT 00702 the Judge has failed to take into account the 2019 decision where the same evidence was considered 3 years previously and had the said decision been taken into account, the Judge would have reached a different conclusion; (b) by failing to properly apply the facts to the case of DK and RK (ETS: SSHD evidence; proof) India [2022] UKUT 112 (IAC) when it is submitted that the Respondent has no record of the Appellant's contact on 22 November 2022 requesting the voice recording and can find no evidence of this in the hearing bundle; when taking into consideration the Appellant's other qualifications and English language proficiency which refuted the argument that the Appellant's standard of English is sufficiently good to mean that there was no need to cheat and lastly by the evidence from the Appellant which is relied upon by the Judge would preclude the use of a proxy test-taker during the test."*

Hearing

7. Mr Lindsay, on behalf of the Secretary of State, submitted that the error is clearcut and material. On the first point, he submitted that the 2019 determination of FtTJ Louveaux was very much material as that judge found against the Claimant on the issue of TOIC fraud. Whilst he accepted that Judge Cohen referred in passing to that determination at [3] there was no indication that he was aware of its findings in relation to TOEIC fraud, but rather he refers to it being an application based on family and private life.

8. Mr Lindsay submitted that FtTJ Cohen erred in applying Devaseelan only to the 2012 determination and not to the 2019 determination of FtTJ Louveaux, which is clearly fatal. In relation to the second

ground of challenge, based on [4] of the grounds of appeal, he accepted, having had his attention drawn by Mr Arif Rehman on behalf of the Claimant, that there was a supplementary bundle containing an email from the Claimant's representatives with a letter of authority requesting a copy of the voice recording, so he formally withdrew that ground of appeal.

9. In relation to the third ground of challenge based on a failure by the FtTJ to take account of the guidance set out in the presidential decision of DK and RK, Mr Lindsay submitted that was also made out, the case law had not been applied or engaged with by the judge, which was a material error.

10. In response, Mr Rehman drew attention to [11] of the FtTJ's decision and reasons and the fact that the judge had mentioned the principles set out in Devaseelan; that he was aware of his duties and the previous determination and at [9] he considered the Claimant's achievements and his innocent explanation. Mr Rehman submitted that there was evidence in support of the Claimant's achievements and no adverse evidence before the First-tier Tribunal Judge.

11. I indicated at the hearing that I found that First-tier Tribunal Cohen had made material errors of law in failing to take account of the substance of the decision and reasons of FtTJ Louveaux in 2019 and that further reasons would following in writing.

Decision and Reasons

12. Whilst the Claimant gave evidence before the FtT he was not subjected to cross-examination due to the fact that the SSHD was not represented, albeit confusingly the FtTJ refers at [5] to hearing submissions from both parties.

13. At [11] the FtTJ acknowledged that the Claimant had a previous appeal in respect of "these matters" which was dismissed in 2012 leading to the Claimant becoming appeal rights exhausted in 2013. He noted that there were matters before him which were not before the previous Immigration Judge and this was prior to the raft of ETS/TOEIC cases that had not been considered or decided and consequently he was entitled to deviate from those findings. There is no reference at all to the decision and reasons of FtTJ Louveaux dated 22 October 2019 and it is clear that the FtTJ simply did not take these findings into consideration when determining the appeal. This is clearly an error of law given the materiality of those findings, which concerned the same issue ie whether the Claimant had utilised a proxy with regard to his ETS test.

14. At [9] the FtTJ states that he has had regard to the most recent case of DK & RK [2022] UKUT 00112 IAC but goes on to find that the

Claimant acted in a way that would be expected of an innocent individual who had taken the test himself and that the SSHD in failing to address or respond this had failed to meet the burden which had reverted to her and accordingly the appeal should be allowed. I find in allowing the Claimant's appeal that the FtTJ did not implement the guidance set out in DK & RK which is as follows:

> "*GENERAL CONCLUSIONS*
>
> *126. The two strands, therefore, amount respectively to the virtual exclusion of suspicion of relevant error by ETS, and the virtual exclusion of motive or opportunity for anybody to arrange for proxy entries to be submitted except the test centres and the candidates working in collusion.*
>
> *127. Where the evidence derived from ETS points to a particular test result having been obtained by the input of a person who had undertaken other tests, and if that evidence is uncontradicted by credible evidence, unexplained, and not the subject of any material undermining its effect in the individual case, it is in our judgment amply sufficient to prove that fact on the balance of probabilities.*
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> *128. In using the phrase "amply sufficient" we differ from the conclusion of this Tribunal on different evidence, explored in a less detailed way, in SM and Qadir v SSHD. We do not consider that the evidential burden on the respondent in these cases was discharged by only a narrow margin. It is clear beyond a peradventure that the appellants had a case to answer.*
>
> *129. In these circumstances the real position is that mere assertions of ignorance or honesty by those whose results are identified as obtained by a proxy are very unlikely to prevent the Secretary of State from showing that, on the balance of probabilities, the story shown by the documents is the true one. It will be and remain not merely the probable fact, but the highly probable fact. Any determination of an appeal of this sort must take that into account in assessing whether the respondent has proved the dishonesty on the balance of probabilities."*

15. The decision and reasons of First tier Tribunal Judge Cohen contains material errors of law. I set aside that decision and remit the appeal for a hearing *de novo* before a different Judge of the First tier Tribunal.

Rebecca Chapman

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

Date 16 June 2023