Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/02789/2020 (V)**

THE IMMIGRATION ACTS

Heard at Field House via Skype for Business	**Decision & Reasons Promulgated**
On Tuesday 4 May 2021	**On Friday 28 May 2021**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

-and-

MR MUHAMMAD ASIF KHAN

Respondent

Representation:
For the Appellant: Ms A Everett, Senior Home Office Presenting Officer
For the Respondent: Mr R Sharma, Counsel instructed by Abbott Solicitors

DECISION AND REASONS

BACKGROUND

1. The Secretary of State is the appellant in this appeal. For ease of reference, however, I refer to the parties as they were in the First-tier Tribunal. The Respondent appeals against the decision of First-tier Tribunal Judge Andrew promulgated on 2 December 2020 ("the Decision"). By the Decision, the Judge allowed the Appellant's appeal against the Respondent's decision dated 3 February 2020, refusing his human rights claim. The context of the claim was an application to remain as the partner of a British citizen.

2. The Appellant is a national of Pakistan. He entered the UK on 22 January 2011 as a student. He applied for further leave in that category but that was refused on 2 January 2013. The Appellant appealed the refusal of leave and his appeal was allowed. However, following reconsideration by the Respondent, the application was again refused. That refusal was based on an allegation that the Appellant had used a proxy test taker when sitting an English language test. This case therefore involves an English Testing Service ("ETS") allegation. The Appellant again appealed but his appeal was unsuccessful. As I understand it, the appeal was determined on that occasion by First-tier Tribunal Judge Barber. That determination does not appear in the bundles.

3. The Appellant then made a human rights application which was again refused by the Respondent and led to an appeal before First-tier Tribunal Judge Hobson. By a decision promulgated on 14 May 2019, she dismissed the appeal. I was not taken to that decision, but I will need to refer to it later in this decision. For present purposes, I note only that Judge Hobson found the ETS allegation to be made out. A further human rights application was made on 16 July 2019 which led to the decision which is here under appeal.

4. On this occasion, Judge Andrew found in the Appellant's favour in relation to the ETS allegation. She did so in reliance on a report by the All-Party Parliamentary Group ("APPG") dated 18 July 2019 in relation to the Respondent's conduct in ETS cases ("the APPG Report"). I will need to return to the extent of her reliance on the APPG Report and the underlying evidence below.

5. Judge Andrew also found at [14] of the Decision that, even if she was wrong about her conclusions in relation to the ETS allegation, she found in the Appellant's favour applying paragraph EX.1. of Appendix FM to the Immigration Rules ("Paragraph EX.1.") on the basis that there were insurmountable obstacles to the Appellant's family life with his partner continuing in Pakistan. That conclusion was based on a report of Ms Marryam Mehmood dated 3 April 2020 ("the Expert Report"). The conclusions of the Expert Report were, in broad summary, that the Appellant and his partner would be at risk of honour killing by his family if they were to return together to Pakistan as they are not married. Furthermore, the Appellant is Muslim and his partner is Sikh.

6. The Respondent appeals the Decision on what can be summarised as two grounds as follows:

   Ground one: The Judge erred in her reliance on the APPG Report when that was considered in the light of guidance given and evidence considered in earlier decisions of this Tribunal in relation to ETS cases. The Judge had also failed to have regard to the earlier appeal decisions relating to the ETS allegation in respect of this Appellant. I refer to this hereafter as "the ETS issue".

   Ground two: The basis on which the Judge found Paragraph EX.1. to be made out amounted to a protection claim and should have been dealt with as

such. The Judge had, in effect, put herself in the position of primary fact finder and had deprived the Respondent of the opportunity properly to examine the claimed risk on return.

I refer to those two grounds in what follows as "Ground One" and "Ground Two" respectively.

7. Permission to appeal was granted by Designated Judge Shaerf on 31 December 2020 in the following terms so far as relevant:

> "… It is arguable the Judge erred in law in her treatment of the APPG report by relying on its conclusions without investigating the evidence referred to in the report and supposed to support its conclusions and to explain why they supported her departure from previous decisions of the Upper Tribunal which although not binding are persuasive.
>
> The Judge rightly directed herself that the Article 8 claim needed to be considered in the light of the extent to which the Appellant met the requirements of the Immigration Rules as a preliminary to the assessment of the proportionality of the decision under appeal to any of the legitimate public objectives identified in Article 8(2). She looked only at the provisions of Section EX.1.(b) of Appendix FM. There is no record in the decision that the parties agreed or the Judge found the Appellant met all the other relevant requirements of the Immigration Rules and notwithstanding the self-direction at paragraph 2 of the decision the Judge did not move on to conduct a balancing exercise to reach a conclusion on the proportionality of the Respondent's decision.
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> The grounds disclose arguable errors of law in the Judge's decision. Permission to appeal is granted and all grounds may be argued."

