



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/12925/2019 (V)

**THE IMMIGRATION ACTS**

Heard at Cardiff Civil Justice Centre  
Remotely by Skype for Business  
On 5 November 2020

Decision & Reasons Promulgated  
On 18 November 2020

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ADIL MEHBOOB

Respondent

**Representation:**

For the Appellant: Ms S Rushforth, Senior Home Office Presenting Officer

For the Respondent: Mr R Solomon, instructed by Lumbini Solicitors

**DECISION AND REASONS**

1. Although this is an appeal by the Secretary of State, for convenience I will refer to the parties as they appeared before the First-tier Tribunal: Adil Mehboob (appellant) and the Secretary of State for the Home Department (respondent).

**Introduction**

2. The appellant is a citizen of Pakistan who was born on 2 March 1986. The appellant entered the United Kingdom on 4 March 2012 with entry clearance as a Tier 4

(General) Migrant. On 12 June 2013, the appellant applied for further leave as a Tier 4 (General) Migrant. He relied on a TOEIC English language test which he had taken on 19 March 2013. His leave was extended until 27 June 2015. On 9 October 2013, the appellant married in the UK. On 15 April 2014, the appellant applied for leave as a dependent of a Tier 4 Student which was granted until 4 March 2015. On 3 March 2015, the appellant applied for leave to remain as a dependent spouse but this was refused on 2 July 2015.

3. On 24 November 2016, the appellant's spouse was granted ILR. On 7 December 2016, the appellant applied for leave to remain on the basis of his private and family life. However, on 22 August 2017 he applied for leave to remain as the spouse of a settled person. As this was before his application made on 7 December 2016 under Art 8 was determined, that application was voided on the basis that it had been varied to an application as a spouse. On 22 August 2017, the appellant was refused leave as a spouse.
4. The appellant appealed that decision to the First-tier Tribunal. In a decision sent on 12 July 2018, Judge Veloso dismissed the appellant's appeal under Art 8 of the ECHR. In the course of that decision, the judge found – as the respondent had contended – that the appellant had dishonestly obtained an English Language certificate (TOEIC) by using a proxy to take part of that test on the appellant's behalf which he had relied on in his 12 June 2013 application for leave. Permission to appeal was subsequently refused.
5. On 27 December 2018, the appellant made a further application for leave based upon Art 8 and his family life with his British citizen spouse.
6. On 10 July 2019, the Secretary of State refused that application under the 'partner' rule relying, again, on the contention that the appellant had obtained a TOEIC English Language certificate by deception and had used that certificate in order to obtain leave as a Tier 4 Student in his successful application made on 12 June 2013. In addition, the Secretary of State concluded that the appellant could not succeed under Art 8 outside the Rules.

### **The Appeal to the First-tier Tribunal**

7. The appellant appealed to the First-tier Tribunal. A hearing took place before Judge Abdar on 13 November 2019. At that hearing, the appellant was represented by Counsel but the respondent was not represented.
8. At the hearing, the appellant's Counsel told the judge of the adverse decision of Judge Veloso. However, neither the appellant nor the respondent (who was of course not represented) put a copy of that decision before the judge. Having cited the relevant decision of SM and Kadir (ETS – Evidence – Burden of Proof) [2016] UKUT 229, the judge noted that the burden of proof was on the respondent. At paras 31-36, the judge gave his reasons for concluding that the respondent had failed to establish that the appellant had previously used a fraudulently obtained English language certificate:

- “31. With the onus being on the Respondent, the Respondent has not served any evidence on the Tribunal on the allegations against the Appellant and, on that basis, I find that the Respondent has not discharged the Respondent’s burden of raising a prima facie issue of deceit.
32. I am informed by Mr Aslam [Counsel for the appellant] that there was an appeal against the decision of 22 August 2017, which was dismissed by the Tribunal on 13 December 2018 [it was actually 12 July 2018], corroborated by the Tribunal’s records. However, neither party has served the copy of the decision on the Tribunal and I am unable to treat the Tribunal’s decision as a starting point, as per Devaseelan [2002] UKIAT 702.
33. It is clear from the appellant’s credible evidence in his statement that the appellant feels very aggrieved by the Respondent’s conduct, particularly as the Respondent has not served any evidence to substantiate the allegations. On the evidence before me, I assume that no evidence on the alleged ETS fraud was served on the appellant or filed with the Tribunal previously either. Even if I am wrong, the fact remains that the evidential burden is on the Respondent and the Respondent has failed to discharge that burden by failing to substantiate the allegations.
34. I also take into consideration the appellant’s IELTS certificate, dated 28 November 2011, in which the appellant scored 5.5 in his speaking test and the fact that the appellant entering the UK and undertaking a course of study in English prior to the TOEIC the appellant undertook to find (*sic*) that the appellant would have had the necessary English skills to pass the TOEIC on 19 March 2013. I give lesser weight to the appellant’s ESOL Level B1.1 certificate of 2 December 2016 as it significantly postdates the TOEIC, nevertheless I find it to be a credible indication of the appellant’s extant English skills.
35. In making my findings, I keep in mind that it has also become trite law, see Adedoyin [2010] EWCA Civ 773 amongst others, that when falsehood is relied upon by the Respondent, the onus is on the Respondent to show intentional dishonesty and I find that the Respondent has failed to discharge that burden.
36. For these reasons, on the evidence before me, I find the Respondent has failed to discharge the evidential burden of proof in raising a prima facie case against the appellant and I find the appellant does not fall foul of S-LTR.1.6. of the Rules.”

