



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/16195/2017

THE IMMIGRATION ACTS

Heard at Field House
On 1 March 2019

Decision & Reasons Promulgated
On 7 March 2019

Before

UPPER TRIBUNAL JUDGE SMITH

Between

MOHAMMAD [J]

And

Appellant

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms E Griffiths, Counsel instructed by RAMFEL
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND

1. The Appellant appeals against a decision of First-Tier Tribunal Judge Peter-John S White promulgated on 14 September 2018 (“the Decision”) dismissing the Appellant’s appeal against the Secretary of State’s decision dated 12 November 2017 refusing a human rights claim made in the context of the refusal of an application for indefinite leave to remain (“ILR”) based on ten years’ lawful residence.

2. The Appellant is a national of Bangladesh. He entered the UK on 15 August 2006 with leave as a student which was extended to 12 April 2013. His wife was his dependent and was granted leave in line although her leave expired in December 2012. On 22 August 2012, she made an application for asylum with the Appellant as her dependent. According to the Decision, that was initially refused on 20 September 2012 with a right of appeal but when the Appellant and his wife lodged notices of appeal, those decisions were withdrawn and on 10 October 2012 the Respondent refused the claim with no right of appeal. I will need to say more about this aspect of the case later.
3. The couple have two children, but I do not need to say anything further about them as the Decision so far as their situation is concerned is not challenged. The grounds challenging the Decision turn on one of the reasons for refusal of ILR namely the Respondent's application of general grounds of refusal. That basis of refusal turns on an allegation that the Appellant used a proxy test taker when taking two English language tests in June and July 2012. This is a so-called "ETS" allegation. The Appellant did not use the ETS certificates when making any application for leave to remain. He claims to have since lost the certificates.
4. The Judge refused an application for an adjournment which was premised on late service by the Respondent of his evidence in relation to the ETS allegation. He went on to uphold the Respondent's decision on the general ground relied upon. He also concluded that the Appellant did not have leave to remain after 12 April 2013 and accordingly could not satisfy the residence requirement for ILR.
5. The Appellant has raised three grounds of appeal against the Decision. The first two were the subject of the pleaded grounds leading to the grant of permission to appeal. The third was not raised until late on the day before the hearing when the Appellant's representatives sent a document entitled "additional grounds of appeal" with no covering letter explaining the basis on which those were submitted (including why the ground was not raised earlier) but including a statement within the additional grounds that "..there is an essential public interest in the decisions of the first-tier tribunal being made on the correct legal basis". In spite of the lack of any application or prior notice to the Respondent I heard submissions from Ms Griffiths on this aspect. Mr Melvin was understandably unable to assist with submissions in reply.
6. The three grounds raised are as follows:
 - (a) Ground one: procedural unfairness arising from the Judge's refusal to adjourn.
 - (b) Ground two: the Decision in relation to the ETS allegation was irrational and/or inadequately reasoned.

- (c) Ground three: the Appellant had continuing leave under Section 3C Immigration Act 1971 (“Section 3C leave”) due to the Respondent’s failure properly to determine the asylum claim in 2012/2013.

- 7. Permission to appeal was granted by First-tier Tribunal Judge P J M Hollingworth on 5 December 2018 in the following terms:

“1. The application for permission was out of time. I extend time in the light of the totality of the factors including the explanation put forward and the circumstances related. I grant the application. It is arguable that an adjournment should have been granted by the Judge given the late service of evidence by the Respondent. The Judge referred to this being regrettably not uncommon in ETS appeals. It is arguable that unfairness has been seen to arise. At paragraph 6 the Judge refers to the evidence comprised in the Respondent’s supplementary bundle. This included evidence at Annex A to a witness statement apparently identifying the Appellant as someone who had taken two ETS speaking tests in June and July 2012. The basis of the application was that the Appellant wished to request the ETS audio tapes relating to those tests and instruct his own expert witness. It is arguable that definitive reliance upon evidence served late is to be distinguished from being put on notice of an allegation.”

- 8. The matter comes before me to decide whether the Decision contains a material error of law and if so to either remit the appeal to the First-tier Tribunal or to re-make the decision. The Respondent has filed a Rule 24 Notice on 28 February 2019 seeking to uphold the Decision.

DISCUSSION AND CONCLUSIONS

Ground Three: Permission to Appeal

- 9. Although the grant of permission does not refer in terms to the second ground, I accept that the grant is not limited to the first ground. However, before I turn to deal with those two grounds, it is appropriate to deal with the issue of permission to appeal on the third ground which, as I indicate above, was raised late on the day before the hearing in front of me. The Appellant does not have permission to appeal on this ground and I therefore determine that issue first not least because the substance of this ground may have some impact on the remainder of the appeal.
- 10. I begin with the factual underpinning of this ground. As I have already noted, the Appellant’s wife made an asylum claim on 22 August 2012 with the Appellant as her dependent. It is common ground that at the time both the Appellant and his wife had continuing leave to remain since the Appellant still had leave to remain as a student. That led to the making of a decision dated 10 October 2012 which is headed “Determination of Asylum Claim” and is addressed to Cornerstone Solicitors Ltd who, I infer, were the solicitors instructed in that regard. No issue is taken by the Appellant that he and his wife did not receive

that notice. The letter refers to an earlier letter dated 24 September 2012 which is not in the bundle before me and to the lodging of appeals by both the Appellant and his wife. The letter goes on to observe that the Appellant had not been served with notice of decision (and therefore had no right of appeal) and that the Tribunal had been so informed. It then refers to the claim having been “reconsidered” and to the reasons for refusal letter “a copy of which is attached for your records”. It goes on to record that both the Appellant and his wife had continuing leave – she until 13 December 2012 and he until 12 April 2013. It records that therefore both have continuing leave and are not entitled to appeal the decision.