8. The Appellant filed a Rule 24 reply on 12 January 2021. I also had for the purposes of this hearing, the Appellant's bundle before the First-tier Tribunal to which I refer hereafter as [AB/xx], the core bundle including the Respondent's bundle and a skeleton argument from Mr Sharma prepared for the purposes of the hearing before me.

9. The matter comes before me to determine whether the Decision contains an error of law and, if I so conclude, to either re-make the decision or remit the appeal to the First-tier Tribunal to do so. The hearing was conducted remotely in light of the continuing restrictions arising from the Covid-19 pandemic. Neither party objected to that course. There were no major technical difficulties affecting the conduct of the hearing.

DISCUSSION AND CONCLUSIONS

10. At the outset of the hearing, I drew the attention of the parties to two decisions of this Tribunal. The first relates to Ground One – DK and RK (Parliamentary privilege; evidence) [2021] UKUT 00061 (IAC) ("DK"). The second is of relevance to Ground Two – JA (human rights claim: serious harm) Nigeria [2021] UKUT 0097 (IAC) ("JA").

In broad terms, DK is of potential assistance to the Respondent. JA is of potential assistance to the Appellant. For this reason and also because Ms Everett had not had sight of Mr Sharma's skeleton argument prior to the hearing and therefore did not know how he put the Appellant's case, it was agreed that Mr Sharma would make his submissions first. I permitted Mr Sharma a right of reply following Ms Everett's submissions in fairness to the Appellant. I deal hereafter with the parties' cases on each of the grounds in turn.

Ground One

11. The Judge dealt with the APPG Report at [11] to [13] of the Decision as follows:

> "11. I have given careful consideration to the APPG Report. The analysis and conclusions of that report was that the evidence relied on by the Respondent in individual cases was weak and that the internal procedures adopted by ETS to determine whether cheating had, in fact, taken place were not robust. I have noted, in particular, paragraph 2.3 of that report which is headed 'Misuse of Expert Advice'.
> 12. The report is damning of both the investigations undertaken by ETS and the Respondent's reliance on the results of those investigations to underpin the Respondent's decisions to revoke visas. The evidence given to APPG is that the Respondent effectively ignored the information which pointed to the unreliability of ETS and that she has continued to do so.
> 13. The Report post-dates the decisions in SM and Quadir [sic] and MA (Nigeria). It also post-dates the well-known report of Professor French. The evidence given by Professor French to the APPG was that his estimate of the false positives is less than 1% but this was qualified because it depended on the result from ETS to the Respondent. The APPG Report concluded that there was a significant doubt as to the usefulness of that statistic relied upon by the Respondent. The experts before the APPG all agreed that there had been a worrying lack of scrutiny of the evidence supplied by ETS as referred to at above [sic] (at paragraph 2.3 of the report). In the light of that evidence, which has not previously been considered, I am satisfied that the Respondent has not discharged the evidential burden to prove that the TOEIC certificate was procured by dishonesty. It would follow from this that the Appellant would be able to meet the suitability provisions of the Rules."

12. At the time of the Decision, the case of DK was in the Court of Appeal pending judgment ([10] of the Decision). That appeal has since been remitted and has been considered at least in relation to the preliminary issue concerning reliance on the APPG Report by a Presidential panel leading to the giving of the following guidance:

> "(1) Although the Upper Tribunal is not bound by formal rules of evidence, it cannot act in such a way as to violate Parliamentary privilege, whether that be to interfere with free speech in Parliament or by reference to the separation of powers doctrine. The Tribunal cannot interfere with or criticise proceedings of the legislature.
> (2) Courts and tribunals determine cases by reference to the evidence before them and not by reference to the views of others, expressed in a non-judicial setting, on

> evidence which is not the same as that before the court or tribunal. Indeed, even if the evidence were the same, the court or tribunal must reach its own views, applying the relevant burden and standard of proof."

13. In short, therefore, the guidance permits a First-tier Tribunal Judge to have regard to the evidence before the APPG in order to reach his own conclusions but not to rely on the views of the APPG itself.

14. Mr Sharma submitted that Judge Andrew had not fallen into this trap. The APPG Report is at [AB/166-200]. Judge Andrew said that she had particular regard to section 2.3 of the APPG Report (beginning at [AB/186]). I do not set that out in full. It begins with an account of the background to the ETS litigation although making no reference to the consideration of the evidence by this Tribunal or the higher courts. It refers to evidence which the APPG appears to have received from Professor French. I accept that this evidence does indicate as Judge Andrew notes that the 1% false positives figure "was valid 'if the results that ETS had given the Home Office were correct'". It goes on to refer to what was said by one of the lawyers acting for appellants in ETS cases, Mr Lewis. I do not suggest that it was not open to the APPG to take evidence from such persons. As Mr Sharma submitted, and I accept, the APPG is not a court or tribunal. A court or tribunal would not generally receive "evidence" from a lawyer but would hear from such a person only by way of submissions which would be given weight as such. The purpose of the APPG Report as set out in the foreword is to hold an inquiry into what is there described as the "TOEIC scandal". However, the way in which evidence is taken by the APPG which includes evidence which would not generally be admitted or given weight by the Tribunal, as set out in section 2.3 underlines the difficulty in placing reliance on it.