9. Then at paras 37-41, the judge went on to find that the appellant satisfied the substantive requirements of the Rules as a “partner” and that, as he complied with the requirements of the Rules, he had established a breach of Art 8 following TZ (Pakistan) and Another v SSHD [2018] EWCA Civ 1109.

### **The Appeal to the Upper Tribunal**

10. On 21 April 2020 the First-tier Tribunal (Judge Fisher) granted the Secretary of State permission to appeal against the judge’s decision to allow the appellant’s appeal under Art 8.

11. In the light of the COVID-19 crisis, on 1 July 2020 the Upper Tribunal (UTJ Bruce) issued directions expressing the provisional view that the issues of whether the First-tier Tribunal's decision involved the making of an error of law and, if so, whether the decision should be set aside, should be determined without a hearing. The parties' submissions were invited both on the substantive issues in the appeal and also on whether the appeal could be determined without a hearing.
12. In response to those directions, the Secretary of State filed submissions on 8 July 2020. The appellant filed submissions dated 21 July 2020. Finally, in response to those submissions, the Secretary of State filed further submissions dated 28 July 2020.
13. Following those submissions, the Upper Tribunal (UTJ Finch) directed on 19 August 2020 that the appeal should be listed for an error of law hearing to be conducted remotely.
14. That appeal was listed before me on 5 November 2020. I was based at the Cardiff Civil Justice Centre and Ms Rushforth, who represented the Secretary of State, and Mr Solomon, who represented the appellant, joined the hearing by Skype for Business.
15. At that hearing, in addition to the previous written submissions, I heard oral submissions from both representatives. In addition, I invited the representatives to make further written submissions in respect of the Court of Appeal's decision in AA (Somalia) v SSHD [2007] EWCA Civ 1040, a decision which I drew to the attention of the representatives during their submissions at the hearing. In the result, I received written submissions from both representatives in respect of AA(Somalia). I am grateful to both representatives for their helpful submissions.

### **The Grounds of Appeal**

16. The Secretary of State relies on number of grounds of appeal.
17. First, having been made aware of the Tribunal's earlier adverse decision in relation to the appellant, it was incumbent upon the judge to establish what findings had been made and whether, following Devaseelan, the additional evidence presented at the hearing permitted him, or entitled him, to deviate from those findings, which otherwise, stood unchallenged. (Ground 1)
18. Secondly, in assessing the evidence, the judge's consideration was coloured by his assumption which could have been clarified at the hearing, that no evidence of the alleged fraud had been served on the appellant or filed with the Tribunal in the previous appeal. (Ground 2)
19. In addition, in the respondent's initial submissions in response to the UT's directions, a further point was raised, namely that the judge failed to give reasons why he reached his conclusion that the appellant, it having not been established that he had previously used fraud, met the substantive requirements of the 'partner' Rules in Appendix FM of the Immigration Rules (HC 395 as amended). (Ground 3)