11. At that time, rights of appeal were limited to “immigration decisions” which were listed in Section 82 Nationality Immigration and Asylum Act 2002 (“the 2002 Act”). As the Respondent’s decision letter rightly recorded, a decision refusing to vary leave to remain did not give rise to a right of appeal unless the effect of the variation was that no leave remained. The decision also rightly indicated that there was no right of appeal under Section 83 of the 2002 Act against refusal of the asylum claim itself because the couple did not have more than 12 months’ leave remaining. The couple were therefore informed that if they made an application after expiry of their leave, they would be given a notice of decision pursuant to the Immigration (Notices) Regulations 2003 (“the Notices Regulations”) which would confer a right of appeal. I observe as an aside that, under the appeals provisions then pertaining, the notice of decision which the couple would have been given in that event would be a notice of removal under section 10 Immigration and Asylum Act 1999 as they would be overstayers. That notice would generate a right of appeal. There was no obligation on the Respondent to serve such a decision at any particular time save that it had to be served before actual removal (see Patel and others v Secretary of State for the Home Department [2013] UKSC 72 at [25] to [31]). The notice of decision would generate an out of country right of appeal unless a protection or human rights claim was made which was not certified as clearly unfounded.
12. A further letter was sent by the Respondent to Cornerstones Solicitors Ltd on 8 January 2013 referring back to the 10 October 2012 letter and recording that the solicitors wrote on 7 December 2012 stating that the Appellant’s wife did not intend to make any further applications before or after 13 December 2012 and that the Appellant did not intend to do so either. The letter reminded the solicitors however that the Appellant’s leave continued until 12 April 2013 and the solicitors were asked to confirm at that time whether he intended to make a further application. If he did not, the letter recorded that the couple would be served a notice of decision and appeal papers.
13. The factual basis of the Appellant’s third ground is straightforward – he says that neither he nor his wife was ever served with a letter providing reasons for refusing the asylum claim. He says that although this is referred to in the 10 October 2012 letter, no such letter accompanied that notice. Accordingly, he says,

as a matter of law, the asylum claim was not properly determined in accordance with rule 333 of the Immigration Rules (“the Rules”). That means, he says, that he continued to have Section 3C leave after 12 April 2013 because the application made by his wife with him as dependent was not determined.

14. As I pointed out to Ms Griffiths, there is a lack of evidential underpinning to the Appellant’s case in this regard. The Appellant’s witness statement in this regard says only this:

“[9] In October 2012 and again in January 2013, the Home Office (specifically a caseworker called Kate Fleming) wrote to us and said that a fresh asylum decision, with a right of appeal, would be served upon us after my leave to remain expired in April 2013. Consequently, we believed that we had made a valid application to extend our stay in the UK.

[10] After April 2013 passed, we heard nothing from the Home Office. However, I was working at Waitrose on a part-time basis, as my student visa permitted, and every six months they contacted the Home Office to confirm that I retained permission to undertake employment. Obviously, I could not provide documentary proof that I was lawfully in the UK as my visa had by this point expired so Waitrose had to conduct these checks to establish my eligibility to work.

[11] Successive employment checks with the Home Office were positively verified and they confirmed that I was permitted to work as per the terms of my student visa i.e. my conditions of leave had been extended upon expiry of my last visa. I therefore inevitably believed that I was lawfully in the UK. This was especially so as the Home Office had also issued me an ARC card that stated I could not undertake employment. I understand that asylum seekers generally are not permitted to engage in employment, but my ARC card expressly stated that I could.

[12] At no point have I knowingly been in the UK without status, nor have I ever worked without believing I had permission to do so. As detailed, the Home Office expressly stated to me (on my ARC card) and to my employer that I was permitted to work.

[13] In October 2016, over ten years after my arrival in the UK I lodged an application for ILR based on my length of residence in the country. It was only upon this application being refused that I was finally advised by the Home Office that I had been unlawfully in the UK since my last visa expired in April 2013. Considering their position until this point, I maintain that I was entitled to think that I was not here without status.”

15. As appears from the above, there is nothing said by the Appellant which amounts to an assertion that he did not receive a letter providing reasons for refusing his asylum claim. There is no evidence whatsoever from Cornerstone Solicitors to that effect. It is they who received the correspondence. It also appears from the above chronology (and as recited in the Decision) that the asylum claim was first refused on 20 September 2012 and that an appeal was lodged against that decision. That letter does not appear in the bundle and it is not said whether a “reasons for refusal letter” was supplied at that stage. I infer that it was since the Appellant and his wife were able to appeal the decision and would no doubt have objected if they did not know the reasons why the asylum claim was refused. I accept that the September decision was later withdrawn but it appears from the

October decision that a copy of the reasons for refusal letter was supplied from which it can also be inferred that this was simply a copy of the earlier refusal (since the difference was only as to the content of the notice for the purposes of appeal).