15. I accept of course that the Judge was entitled to have regard to what is recorded in that section as apparently said by the three technical experts that the reliability of the ETS evidence rendered the voice recognition software results "almost irrelevant" and cast doubt on the 1% false positives figure. However, that part of the APPG also has to be read with what Professor French apparently told the APPG that the 1% false positives figure should not be used as "the sole basis for accusing a particular person of fraud". It is not there suggested that there were no cases where deception was exercised but rather that as a generality the false positive rate could not be relied upon as the sole reason for accusing of deception all those whose voice recognition tapes appeared to match a proxy test taker. It appears accepted in the introduction to the APPG Report that there were some cases at least where cheating had taken place.

16. I have in the foregoing sentences referred to what was apparently said to the APPG. That leads me on to the second reason why reliance on the section of the APPG Report is, in and of itself, unsafe, at least as a sole reason for rejecting the Respondent's evidence. There is no record of what the APPG was told. There is no record of the questions asked or the answers given. I do not suggest that the APPG did not receive the evidence as recorded but there is no context given to any of this evidence. By contrast, previous Tribunals have examined the evidence in the form of written reports

and oral evidence from the experts. The content of that evidence is fully recorded to support the Tribunal's reasoning and conclusions.

17. That brings me on to the lack of any reference in the APPG Report to the decisions of this Tribunal or the higher courts in relation to the ETS cases which have been scrutinised in both appeals and judicial reviews. I recognise that Judge Andrew has made reference to the decision in SM and Qadir v Secretary of State for the Home Department (ETS – Evidence – Burden of Proof) [2016] UKUT 299 (IAC) ("SM"). In that case, a Presidential panel of this Tribunal concluded that the Respondent's generic evidence "sufficed to discharge the evidential burden of proving" that the TOEIC certificates "had been procured by dishonesty". The Tribunal in that case recognised the "multiple frailties from which this generic evidence was considered to suffer". In reaching that conclusion, the Tribunal heard evidence from the makers of the generic witness statements (which APPG did not since it did not apparently take any evidence from anyone on behalf of the Home Office) and, importantly, the Tribunal heard and considered evidence from Dr Harrison who was one of the three experts from whom the APPG heard evidence. SM pre-dated Professor French's evidence and therefore there was no reliance by the Tribunal on the 1% false positive evidence.

18. Judge Andrew also referred to MA (ETS – TOEIC testing) [2016] UKUT 450 (IAC) ("MA"). In that case another Presidential panel reconsidered the generic evidence in light of expert evidence which it heard from three experts, including Professor Sommer who was one of the three experts who gave evidence to the APPG. Although not part of the guidance for which MA is reported, I note what is said about the expert's criticism of the Respondent's evidence at [47] of the decision that "there are enduring unanswered questions and uncertainties relating in particular to systems, processes and procedures concerning the TOEIC testing, the subsequent allocation of scores and the later conduct and activities of ETS". Those are in large part the criticisms made by the experts to the APPG. In MA, the Tribunal had a great deal more evidence from the Respondent than simply the generic evidence relied upon in SM. However, as the Tribunal said in MA, this merely serves to underline the point that "[t]he question of whether a person engaged in fraud in procuring a TOEIC English language proficiency qualification will invariably be intrinsically fact sensitive".

19. Mr Sharma also relied in his skeleton argument on the case of R (oao Saha and others) v Secretary of State for the Home Department (Secretary of State's duty of candour) [2017] UKUT 17 (IAC). He suggested that, if the Tribunal did not accept that the Judge was entitled to find that the Respondent's case on the ETS issue was undermined by the APPG Report then it was immaterial because the same conclusion could be reached via the decision in Saha. There are three fundamental difficulties with that submission.

20. First, of course, that was not the basis for Judge Andrew's conclusion. She relied squarely on what was said in the APPG Report about the evidence of the experts in that forum. She did not rely on what the same experts had said in evidence previously given. Granted, one of the experts in Saha was one of the experts who gave evidence to the APPG. I also accept that, in Saha, the Tribunal probed that evidence in more

depth than in SM. It also gave a much more thorough analysis of the deficiencies in the ETS evidence than did the APPG. That is, as I say, to be expected. The APPG is a very different body to a court or tribunal and has a very different function.

