Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/05427/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4 October 2019	**On 29 October 2019**

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

THIRUSUTHAN GANACHANDRALINGAM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr West of counsel, instructed by City Heights Solicitors
For the Respondent: Mr Kotas, Senior Presenting Officer

DECISION AND REASONS

1. This is what has come to be known as an ETS case, in which the correct approach which is to adopted by the First-tier Tribunal has been considered in a number of reported decisions from the Upper Tribunal and the Court of Appeal. For reasons which I will explain, the First-tier Tribunal failed to adhere to that guidance in this appeal. It is for that reason, in summary, that the appeal to

the Upper Tribunal falls to be allowed and the matter remitted to the FtT for redetermination *de novo*.

2. The appellant is a Sri Lankan national who was born on 21 August 1990. He entered the UK as a student in 2010. He received various periods of further leave to remain in that capacity. In 2015, however, there was a refusal of further leave which resulted in an appeal to the FtT. That appeal was dismissed by the FtT in August 2016 and the appellant became appeal rights exhausted on 22 September 2017. He then made an out of time application for leave to remain on human rights grounds on 6 October 2017. He stated that he was in a relationship with a British citizen and that he ought to be granted leave to remain under Appendix FM of the Immigration Rules or because his removal would be disproportionate under Article 8 ECHR. Further submissions in support of that claim were made by his present representatives on 31 January 2018.

3. On 5 February 2019, the Secretary of State refused the application. She concluded that the appellant did not qualify for leave as a spouse for three reasons. Firstly, she concluded that the appellant had used a proxy to take an English language test at Eden College on 3 April 2013. The results of that test had been submitted in support of two applications for leave to remain which the appellant had made in 2013 and the respondent considered that the appellant had made false representations in a previous application. He was consequently refused on suitability grounds, under paragraph S-LTR 4.2 of Appendix FM. The second ground of refusal was that the appellant did not meet the Immigration Status Requirement (for leave to remain under the Five-Year Route) because he was on immigration bail: E-LTRP 2.1-2.2. The third ground of refusal was that the respondent was not satisfied that the appellant met the requirement in paragraph EX1(b) of Appendix FM; whilst it was accepted that the appellant and his British partner were in a genuine and subsisting relationship, the respondent was not satisfied that there were insurmountable obstacles to that relationship continuing in Sri Lanka. The respondent did not consider that the appellant fell to be granted leave to remain on Private Life grounds under the Immigration Rules, or that there were proper reasons for concluding that his removal to Sri Lanka would give rise to unjustifiably harsh consequences which would breach Article 8 ECHR.

4. The appellant gave notice of his appeal to the FtT(IAC) and his appeal came before Judge Abebrese, sitting at Taylor House on 10 June 2019. Both parties were represented. The appellant and his wife gave oral evidence. Submissions were made on the issues above and the judge reserved his decision.

5. In his decision of 5 July 2019, the judge rejected a submission from Mr West (who appeared then as he does now) that the 'Look Up Tool' at p154 of the respondent's bundle was illegible: he concluded that it was 'in small letter' but that it was not illegible. He rejected the appellant's account of events at Eden College on 3 April 2013, partly because he considered the evidence produced by ETS to be reliable and partly because he noted that a significant proportion of the results from that college had been cancelled by ETS. He considered that the appellant had not provided an innocent explanation for the apparent problems with his speaking test and that his appeal fell to be dismissed on suitability grounds. Nor did the judge find for the appellant on the issue which arose under EX1(b) of Appendix FM; he concluded that the family life between the appellant and his wife could continue in Sri Lanka. He did not accept that there were exceptional circumstances outside the Immigration Rules which rendered the appellant's removal from the UK contrary to Article 8 ECHR.

6. Permission to appeal was sought and granted (by First-tier Tribunal Judge Landes) on four grounds. The grounds are prolix and discursive but may be summarised as follows. Firstly, the judge had erred in his application of the burden and standard of proof in respect of the suitability ground of refusal. Secondly, the judge had failed to consider material matters in concluding that there were no insurmountable obstacles to the continuation of family life in Sri Lanka. Thirdly, the judge had failed to address the contention that there would be very significant obstacles to the appellant's relocation to Sri Lanka. Fourthly, the judge had failed to address a Chikwamba [2008] 1 WLR 1420 argument which had been set out in the appellant's skeleton.