## The Submissions

20. Ms Rushforth submitted that, having drawn the earlier decision to the judge's attention, the appellant's representative should have provided the judge with a copy of the determination or, alternatively, the judge should have sought a copy of the determination before determining the appeal. The basis of her submission was that, following Devaseelan, the earlier determination was always the "starting-point" for the judge in this appeal as it stood as a decision on the facts establishing the appellant's earlier fraud in obtaining the English Language certificate and its use in an application in June 2013 for further leave as a Tier 4 Student. Ms Rushforth accepted that the earlier Tribunal's decision was, in her words, "a piece of evidence" and the judge had erred by proceeding without calling for that evidence.
21. Ms Rushforth sought to distinguish the views expressed by the Court of Appeal in AA (Somalia) at [33]-[34] and [71] that it was not an error of law for a judge to determine an appeal without sight of an earlier judicial determination relevant to the issues of fact in the subsequent appeal where neither party had sought to produce that determination.
22. First, in AA(Somalia) the earlier determination concerned a family member of the appellant (his sister) not an earlier determination whether the appellant was a party. Secondly, the Court of Appeal found that the earlier determination was not material to the outcome of the appellant's appeal. Thirdly, AA(Somalia) was not concerned with common law fairness. Thirdly, Ms Rushforth relied on the decision in VH(Malawi) v SSHD [2009] EWCA Civ 645 at [25] where the Court of Appeal held that he AIT had not made a legal error by taking into account a determination of the appellant's husband even in the absence of it being relied upon by the Home Office. She submitted the judge could not 'close his eyes' to the determination of the appellant's sister once he knew of its existence.
23. Mr Solomon, relying upon his detailed earlier submissions, submitted that where neither party relies on the earlier determination then a judge does not err in law by not referring to it. That applied to the appellant's appeal.
24. Mr Solomon submitted that the Court of Appeal's decision in AA (Somalia) was not distinguishable. There, albeit in the context of an earlier appeal involving a family member of the appellant, the court concluded that Devaseelan did not mean that the judge erred in law when determining the appellant's appeal without sight of the earlier determination in relation to the family member where neither party relied upon it. Fairness had not been the issue in the Court of Appeal and was not a ground of appeal in the present appeal.
25. Mr Solomon submitted that VH(Malawi) did not establish that a judge had a duty to obtain a copy of a determination which neither party relied on. Rather, the case decided that it was not wrong for the AIT to obtain a copy of the determination at its own volition and in doing so had not impermissibly descended 'into the arena' and acted unfairly.

26. Mr Solomon submitted that although the Upper Tribunal in Nimo (appeals: duty of disclosure) [2020] UKUT 00088 (IAC) concluded that, despite there not being a duty of candour on a party, nevertheless a party could not knowingly mislead the Tribunal, that did not apply in the instant appeal. The appellant's representative had not said that there was no previous decision but rather had drawn it to the judge's attention. Nothing that had been said was misleading.
27. Mr Solomon submitted there was no unfairness. The Secretary of State had not referred to the earlier decision in the decision letter. If she had wished to rely upon it, she could have brought it to the judge's attention even though not represented at the hearing.
28. Mr Solomon submitted that, in any event, any error was not material as the judge (at para 35) had given adequate reasons for finding that he respondent had failed to prove fraud.

## **Discussion**

### *Ground 1*

29. In this appeal, it was for the respondent to prove on a balance of probabilities that the appellant had previously used a fraudulently obtained English Language certificate. The decision letter sets out the respondent's case on that issue. It states as follows:

“As part of your application at Sheffield Premium Service Centre on 22 August 2017, ETS has a record of your speaking tests. Using voice verification software, ETS is able to detect when a single person is undertaking multiple tests. ETS, has via the use of computerised voice recognition software and a further human review by anti-fraud staff (each of whom has determined that a proxy was used), undertaken a check of your test and confirmed to the SSHD that there was significant evidence to conclude that your certificate was fraudulently obtained by the use of a proxy test taker. Your scores from the test taker on 19 March 2013 at Flexilearning Test Centre has now been cancelled by ETS. On the basis of the information provided to her by ETS, the SSHD is satisfied that your certificate was fraudulently obtained and that you used deception in your application of 12 June 2013.”

30. That, of course, is not direct evidence concerning the issue of fraud. It is rather, at best indirect evidence and, perhaps, evidence of what the Secretary of State knows from material that she has (see, e.g. RP (Proof of Forgery) Nigeria [2006] UKAIT 00086).
31. At no point in the decision letter did the Secretary of State refer to the appellant's earlier appeal. Indeed, no mention is made of the appeal at all in the immigration history, let alone the Judge Veloso's adverse finding in relation to the use of a fraudulently obtained English language certificate. The decision letter does not, in my judgment, set out any evidence upon which, in itself, a judge would be entitled to

make an adverse finding, given that the burden of proof is upon the Secretary of State, on this issue.