16. Ms Griffiths pointed out that the Respondent had not produced a “reasons for refusal” letter in his bundle for this appeal. She submitted that it must follow that none had been issued. I cannot infer that from this omission. This was not an appeal against the refusal of the protection claim which was not reiterated after the couple’s leave ended. As such, there would be no reason for the Respondent to include that letter. Further, it is clear from the Respondent’s letter that the assertion now made as to the omission was not understood in this way. The Respondent’s decision under appeal on this aspect reads as follows:

“Your legal representative submits that the asylum application, on which you were included as a dependant, is still outstanding and so your leave is deemed to have been continuing under the provisions of Section 3C leave of the 1971 Immigration Act. You were included as a dependant on your spouse’s asylum application which was refused on 10 October 2012. Your legal representative has provided a copy of a letter from UKBA dated 10 October 2012 which advises that as you and your spouse both had extant leave, the refusal of the asylum application does not amount to an immigration decision for the purposes of Section 82 of the Nationality and Immigration Act. The letter also states that if you and your spouse did not make any further applications for leave once your leave expires, you will be served a Notice of Decision and appeal papers.

It does not look like any Notice of Decision was served to either you or your spouse, but this does not mean that your leave is deemed to be continuing under section 3C. Your legal representative submits that the asylum claim had not been determined but this is not the case. The asylum claim was refused on 10 October 2012 and is not ongoing. Your legal representative has provided evidence to show that on 14 March 2016 Waitrose requested an Employer Checking Service (ECS) check for you and Waitrose were advised that you had the right to work. This is an error, but this error does not confer any leave on you.

Your legal representative has provided a letter from UKBA dated 8 January 2013 addressed to your previous legal representative advising that your application as a dependant on your spouse’s asylum claim was refused with no ROA. This letter states that if you do not intend to lodge any application for leave once your leave expires then you should write to inform us of this, and you would then be served a notice of decision and appeal papers. There is no trace of any correspondence from you once your leave expired on 12 April 2013 until October 2016 when you submitted this application for indefinite leave to remain. Your legal representative does not claim that you wrote to us when your leave expired in April 2013 to advise that you would not be submitting a further application. Your lawful leave expired on 12 April 2013 and has not been extended by the provisions of Section 3C”

17. In spite of the lack of evidential underpinning to the Appellant’s legal submission, the Judge as I permitted the legal submissions to be developed. He also permitted written submissions on the issue to be submitted after the hearing

and before the Decision. Those submissions read as follows so far as relevant to the factual issue:

“[3] At the hearing, it was accepted by both parties that A received correspondence in October 2012 and January 2013 informing A and his wife that their asylum decision had been refused and stating that a Notice of Decision would be sent after A’s remaining leave to remain (on a student visa) expired. It is agreed that the Notice of Decision was never served and nor was one produced at the hearing itself.”

18. If that statement is intended to convey the factual basis of the submission now made that the Respondent did not serve a “reasons for refusal letter” with the two decision letters, it is at best ambiguous and at worst conveys a fundamental misunderstanding by the representatives as to terminology. What the Respondent was saying in his decision under appeal (and in the earlier letters) was that there was no right of appeal in 2012/13 because the decision was not one which generated that right of appeal. However, if the Appellant and his wife did make any further applications once their leave expired, they would be served with a “Notice of Decision” ie an immigration decision which did confer a right of appeal under Section 82 of the 2002 Act which, as I observed, would be a decision to remove them as overstayers. The decision could be appealed on the ground, inter alia, that removal would breach the Refugee Convention. In turn, that would be a determination of the asylum claim and the opportunity to appeal the refusal of the claim. However, the “Notice of Decision” is not to be equated with a letter providing reasons for rejecting the substance of the claim. No “Notice of Decision” was given, however, because the Appellant did not confirm after his leave ended that he was not making any further applications.
19. Of course, I am considering at this stage whether there is an arguable error of law made by the Judge in the Decision on this aspect. The Judge dealt with the issue at [27] to [32] of the Decision. Paragraph [27] sets out the Appellant’s factual case and I do not need to repeat this. The Judge continued as follows:

“[28] I have no doubt that the appellant’s submission is wrong. Section 3C provides that when an in-time application is made and leave as originally limited expires before a decision that leave is extended while the application is neither decided nor withdrawn, and while an in-time appeal under section 82 of the 2002 Act could be brought. Section 105 of the 2002 Act gave power to make regulations about the service of notice of an “immigration decision”, a term defined for the purposes of that part of the Act, and Regulation 4 of the Immigration (Notices) Regulations 2003 requires a decision-maker to give written notice to a person of any decision taken in respect of him which is appealable under section 82, although it permits notice to be given to the representative rather than directly to the person. Paragraph 333 of the Immigration Rules provides that written notice of decisions on applications for asylum shall be given in reasonable time, to the person or legal representative, and further that where the person is unrepresented he or she must be informed of the decision, and if it is a rejection, how to challenge that, in a language he may be expected to understand. Finally, I was referred to the decision

in R (Anufrejeva) v SSHD [2003] UKHL 36, for the proposition that notice of a decision must be given before it can have the character of a determination with legal effect because the individual must be in a position to challenge it in the courts if he wishes.