7. In granting permission to appeal, Judge Landes noted amongst other things that it was arguably perverse for the judge to have concluded that the ETS Look UP Tool at p154 of the respondent's bundle was legible. She stated that 'the document at p154 of the respondent's bundle cannot be read'. My own examination of that document clearly supported Judge Landes' view. The document which appears at p154 of the respondent's bundle is almost completely illegible. I can make out the words 'ETS Search', 'ETS SELT Source Data' and 'MDA Matched Data' (where applicable) but everything else is in such small type that it cannot be read.

8. When the appeal was called on, therefore, I asked Mr Kotas whether he was able to read the ETS Look Up Tool which was before the judge. He said that he was able to read it perfectly well. I asked him to read it out to me, and he was readily able to do so. He was reading from the Home Office's copy of the bundle, however. When I gave Mr Kotas the copy of the bundle

which had been filed with the FtT, he readily accepted that it was completely illegible. It seems that the small typeface was legible when it was originally printed but that the copy of the bundle which had been transferred electronically to the Tribunal had lost clarity, although it is not possible to know whether this was as a result of the scanning of the bundle by the Home Office or the printing of the bundle by the Tribunal.

9. This produced a rather unsatisfactory and, it is to be hoped, rather unusual state of affairs. Mr Kotas was sensibly able to accept that there was no rational basis upon which the judge in the FtT was able to conclude that he had a legible copy of the Look Up Tool. I asked Mr Kotas where that left the respondent's opposition to the appeal. He initially sought to submit that the error on the part of the judge was immaterial, since there was a legible copy of the Look Up Tool in existence. He was subsequently constrained to accept, however, that the judge could not rationally have proceeded beyond the first stage of the enquiry required by [10] of SM & Qadir [2016] UKUT 229 (IAC) when there was no legible copy of the ETS Look Up Tool.

10. That must be correct. It is clear from Shehzad & Chowdhury [2016] EWCA Civ 615 that a copy of the ETS Look Up Tool, together with the respondent's 'generic evidence' is required if she is to discharge the initial evidential burden upon her. It is trite, as Mr Kotas in fairness accepted, that the question of whether there is a material error of law in a first instance decision is to be determined on the basis of the evidence which was before the first instance judge: CA v SSHD [2004] 1165; [2004] Imm AR 640. That question cannot sensibly be resolved by reference to evidence which was not available at trial.

11. I concluded at the hearing that I was bound to find that the judge in the First-tier Tribunal had erred in law in his approach to the ETS Look Up Tool. Contrary to the finding he made, it is accepted on all sides that he did not have a legible copy of the Look Up Tool. He did not have the minimum evidence required by the jurisprudence to discharge the initial evidential burden on the Secretary of State. It follows that his assessment of whether the appellant cheated in his speaking test at Eden College in 2013 cannot stand. It would not be appropriate, in my judgment, to seek to preserve any aspect of that assessment in the circumstances which I have described.

12. That is particularly so when there is merit in the other aspects of the first ground. As contended at [22]-[34] of Mr West's grounds of appeal, the judge failed to engage in any meaningful way with the appellant's answer to the respondent's allegation of fraud. He asserted and produced evidence to show, for example, that he was proficient in the English language at the time he was

meant to have cheated. The judge failed to engage with that evidence at all and whilst that evidence was plainly not decisive (for the reasons given at [57] of MA (Nigeria) [2016] UKUT 450 (IAC)), it was undoubtedly a relevant consideration. Whilst the judge was entitled, at [13] of his decision, to find that the appellant had been somewhat vague about how much he had paid to take the test, he was required to engage with the appellant's contention that he was a man who had no reason to cheat in this test. His failure to do so represented a further legal error which vitiated the assessment of the suitability ground of refusal.

13. It follows, as I announced at the hearing, that the proper course is for the decision of the First-tier Tribunal to be set aside as a whole. The parties were agreed that the correct course, in the unusual circumstances I have described, was for the appeal to be remitted to the First tier Tribunal. On remittal, the parties will be at liberty to adduce evidence which was not before Judge Abebrese or me. It is to be hoped, in the circumstances set out above, that the respondent will ensure that a legible copy of the Look Up Tool is made available to the FtT and to the appellant well in advance of that hearing. I make no direction in that regard, however, since it is for the respondent to decide what evidence she seeks to rely upon.

Notice of Decision

The decision of the First-tier Tribunal was erroneous in law and is set aside. The appeal is remitted to the FtT to be heard afresh by a judge other than Judge Abebrese.

No anonymity direction is made.

MARK BLUNDELL
Judge of the Upper Tribunal (IAC)

Dated 25 October 2019