32. There was no other evidence from the respondent before the judge at this appeal hearing. Of course, if the judge had been shown the earlier determination and it had been relied upon by the Secretary of State, as Ms Rushforth submitted, it would be the “starting point” for the judge’s determination as to whether the Secretary of State had, on this occasion, established the fraudulent use of an English Language certificate. In the absence of any persuasive evidence from the appellant, which the earlier judge had not considered, no doubt the judge could have found that the fraud had occurred. That, however, did not happen. Although Ms Rushforth informed me that the determination had been sent to the First-tier Tribunal prior to the appeal, she did so having consulted her records, there is no record held in the Tribunal’s file to suggest that the FtT (let alone the judge himself) did receive the determination. Indeed, the judge proceeded on the basis that he did not have the determination available to him. The only copy of Judge Veloso’s determination in the file is one attached to the respondent’s submissions of 8 July 2020.
33. I do not accept Ms Rushforth’s submission that Devaseelan imposes an obligation upon a Tribunal, once it is aware that there has been an earlier appeal, including findings that might be relevant if brought to the Tribunal’s attention, to obtain that determination so that it can be the ‘starting-point’ for its assessment and findings. Ms Rushforth relied upon the IAT’s view in Devaseelan that the earlier decision would *always* be the ‘starting point’ in a subsequent appeal and, she submitted, therefore the judge in the subsequent appeal would need the earlier determination. I do not accept the submission that follows from the determination being the ‘starting-point’. That was said in the context of an appeal where the earlier determination *was* before the judge and was relied upon by at least one of the parties.
34. The case law, beginning with Devaseelan and approved by the Court of Appeal in the subsequent case of LD(Algeria) v SSHD [2004] EWCA Civ 804, makes plain that the effect of an earlier decision has no resonance in the doctrines of *res judicata* or issue estoppel (see, e.g. Ocampo v SSHD [2006] EWCA Civ 1276 at [26]; AA(Somalia) at [54]). Consequently, the earlier judgment is not a ‘binding’ decision between the parties on the issue determined in any future appeal. As Ms Rushforth accepted, an earlier determination is simply a “piece of evidence” in the subsequent appeal. I agree with that characterisation. Nevertheless, the earlier determination, if part of the evidence, becomes relevant not least because of the importance of consistency of decision making, particularly in the public law context (see, e.g. LD(Algeria) at [28]; AA(Somalia) at [66]). In general, judges reach decisions in cases based upon the evidence presented to them by the parties. Judges do not usually engage in their own research relying upon evidence which neither party has referred them to or relied upon (but see VW(Malawi) below). The imperative of applying (and not deviating from) a determination which is *res judicata* is missing when the earlier determination is characterised as a piece of evidence albeit one that forms the ‘starting-point’ for the judge in the subsequent appeal.

35. The respondent's position in this appeal was, in my judgment, rejected by the Court of Appeal in AA (Somalia). In that case, the Court was concerned with the issue of whether Devaseelan should be applied where the earlier determination did not involve the particular appellant but rather a family member. For these purposes it suffices to note that the appellant claimed to be at risk on return to Somalia because of his clan affiliation. In an earlier decision, his sister, whom it was accepted must come from the same clan, had succeeded in her appeal on the basis that she was from a clan which put her at risk. The Court of Appeal (by a majority) approved, albeit with a slight modification, the Court of Appeal's earlier determination in Ocampo v SSHD [2006] EWCA Civ 1276 that in principle Devaseelan applied where the earlier determination involved a family member and not the appellant, provided that the factual matrix was substantially the same.

36. When it came to the disposal of the appeal in relation to the appellant "AA", all three judges approved the reasoning of the AIT. That reasoning dealt with the fact that neither the appellant nor the Secretary of State had sought to introduce the determination in the appeal of that appellant's sister. At [34] Hooper LJ (dissenting but not on this issue) agreed with the reasoning of the AIT at [75] of its decision. He set out the AIT's reasoning at [33] of his judgment as follows:

"75. In AA's case, there had been a previous judicial determination. We reject the suggestion that it was for the Home Office to produce it, or for the Adjudicator to inquire for it. The case before the Adjudicator was that of the Appellant and the Adjudicator was to determine it on the material before him. The position is simply that a determination in [the sister's] case was not before him and in those circumstances he did not err in law by failing to take account of its contents. Whether he had the determination or not, we also reject a submission that it was binding on him in a sense that it regulated, or ought to have regulated, his determination of the appeal of the Appellant before him. He was bound to determine the appellant's appeal on the whole of the evidence before him, as an independent judge of fact and law. He did exactly that."