[29] What I am satisfied has been overlooked is that this was a decision made under the appellate structure in place before the changes made by the Immigration Act 2014. Prior to that appeals lay against appealable “immigration decisions”, as defined in section 82 of the 2002 Act. Refusals of asylum were not appealable immigration decisions. They were in practice accompanied by decisions to remove the applicant by way of directions, usually under section 10 of the Immigration and Asylum Act 1999, which were appealable, and the subsequent appeals were technically against those removal decisions. Here, no removal decisions could properly have been made because both the appellant and his wife still had leave. That was plainly what lay behind the references to later service of a Notice of Decision (capitalised in the original letters) and appeal papers.

[30] The appellant and his wife were undoubtedly sent written notice of a decision to refuse her asylum claim, as required by paragraph 333 and Anufrijeva. That notice was sent to the legal representative, and the last sentence of Paragraph 333, about providing information on how to challenge the refusal, did not apply. Nor did Regulations 4 of the 2003 Regulations, because this was not an appealable decision. The absence of a formal notice of appealable immigration decision, in a case where the decision is not an appealable immigration decision, cannot of itself mean that no decision has been made or notified. The letter of 10th October 2012 is quite unequivocal. The asylum claim has been decided and refused. If no application is made before current leave ends a further and appealable decision will be made. In the event it was not, but that does not in my judgment later the fact that the asylum claim had been determined and written notice of that fact given, before the expiry of current leave, and thus section 3C never came into operation here.

[31] That the respondent subsequently and incorrectly said that the appellant had a right to work cannot affect the position. Leave either was or was not extended by the operation of the statute, and no error made by the Secretary of State could override that statute. Nor am I persuaded that the appellant somehow derived a reasonable or legitimate expectation that the asylum claim was still live, having been told quite unequivocally that it was not.

[32] Accordingly I am satisfied that the appellant has had no leave since April 2013, and has not completed 10 years’ continuous lawful residence, and on that account also his claim under paragraph 276B fails.”

20. This statement of the way in which the law and appeal rights operated at the relevant time is admirably clear. As will be observed, it is entirely consistent with the way in which I explained the rights of appeal in the context of the facts of this case above. I wish simply to add a few observations of my own.
21. First, this ground of appeal conflates two separate concepts – determination of an application for leave to remain and refusal of a claim that removal will breach the Refugee Convention. In terms of current rights of appeal a refusal of the latter claim is what gives rise to the right of appeal but, per the Notices Regulations, it remains the “Notice of Decision” which determines the application and generates

the right of appeal (see regulation 4). That is incidentally the answer to the exchange of e mails which post-dated the Respondent's decision where the representatives raised an issue about whether the appeal was also against the refusal of ILR. That too confuses concepts. The appeal in this case is only against the refusal of a human rights claim but one which needs to take into account whether the Appellant is entitled to ILR just as, previously, an appeal was only against a decision refusing leave or giving notice of removal, but which appeal included the ground that the decision breached the Refugee Convention.

22. Second, that the application for leave based on the asylum claim is determined by the notice of decision and not to the reasons for refusing the claim is also supported by Section 77(2) of the 2002 Act which provides that "a person's claim is pending until he is given notice of the Secretary of State's decision on it".
23. Third, the section of the Rules relating to asylum claims deals with the requirements of determination of the latter claims. They say nothing about the way in which the application of leave to enter or remain is determined. Those requirements derive largely from the Convention itself and EU law instruments concerning asylum. As the Judge pointed out, the argument that the asylum claim was not determined because it was not accompanied by a refusal letter is misconceived even applying paragraph 333 of the Rules. It may be that the Appellant intended to rely on an earlier version of the Rules although paragraph 333 as appears in the Annex to the skeleton argument before me is in the same form as considered by the Judge. Paragraph 336 of the current Rules provides for reasons to be given in the decision as to the refusal of the asylum claim. However, other paragraphs within Part 11 of the Rules make clear that consideration of an application for leave to enter or remain is separate to consideration of the asylum claim (or application) itself. Such an application is in effect either an application for leave to enter or remain or an application not to be removed but is separate from it (see for example paragraphs 330 to 332 of the Rules).
24. Fourth, conversely, Section 3C relates to the application for leave to enter or remain. It provides as follows:

"3C Continuation of leave pending variation decision

(1) This section applies if –

- (a) a person who has limited leave to enter or remain in the United Kingdom applies to the Secretary of State for variation of the leave,
- (b) the application for variation is made before the leave expires, and
- (c) the leave expires without the application for variation having been decided.

(2) The leave is extended by virtue of this section during any period when –

- (a) the application for variation is neither decided nor withdrawn,
- (b) an appeal under section 82(1) of the Nationality, Asylum and Immigration Act 2002 could be brought, while the appellant is in the United Kingdom against the decision on the application for variation (ignoring any possibility of an appeal out of time with permission),.
- (c) an appeal under that section against that decision, brought while the appellant is in the United Kingdom, is pending (within the meaning of section 104 of that Act)."

In this case, the application to remain on protection grounds was determined by the notice of decision dated 10 October 2012, whether or not reasons for refusing the asylum claim were or were not included with that notice. Accordingly, there was no application outstanding as at 12 April 2013 when the Appellant's leave expired. There was therefore nothing which could extend his leave under Section 3C.

25. Fifth and finally, the point made by the Judge about section 4 Immigration Act 1971 finds support in the guidance given in Syed (curtailment of leave – notice) [2013] UKUT 144 IAC as follows:

“(2) There is no statutory instrument under the 1971 Act dealing with the means of giving notice for the purposes of section 4(1) of a decision under that Act, which is not an immigration decision.

(3) Accordingly, the Secretary of State has to be able to prove that notice of such a decision was communicated to the person concerned, in order for it to be effective. Communication will be effective if made to a person authorised to receive it on that person's behalf: see Hosier v Goodall [1962] 1 All E.R. 30; but the Secretary of State cannot rely upon deemed postal service.”

26. The decision in Anufrijeva does not avail the Appellant. That was a case where the decision refusing the asylum claim was not notified to the appellant at all. The reference at [55] to rule 333 which at that time apparently included a requirement to inform of the reasons for refusal (now included in paragraph 336) is only in support of the proposition within that paragraph that the decision must be communicated and not that the reasons need to be included in order for the decision to be legally effective. As is said at the end of that paragraph, “[t]he Immigration Rules require a refusal and that refusal is to be communicated by a “notice of refusal””. That is consistent with what is said in Syed and the Respondent complied with that obligation in this case.
27. The application to remain on the basis that removal would breach the Refugee Convention was therefore properly determined by the decision dated 10 October 2012 whether or not that was accompanied by a letter providing reasons for refusing the asylum claim. The Appellant's leave expired thereafter on 12 April 2013 at which time there was no application outstanding and therefore nothing which could serve to extend his leave under Section 3C.
28. It follows from the above that I am satisfied that there is no arguable error of law in the Decision in relation to this aspect and I therefore refuse permission to appeal on this ground.

Ground one

29. Although, based on the upholding of the Judge's conclusion in relation to the Appellant's lawful residence, the Appellant could not succeed in his application for ILR, that does not necessarily determine the appeal because the outcome of

the appeal depends whether removal would breach the human rights of him and his dependents. As Ms Griffiths pointed out, the two grounds on which the Appellant has been given permission have material impact because the finding that the Appellant has cheated in his English language test would affect his suitability in not just this but any subsequent applications and is also relevant to the proportionality balance inherent in Article 8 ECHR. Further, the first of those grounds raises the issue of procedural fairness of the First-tier Tribunal hearing. I therefore turn to deal with that ground first. If the Appellant succeeds on this ground, ground two becomes immaterial and I accept that the appeal would need to be heard afresh (although for the reasons given above I would preserve the Judge's findings and reasoning in relation to the period of the Appellant's lawful residence).

30. I begin by reminding myself what is said in the headnote of Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC) as follows:

“...In practice, in most cases the question will be whether the refusal deprived the affected party of his right to a fair hearing. Where an adjournment refusal is challenged on fairness grounds, it is important to recognise that the question for the Upper Tribunal is not whether the FtT acted reasonably. Rather, the test to be applied is that of fairness: was there any deprivation of the affected party's right to a fair hearing?”

31. In this case, the unfairness is said to be the Respondent's reliance on and the Judge's acceptance of evidence produced late. The Respondent's supplementary bundle is dated 2 August 2018 and was apparently provided to the First-tier Tribunal on that day. The Respondent's bundle was sent to the Appellant's representative on 6 August 2018. The Appellant's representative says that this was not received until after the hearing on 9 August 2018 and the supplementary bundle was not served at all. The date of the hearing was on a Thursday and the bundle was sent on the Monday prior to the hearing. It is not clear why it would not have been received before the hearing but that it was not is not disputed by the Respondent. No evidence has been provided of service of the supplementary bundle dated 2 August 2018 and it therefore appears to be accepted that it was not received until the day of the hearing.

32. Ms Griffiths argued that the material supplied late was extensive. I reject that submission. The supplementary bundle includes the “generic” ETS evidence relied upon by the Respondent in such cases being the statements of Rebecca Collings and Peter Millington and the expert report of Professor French. The witness statements are included also in the Respondent's bundle. There has been much litigation surrounding ETS cases which includes consideration of all this material. Although Ms Griffiths said that the report of Professor French is now historic being dated 20 April 2016, it must be remembered that the ETS cases are also historic and it cannot therefore sensibly be suggested that Professor French's report is out of date.