37. Likewise, Carnwath LJ approved the reasoning and outcome of the AIT in AA's appeal at [71]:

"In AA it is said that the Adjudicator should have regarded himself as bound, on the issue of ethnicity, by the earlier favourable finding on the sister's claim. The Adjudicator had been aware of the previous decision, but he was not shown the actual determination. Although the claimant was represented by Counsel, there is no indication that he sought to rely on the previous decision in respect of the issue of ethnicity. The simple answer to this point, in my view, is the first answer given by the AIT:

'We reject the suggestion that it was for the Home Office to produce it, or for the Adjudicator to inquire for it. The case before the Adjudicator was that of the appellant and the Adjudicator was to determine it on the material before him. The position is simply that a determination in [the sister's] case was not before him and in those circumstances he did not err in law by failing to take account of its contents.'



In view of the way in which the case was presented by a legally represented claimant, there was no error of law in the Adjudicator's approach."

38. At [79], Ward LJ agreed with Carnwath LJ's reasons for dismissing AA's appeal.
39. In my judgment, that reasoning equally applies in this appeal. It matters not that the AIT would have reached the same conclusion even if the determination had been considered (see [35] citing [76] of the AIT's decision). It is the considered position of all three judges in the Court of Appeal as to the correct legal approach. The party upon whom the burden of proof lay, in relation to the issue of earlier fraud, was the respondent. The respondent did not rely upon the earlier determination before the judge. It was no part of the decision letter and, being unrepresented before the judge, the respondent did not put forward a case based upon Devaseelan and the production of the earlier determination. Reading "respondent" for the "appellant" in the extract approved by the Court of Appeal from the AIT's decision, in this case the decision of Judge Veloso was not before the judge. The case before the judge in this appeal (on the issue of fraud) was that of the respondent and the judge was required to determine the respondent's case that the appellant had previously used fraud "on the material before him". The earlier determination was not binding on the judge "in the sense that it regulated, or ought to have regulated, his determination of the appeal". He was bound to determine the appellant's appeal (and the respondent's case in relation to the allegation of fraud) on "the whole of the evidence before him".
40. I do not accept Ms Rushforth's submission that AA(Somalia) can be distinguished.
41. First, in my judgment, there is no difference in principle between that position in a case where the appellant was a party to the earlier appeal and, as in AA (Somalia) itself, it was a family member who was the party to the earlier appeal. In both situations, the determinations are, albeit with slightly different emphases, taken as evidence when produced at a subsequent hearing and are a "starting point". In the absence of that determination, the judge was required to determine the appeal only on the evidence relied upon before him by both parties. The earlier determination was simply not in evidence before him.
42. Secondly, Ms Rushforth says, in her written submissions, that the Court in AA(Somalia) did not consider "common law fairness" but she does not explain what difference that could have made to the Court's decision or reasoning. The contention is not particularised. It must be that the judge acted unfairly by not taking action (by adjournment or otherwise) to obtain the earlier determination. It is difficult to see how this could fall within the rubric of procedural 'fairness' in the *audi alteram partem* principle (see R(Pathan) v SSHD [2020] UKSC 41 e.g. at [153]-[161] per Lord Briggs). The respondent had ample opportunity to make representations as to the proper outcome of the appeal, including if she wished relying on the earlier determination, first in the decision letter, and secondly at the hearing. She took neither opportunity. I see no basis in this appeal, or indeed in AA(Somalia), for identifying any unfairness to the respondent in the judicial process.

43. That then leaves the decision in VH(Malawi) which Ms Rushforth relied upon in her written submissions. In that case, it was argued that the AIT had committed a legal error when it obtained of its own volition a determination relating to the appellant's husband which was relevant as to whether he had any status in the UK. The determination showed he had successfully appeal under Art 8 of the ECHR. Having obtained the determination, the AIT made it available to the parties and gave them an opportunity to make submissions on it and to adduce any further evidence they wished. The Court of Appeal rejected the appellant's contention that the determination was not admissible (see [21] and [25]). It was argued that the AIT had "descended impermissibly into the arena" in obtaining the evidence for itself. The Court of Appeal rejected that argument. Stephen Richards LJ (with whom Pill and Longemore LJ agreed) said this at [25]:

"If, as I have held, the husband's determination was admissible in evidence, then it seems to me that the panel were entitled (and, indeed, were required) to consider it in conjunction with the other evidence in reaching their findings on the key issues before them. This was not an exercise of the kind that the tribunal can have had in mind in saying what it did in *JK (Conduct of Hearing) Côte d'Ivoire*; and in any event I do not think that the panel can be said to have trespassed beyond their permitted function in the present case and to have fallen into legal error by taking the husband's determination into consideration even in the absence of any positive reliance on it by the Home Office Presenting Officer. I agree with the panel's own observation at paragraph 20 of their determination (quoted above) that "[to] ignore that evidence would be for the Tribunal to close its eyes to what may be a very material aspect of the case in determining risk".