33. Insofar as Ms Griffiths sought to suggest therefore that the Appellant might wish to instruct an expert to opine on the generic aspects of the case, that is highly unlikely to be the case. The report of Dr Harrison which formed the basis of challenge in ETS cases in the initial stages is overtaken by Professor French's report which was considered for example by the Administrative Court in Abbas v Secretary of State for the Home Department [2017] EWHC 78 (Admin). In later cases such as MA (ETS - TOEIC testing) [2016] UKUT 00450 (IAC), the Tribunal has heard from different experts who "demonstrated a substantial measure of agreement among them" ([11]). Accordingly, as Mr Melvin pointed out, it should be evident from reported cases in this area what the Respondent would rely on in terms of generic evidence. Moreover, the Respondent could, if he so wished, simply rely on reported cases on the subject to the effect that the generic evidence was sufficient to discharge his evidential burden of proof and to shift the burden on to the Appellant (see in particular the guidance in the reported case of SM and Qadir v Secretary of State for the Home Department (ETS - Evidence - Burden of Proof) [2016] UKUT 00229 (IAC) which guidance is of course binding on a First-tier Tribunal Judge).
34. I accept that, as noted in MA, thereafter the exercise becomes "intrinsically fact sensitive" and therefore what was important to the Appellant was to know the evidence against him individually. But, once again, the judgments in this area make clear the nature of the evidence and the sorts of evidence available to rebut the generic evidence (see in particular [23] to [25] of the Court of Appeal's judgment in Ahsan and others v Secretary of State for the Home Department [2017] EWCA Civ 2009 including at [25] reference to the obtaining of the voice recording tapes and instruction of an expert in that regard).
35. The evidence relating to this Appellant is a statement of Reema Bassi, a Home Office caseworker, which deals in the main with the generic evidence, but which annexes the excerpt from the spreadsheet showing the scores relating to the tests of the Appellant and the spreadsheet in relation to tests taken on the two relevant dates (19 June 2012 and 17 July 2012) at the test centre in question. There is also evidence relating to the criminal investigations into that test centre, Premier Language Training Centre, Barking. All in all, including the witness statement, that material runs to nine pages.
36. The Judge set out the basis of the application for the adjournment and his refusal as follows:
- "[6]...Ms Walker, however, made an application for an adjournment. This followed the late service of the respondent's supplementary bundle, including evidence, at annex A1 to a witness statement of Reema Bassi, apparently identifying the appellant as someone who had taken two ETS speaking tests in June and July 2012. The basis of the application was that the appellant wished to request the ETS audio tapes relating to these tests and instruct his own expert witness.

[7] Ms Javed opposed the application, saying that the appellant had been on notice of the allegation made about these tests and could have instructed his own expert much earlier.

[8] Ms Walker in reply said that there had been limited information before today, and the information now produced gave rise to concerns, because in relation to one of the tests apparently identified the writing score was missing.

[9] I refused the adjournment. I was satisfied that it was not in the interests of justice now to adjourn the matter. Although the respondent's evidence had been served late (as is, regrettably, not uncommon in ETS appeals) the allegation had been known since the refusal, and the appellant had had ample time to address it, as fully or as sparingly as he chose. There was no basis for allowing him now to take a step which he could have taken months ago."

37. I observe that the Appellant has not taken any steps since the First-tier Tribunal hearing or the Decision to obtain the tapes or to instruct his own expert. Ms Griffiths appeared to be under the misapprehension that the Tribunal ought to have ordered the Respondent to produce them. That is not the position. The tapes are the property of ETS and have to be sought from those acting for that provider. So much is clear from what is said at [25] of the judgment in Ahsan as follows:

"One other development that I should mention is that it in due course became known that ETS has retained copies of the individual voice recordings which it has identified as showing the use of a proxy, and that a copy can be obtained (without charge) on application. This will allow the person concerned to listen for themselves to check if the recorded voice is their own. If they believe it is, they can seek confirmation from an independent expert: the Secretary of State's practice is to agree in such a case to the instruction of a joint expert. However, even where the voice appears to be someone else's that is not necessarily accepted by applicants/appellants as conclusive. There have been challenges to the accuracy of the system for storing and retrieving the relevant file; and it has been argued that even if a test centre submitted a batch of recordings made by a proxy that was done in its own interests and without the knowledge of the person taking the test."

38. As Mr Melvin submitted, it is inconceivable that representatives preparing an ETS case would not familiarise themselves with the case law in this area and consider the options open to them to obtain evidence. I accept that the fact that the Appellant has not taken steps to obtain the tapes after the First-tier Tribunal hearing is not itself relevant to the fairness of the previous hearing but is some indication whether he thought it necessary to obtain that evidence to make out his case. Of course, such evidence could not assist at this stage in relation to whether the Decision contains an error of law, but the Appellant could have made an application to adduce it if an error of law was found. He has not done so.

39. The Appellant was on notice as to the dates of the tests and venue if he had forgotten when and where he took them. Those details are included in the Respondent's decision letter (which refers also to the witness evidence of Mr Millington and Ms Collings). In this case, the Appellant was also interviewed about the tests on 17 March 2017. The interview record is in the Respondent's

bundle. I am not clear whether that was provided to the Appellant at the time (it is not in the Appellant's bundle) but those representing him could have asked for it at any time and apparently did not.

40. I accept that there may be a difference between being on notice as to a point to be taken and having the evidence supporting that point. I accept also what is said in Macharia v IAT [1999] EWCA Civ 3001 that an adjournment is a safeguard where evidence which is necessary to determine an issue is admitted late. However, that is not to say that an adjournment is necessary in every such case. Whether that is the position depends on the nature and extent of the material and why the adjournment is needed. The balance is between avoiding the delay caused by an adjournment (to ensure that justice is dispensed promptly and efficiently) against the need to ensure that the party affected by the late production is not disadvantaged and can participate fully in the proceedings.
41. Ms Griffiths made the valid point that the Appellant might have taken the view that he did not need to prepare his case on this aspect because the Respondent had not produced the evidence on which he relied. If that had been the position, I may have had more sympathy for his submissions on fairness. However, although the grounds of appeal before Judge White make the point that the Applicant has not seen the evidence on which reliance is placed, those go on to make submissions why he would not need to cheat. A third of the Appellant's witness statement is devoted to the allegation. He could not know when his case was being prepared whether the Respondent would provide the evidence before the hearing. He had to prepare his case on the assumption that the Respondent would produce the evidence and he would have to answer it.
42. Moreover, it is clear from the interview record that the Appellant knew full well which tests were in issue and provided information about them on that occasion; indeed, Ms Griffiths relied on what he said during that interview as evidence that the Appellant himself sat the test. The Appellant was present at the hearing to give instructions about any aspects arising from the evidence and to give oral evidence in relation to what the spreadsheet evidence showed about his own test. I do not accept therefore that the Appellant prepared on the basis that he would not need to rebut the allegation because the Respondent had not produced his evidence. Even though the late production of the evidence by the Respondent is to be deprecated, I am satisfied that the Appellant could and should have been able to deal with it. I am therefore satisfied that the hearing was not unfair.
43. I am satisfied that there is no error of law in the Judge's refusal of the adjournment. For the foregoing reasons, I am satisfied that the Appellant knew the nature of the evidence on which reliance would be placed and ample opportunity to obtain whatever evidence he wanted to in order to rebut it (as the Judge observed). He therefore had the opportunity to deal with the late evidence and was in fact able to deal with the points which he says emerge from it (save for the obtaining of the tapes which he could have done before or since but has not).

Ground one is not made out. I therefore turn to ground two which concerns the way in which the Judge dealt with the competing evidence on the ETS issue.

Ground two

44. There are a number of matters which it is said that the Judge either failed to take into account or provided inadequate reasons for rejecting as follows:

- (a) The Judge found at [23] of the Decision that the Appellant may have used a proxy notwithstanding being able to speak English because he may have found it convenient to do so; he did not provide reasons for that finding.
- (b) The Judge also found in that paragraph that the Appellant's use of a proxy test taker may indicate a contempt for immigration control when his evidence was that he was (or thought he was) in the UK lawfully throughout his stay.
- (c) It is also asserted that the Judge found that the fact of the Appellant's good spoken English might be due to an improvement in his skills since the test which failed to take into account the fact that the Appellant had passed an upper, intermediate level English language course some five years prior to the test.
- (d) The Judge also implicitly rejected without reasons the Appellant's evidence as contained in the interview record about the detail of the test which he sat.
- (e) Ms Griffiths points out that there is either a gap or omission in the second of the tests relied upon in relation to the writing score. No score is given and that is unexplained. She also pointed out that both the speaking and writing scores were low in the first test which was indicative of the Appellant not having used a proxy test taker.

45. As I understand the Appellant's grounds it is not disputed, save in relation to procedural fairness, that the Respondent's evidence was sufficient to establish the evidential burden and to shift that burden to the Appellant. I therefore focus on the part of the Decision dealing with the Appellant's evidence and the Judge's findings on that evidence:

"[20] I heard evidence from the appellant. His witness statement says that he took the speaking tests himself, that he took a second one because he failed the first, that he then re-sat and passed, and that he subsequently completed an MBA, showing that his English was good. He made the point that it would be illogical to use a

proxy who failed the test, and also said that he never used the certificates, so they were irrelevant.

[21] In his oral evidence he gave a little more detail. He said that it was the writing that he failed - I note that he also said this when interviewed by the respondent prior to the decision. He said that the test centre was close to him and that he wanted to see his English level for himself, and also to take the test in case he needed it. He thought there were about 25-30 people taking the test each time - I note that in his interview he said there were 2-15. He repeated that he had not used a proxy.

[22] In his interview he had given a brief description of how the tests were conducted, and said that he paid cash at the centre, and could not recall what he had paid. He no longer had the certificates, having lost them when he moved house.

[23] He gave his evidence in English, and had no apparent difficulty in doing that, but that is of relatively little assistance, because that was in August 2018, and the tests with which I am concerned were in June and July 2012. I note that his score on the first speaking test was 140 out of 200 according to the spreadsheet produced, and a month later was a much improved 190. I accept that he subsequently completed an MBA and that his English may well have been at a reasonably good level. That a person may be good at English is not, however, in itself a guarantee that they may not have decided to minimise any risk of failure by employing a proxy taker whose English was even better. There may be a variety of reasons, ranging from lack of confidence through inconvenience of the date or place to contempt for immigration control, why a person who would probably have been able to pass the test, might nonetheless have decided to guarantee the result by using a proxy. I note that the appellant says that it was the writing, not the speaking, which he failed first time which would entail that the documentary evidence was wrong. The appellant has not been able to produce his certificates, which would have confirmed the results, and has not described any attempts to obtain duplicates once the issue arose. I also note that it would be surprising to engage a proxy speaker who then failed the test, although it is no doubt possible that something went wrong on the day. Finally I note the observation that the certificates were never used, but, as the appellant accepted, were he to make any application, his leave being due to expire in early 2013, he would have needed such certificates. That he did not make any application is explained, at least in part, by the decision to join in his wife's asylum claim shortly afterwards.