44. Ms Rushford places reliance on this passage in the present appeal but it does not, in my judgment, make good her case.
45. It is important to notice that the Court of Appeal was principally concerned with whether, in effect, the AIT had acted fairly to an appellant by obtaining an earlier determination for itself despite neither party relying on it. The Court of Appeal did not dissent from counsel's acceptance in the case that the AIT had a "limited inquisitorial function" (see [21]). That function, like the FtT as its successor, it clearly had even though proceedings in the AIT were (and in the FtT are) essentially adversarial. However, the Court recognised that a tribunal should not 'over-step the mark' by developing a different case from that presented by the parties (citing JK (Conduct of Hearing) Cote d'Ivoire [2004] UKIAT 00061). It had not in the seeking out a determination on a relevant issue raised before it (see [25]). The Court recognised that a tribunal must act fairly but the AIT had done so by bringing the determination to the attention of the parties and giving them an opportunity to make submissions and present any further relevant evidence (see [23]).
46. Then, and this is the important point, the AIT having obtained the determination and proceeded fairly, the Court held it was not an error of law to take the determination into account. It would have been wrong to ignore evidence that was properly before it. That does not, in my judgment, place a duty or obligation on a tribunal to seek out a determination of its own volition. That is what the respondent contends in this

appeal but I do not understand VH (Malawai) to impose such a duty. The Court was concerned with the legality of obtaining such a determination and then, having done so, taking it into account in reaching a decision. In essence, the Court was concerned with the converse situation to that in AA(Somalia) which is contrary to the respondent's contention in this appeal. Although the Court did not refer to AA(Somalia), its reasoning does not call into question the considered view of the three judges in AA(Somalia).

47. Mr Solomon relied upon the decision in Nimo. In that case the UT (President, Lane J and VP Ockelton) held that the respondent (and the same must apply to an appellant) owed no duty of candour to disclose material to the Tribunal. In Nimo, the Tribunal held that the earlier decision of the Upper Tribunal in Miah (interviewer's comments; disclosure, fairness) [2014] UKUT 515, which had held that the respondent did have a duty of disclosure, in that appeal in the context of a "marriage of convenience" case, was wrongly decided. At [20], The UT said this:

"It is plain from paragraph 21 of Miah, in which the Upper Tribunal made reference to the duty "to make disclosure (formerly discovery) of all material documents in a party's possession custody or power", that the Upper Tribunal considered this duty, or something very like it, applies in immigration appeals, including EEA appeals. With respect, that is not right. Regrettably, the Upper Tribunal did not have cited to it the relevant authorities, which establish that there is a significant difference between, on the one hand, appeals in the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal and, on the other, civil litigation as conducted in courts."

48. Having set out the analysis of the UT in CM (EM country guidance; disclosure) Zimbabwe CG [2013] UKUT 59 (IAC) at [36]-[38] rejecting any analogy between judicial review proceedings and statutory appeals, the UT concluded at [23]:

"... the Upper Tribunal in Miah appears to have equated judicial review proceedings with those of a statutory immigration appeal. However, these two types of litigation are distinct. There is no legitimate reason to import into immigration appeals the duty of candour, which exists in judicial review."

49. If there is no duty of candour upon the respondent, there can be duty of candour upon the appellant.

50. In Nimo, the UT nevertheless recognised, at least in relation to the Secretary of State, that there was a duty not to "knowingly mislead" the Tribunal (relying on the UT's decision in CM at [38]). At [35], the UT said this:

"The duty not to mislead, as described by the Upper Tribunal in CM, will require the respondent to disclose form ICD.4605, where there is something in it that could materially assist the appellant, but which is not mentioned in the respondent's decision or in the records of interview. If, for example, the interviewing officer comments that the appellant or spouse appeared to be seriously unwell during the interview, and that this might account for the unsatisfactory answers given, then the respondent is under a duty to disclose. The presenting officer would, in such circumstances, be misleading the Tribunal, if she were to rely on the discrepant or otherwise unsatisfactory answers, without

drawing attention to what the interviewer had had to say about the interviewee's apparent state of health. The possibility that such a piece of information might lie within form ICD.4605 is not, however, a reason to require its automatic production, any more than there ought, for such a reason, to be a general duty of disclosure on the respondent in respect of all internal communications leading to any decision in the immigration field, which may be appealed to the First-tier Tribunal."

51. That was said in the context of a document (ICD.4605), provided to the decision-maker with the marriage interview, which set out any recommendations by the interviewing officer to the decision-maker.
52. Here, however, I agree with Mr Solomon's submission that it cannot be said that the appellant's legal representative misled the Tribunal. It is clear that the Tribunal was told about the earlier decision by the appellant's legal representative and that the appeal was dismissed (see para 32 of the determination). It could hardly be relied upon directly as the appellant's earlier appeal was dismissed. There is nothing in the determination, or in the material to which I was shown, which suggests that the appellant's legal representative put forward a positive case based upon that earlier decision contrary to the earlier decision's finding in relation to the fraudulently obtained English Language certificate. If it was said, for example, that the judge was told that the earlier judge had found in the appellant's favour on the fraud issue that would, undoubtedly, have been quite different. It is not this case. Having referred to the fact that the appellant's legal representative had informed the Tribunal of that, the judge simply noted that as neither party had served a copy on the Tribunal he was unable to treat that Tribunal's decision as a "starting point" following Devaseelan. In my judgment, the judge was correct to take that position and the judge then went on to consider, in the absence of any evidence having been put before him from the respondent other than the assertions in the decision letter, that the respondent had failed to establish the allegation of a fraudulently obtained English Language certificate.
53. To the extent that it might be thought that it is somewhat incongruous that two judges should reach different conclusions on this issue, there is no basis for that perception. Both judges were required to determine the issue on the basis of the evidence that was presented to them. The first judge had evidence which he accepted and therefore concluded the respondent had established her case on the issue of a fraudulently obtained English language certificate. The second judge had no evidence at all of any significance from the respondent. He only had the statements, without any direct supporting evidence, in the decision letter. No doubt the position would have been otherwise if the respondent had been represented at the hearing. The lack of evidence would have been obvious and the absence of the earlier determination as part of the evidence to be taken into account on a Devaseelan basis, would also have been obvious. That, however, was not the situation as presented to the judge. Given the absence of the earlier determination and any direct evidence relating to the appellant's fraud, it is not the least surprising that the judge found that the respondent had failed to establish her case on this issue.

As I said earlier, the evidence (such that it was) could not conceivably have discharged the burden of proof on the respondent to establish fraud.

54. For these reasons, I reject the first ground relied upon by Ms Rushforth in this appeal.

*Ground 2*

55. Turning to the second ground of appeal, that relates to the judge's comment in para 33 that he "assume[d] that no evidence on the alleged ETS fraud was served on the appellant or filed with Tribunal previously either". Ms Rushforth submitted that that was an unwarranted assumption. It may well, in fact, have been an unwarranted assumption. But, it had no impact upon the judge's decision. It would have been relevant if the judge were being asked, and agreed, to apply Devaseelan. But he did not as he made clear in para 32 in the absence of the determination. What he then says in para 33 does not affect his conclusion that the respondent on the basis of the evidence relied upon had not discharged the evidential burden of substantiating the allegation of fraud. The judge made that plain in para 33 when he begins the sentence, immediately following the one objected to by Ms Rushforth, with the words "even if I am wrong ..." and goes on to find that the evidential burden is not discharged. For this reason, I also reject ground 2.

*Ground 3*

56. That then leaves the third issue raised in the respondent's submissions in response to the UT's directions. Mr Solomon did not raise any objection to this point being relied upon by Ms Rushforth in the appeal. There is, in my judgment, no proper answer to the point made. At para 37 of his determination the judge found, and this is not now challenged, that the appellant had lawful leave at the relevant time because the respondent had wrongly based her decision on the premise that he had entered the UK with limited leave as a visitor when, in fact, he had entered the UK with leave as a Tier 4 Student which continued, and was renewed, subsequently.
57. Then at para 39, the judge said that the respondent had, in effect, not raised any other issues as to the eligibility requirement in E-LTRP2.2 of the Rules.
58. At para 40 the judge found that the appellant and sponsor were married and had a genuine subsisting relationship and, stated that there were no other reasons given by the respondent, for refusing the appellant's application. He then concluded that the appellant met the requirements of the Rules as a partner and that, applying TZ (Pakistan), the appellant succeeded under Art 8.
59. The difficulty with this reasoning is that the appellant had two routes to succeed in meeting the requirements in Appendix FM as a partner. The first route - sometimes referred to as the 5-year route - required the appellant to establish all the eligibility requirements in Section E-LTRP (see R-LTRP.1.1.(a)-(c)). The alternative route - sometimes called the 10-year route - required the appellant to establish the eligibility requirements only in E-LTRP.1.2-1.12. and 2.1-2.2 but also, in the absence of

establishing the remaining elements of eligibility, also the requirements of para EX.1 (see R-LTRP.1.1(a), (b) and (d)). That, in effect, required the appellant to show that there were “insurmountable obstacles” to him continuing his family life with his spouse in Pakistan.