[24] I have reminded myself of the seriousness of the allegation. I have also considered the guidance of the House of Lords, that there is only one civil standard of proof but decision makers will bear in mind, to the extent appropriate, that serious allegations may be inherently less probable and in consequence require more cogent evidence. The background here, as noted above, is that there is evidence of cheating on a substantial scale in these tests, and I cannot therefore regard the allegation as inherently improbable. On the one hand I have the evidence from the respondent which indicates that by a process of testing ETS have concluded that this appellant's results were procured by deception, and further indicates that the test centre where the appellant said he took the tests was one with a very high level of cheating, both generally and on the day of his claimed tests. Against that I have the evidence of the appellant himself that she [sic] took the test, with limited detail provided in oral evidence at the hearing and in any interview, which in respect of the numbers present was inconsistent, and arguably inconsistent with the evidence of the number of tests being taken on each day. I am aware that

the evidence on which the respondent relies is not foolproof, but the only expert evidence actually before me is generally supportive of it. I note the absence of evidence other than the appellant's own testimony, for example documentary evidence of payment of the appropriate test fee, to confirm the actual taking of the test, or duplicate certificates to confirm which element was failed. I am on balance satisfied that the respondent has discharged the legal burden of proof, and shown that this particular appellant used proxies in the taking of his English test in 2012. Although the test certificates were not thereafter used in any application I am satisfied that this is because the appellant chose to make an asylum claim, which failed, and thereafter to make no further applications. I am not satisfied that the tests were taken purely for information and with no intent ever to use the certificates; the only likely reason for re-taking the test, after obtaining the information supposedly required, would in my judgment be to have a test pass available for use."

46. I deal then with the individual challenges made as set out above using the same letters:

- (a) The reasoning that the Appellant might find it convenient to use a proxy at [23] is to one of a number of hypothetical reasons why the Appellant might have done so notwithstanding his assertion that he spoke good English. That is in any event explained at the end of [24] of the Decision where the Judge refers to the need which he finds the Appellant had at the time for a certificate (even though he did not subsequently use it in any application for the reasons there given) and to the fact that, even on his own account the Appellant had failed part of the first test.
- (b) The Judge subsequently found that the Appellant had not been in the UK lawfully throughout his stay (see extract from the Decision cited in relation to ground three). The Judge found at [30] of the Decision that the letter refusing the asylum application was "unequivocal". As the Judge points out at [31] of the Decision, the Appellant was allowed to continue working due to the Respondent's error but that did not affect the lawfulness of his position. Again, in any event, what is said at [23] of the Decision is merely one of a number of hypothetical possibilities about why an individual may use a proxy even though he speaks English.
- (c) The Judge accepts at [23] of the Decision that the Appellant's "English may well have been at a reasonably good level". He does not rely expressly on the passage of time since the tests. However, as the Judge points out, that part of the Appellant's case is undermined to some extent by the scores in the first test and that the Appellant even on his own case had to re-sit the test. As the Judge also points out, there is a significant difference

between the scores in the first test and the second in spite of the fact that the tests were only a few weeks apart (which is indicative of them not being sat by the same person).

- (d) The Judge records the Appellant's evidence of how the tests were conducted at [22] of the Decision. That is then taken into account in what the Judge says at [24] of the Decision. He rejects that as probative of the Appellant's case for the reasons there given and the discrepancies in other regards.
- (e) Although I accept that there is a gap in the spreadsheet evidence relating to the written test on the second occasion, that does not of itself undermine the evidence of the Respondent. The Appellant himself says that he failed part of the first test and had to re-sit it. It is his case that it was the writing part which he failed and the speaking part which he passed - although both scores are the same in the first test. Be that as it may, it is the Appellant's case that he re-sat the test and the fact that he had low scores on the first occasion only a few weeks before he achieved an almost perfect score is indicative of at least the second test being taken by someone else. Moreover, the Judge did consider the low scores at [23] of the Decision where he points out that this may either be evidence that the proxy who took the test failed it or that something else went wrong.

47. I am satisfied that the Judge was entitled to make those findings on the evidence for the reasons given. I am satisfied that there is no error of law in the Judge's consideration of the evidence or reasoning in relation to the ETS issue. Ground two is not made out.

Conclusion

48. For all of the above reasons, the Appellant's grounds are not made out. I refuse permission to appeal on ground three. I am satisfied that the Decision does not contain an error of law on the other two grounds. Accordingly, I uphold the Decision.

DECISION

I am satisfied that the Decision does not contain a material error of law. I uphold the decision of First-tier Tribunal Judge P-J S White promulgated on 14 September 2018 with the consequence that the Appellant's appeal stands dismissed



Signed
Upper Tribunal Judge Smith

Dated: 5 March 2019