60. One of the eligibility requirements is that an individual should meet the financial requirements set out in E-LTRP.3.1-3.4. In order to qualify under the 5-year route the appellant must establish that he met the financial requirements (see R-LTRP.1.1.(c)). However, that is not one of the requirements specified in R-LTRP.1.1.(a), (b) and (d) under the 10-year route.
61. The respondent considered the appellant’s claim as a partner only under the 10-year route, including the requirement in para EX.1. Consequently, the respondent reached no conclusion on whether the appellant could meet the financial requirements in E-LTRP.3.1.-3.4. Indeed, if the appellant could have met those requirements, the respondent would have reached a conclusion in relation to the appellant’s entitlement under the 5-year route.
62. Consequently, before the judge, in order to succeed in establishing the substantive requirements under the ‘partner’ rules in Appendix FM, in addition to the matters upon which the judge was satisfied, the appellant had to establish either
  - (a) that he met the financial requirements in E-LTRP.3.1.-3.4 (and he would then succeed under the 5-year route); or
  - (b) if he could not do that, that he satisfied the requirement in EX.1, in particular that having a genuine subsisting relationship with his partner, and there were insurmountable obstacles to their family life continuing in Pakistan (and he would then succeed under the 10-year route).
63. The respondent had made no concession in the decision letter in respect of the financial requirements and the judge made no finding on that issue. Likewise, the respondent had reached an adverse conclusion in relation to para EX1 in the decision letter but the judge made no finding, indeed he did not address at all, the issue of whether para EX.1 was met.
64. Consequently, it is unclear upon what basis the judge reached the conclusion, in allowing the appeal under Art 8, that the appellant was entitled to succeed because he met the requirements of the ‘partner’ rules. In failing to give reasons why he did meet the requirements of the Rules, on whichever basis the appellant sought to succeed, the judge erred in law in allowing the appellant’s appeal under Art 8.
65. Mr Solomon submitted that error was not material. He relied upon a casework instruction from August 2020 which instructed caseworkers, where a judge had found in an ETS case such as the present, that there was no fraud to allow the appellant a grant of leave of 60 days in order to make a new application or to leave the UK. Mr Solomon submitted that, in effect, applying that policy the judge would have allowed the appeal under Art 8.

66. I do not accept that submission. First, this is a policy that dates from August 2020 and, therefore, postdates the judge's decision. Whether or not any error was material requires a conclusion that the judge, on the basis of the material before him, would inevitably have allowed the appeal but for his error in concluding that the appellant met the requirements of the 'partner' rules. This post-hearing policy cannot sustain such a conclusion. Secondly, in any event, the policy is concerned with a wholly different basis upon which an appeal might have been allowed. To conclude that there is a breach of Art 8 because an individual establishes their claim to a period of leave under the Immigration Rules – usually 30 months – under the 5-year route or 10-year routes, is entirely different from the casework instruction to which Mr Solomon referred which allows an individual 60 days in order to make a new application or to leave the UK.
67. For these reasons, the judge's error in allowing the appeal under Art 8 based on the 'partner' rules was material to his decision.

### Decision

68. For these reasons, the judge's decision to allow the appellant's appeal involved the making of an error of law. That decision cannot stand and is set aside.
69. Both representatives invited me to remit the appeal to the First-tier Tribunal if an error of law was established. Mr Solomon has invited me, if the respondent only succeeded on the issue concerned with the 'partner' rules, to preserve the judge's finding that the respondent had failed to establish the fraudulent use of an English language certificate.
70. Given that I have found that the judge was entitled to reach the conclusion that the respondent had not established her case on that issue, I agree that that finding should be preserved. In remaking the decision under Art 8, the issue will be whether the appellant, given that he is now shown to meet the 'suitability' requirements in Appendix FM, meets the remaining requirements of the Rules, in particular the eligibility requirements applicable under the 5-year or 10-year routes.
71. The appeal is, therefore, remitted to the First-tier Tribunal to remake the decision under Art 8 to the extent indicated above. The appeal to be heard by a judge other than Judge Abdar.

Signed

*Andrew Grubb*

Judge of the Upper Tribunal  
13 November 2020