21. Second, however and crucially, notwithstanding the criticisms made of the Respondent's evidence based on the expert views in Saha, the case was not reported for any conclusions about the evidential value of the Respondent's ETS evidence. It was not reported to give guidance that what was said in SM about that evidence should not be followed.

22. Third, there is good reason for that because Saha was a judicial review application and not an appeal. As such, the Tribunal was addressing a different issue namely whether the Respondent's decisions under review were irrational based on the generic evidence when judged not only with the benefit of the expert evidence but also against the evidence of the applicants in those cases.

23. I do not suggest that Judge Andrew was not entitled to find that the Respondent's generic evidence was undermined by the evidence given to the APPG. However, in order to reach the conclusion that it undermined the evidence to such an extent that the Respondent could not discharge even the evidential burden, she had to consider whether the evidence which was given to the APPG displaced the Tribunal's findings in SM that the generic evidence did meet the burden, notwithstanding the weaknesses in that evidence. She was not entitled to do so merely relying on the APPG's opinions. The APPG is not a court of law and does not purport to be. It heard no evidence from anyone in the Home Office so far as I can see. It took evidence which, even with the Tribunal's more flexible rules of evidence would not be accepted as such (from appellants' lawyers). There is no record of the evidence which the APPG received in order to set that evidence in context.

24. In short, the error disclosed by the Judge's reliance on the APPG Report can be categorised as a failure to provide reasons which is the basis on which the Respondent's first ground proceeds.

25. That brings me on to the second central reason why I conclude that Judge Andrew has erred in relation to the ETS issue. As Judge Andrew notes at [9] of the Decision, the ETS issue had been considered in the Appellant's case in two previous Tribunal appeals. The decision of First-tier Tribunal Hobson is at [AB/239] and following. The decision in the earlier appeal of First-tier Tribunal Judge Barber is not in either of the bundles. It is recorded at [9] of Judge Hobson's decision that Judge Barber, on 4 August 2016, "had dismissed the Appellant's appeal against the refusal of leave in relation to the TOEIC issue". Thus, as Judge Hobson rightly recognised, in accordance with the Devaseelan guidelines, she was obliged to take that as her starting point. The Appellant's case before Judge Hobson was that there were two important differences since Judge Barber's determination. The first consisted of inconsistencies in the Respondent's evidence about the test venue and second that in spite of the Appellant's efforts to obtain his voice recording, he had been unable to do so. I do not need to say more about those reasons as they are not relevant to the case now put. Judge Hobson

however went on to consider the Appellant's case on the ETS issue afresh. I accept that she did so on the basis that the Respondent's evidence satisfied the evidential burden. As I have already pointed out, that is consistent with the guidance given in SM which has, even now, not been displaced by later evidence. Judge Hobson then went on to consider the Appellant's evidence but rejected that due to inconsistencies. In other words, Judge Hobson did not believe the Appellant's evidence.

26. I add as an aside that I am not assisted by the inclusion in the Appellant's bundle of an appeal decision in an unrelated case ([AB/227-238]). In fairness to Mr Sharma, he did not take me to it or seek to rely on it. However, since it was part of the Appellant's bundle before Judge Andrew, I should explain why I do not find it of assistance. First, I note that the Appellant has not sought permission to rely on what is an unreported case of another Upper Tribunal Judge in a case which is unrelated to the present appeal. Second, the views of that Judge about the evidential value of the APPG Report are, understandably, not informed by the case of DK as the decision pre-dates the Tribunal's decision. Third, the decision is only at error of law stage and therefore depends on the reasoning of the First-tier Tribunal Judge. There is no further decision on re-making. Finally, and more importantly, the Judge in that case concludes at [17] of the decision that "[t]he APPG report is capable of undermining the strength of the Respondent's case against the Appellant or at least assists the Appellant to raise an innocent explanation". She does not there say that it renders the guidance given in SM about the evidential weight of the generic evidence of no value.

27. That then brings me on to the way in which Judge Andrew determined the ETS issue. As I have already pointed out, in spite of its criticisms, the APPG did not suggest that there had been no cheating in TOEIC tests. The thrust of its report was that many students who were innocent had been falsely accused. Nor do I understand the experts, however critical of the methodology of the Respondent's evidence, to have said that the evidence was entirely valueless. As Mr Sharma put it in his skeleton argument "[t]he weight to be given to evidence is a matter for the Tribunal". He goes on to say that the Judge has "clearly" taken the previous appeal decisions as the starting point. I observe of course that Judge Andrew could not have taken Judge Barber's decision into account as it was not part of the evidence before her. However, there is no indication that Judge Andrew took into account what had previously been said about the Appellant's evidence in relation to the ETS issue. The thrust of [9] to [13] of the Decision is that the APPG Report meant that the Respondent had "not discharged the evidential burden to prove that the TOEIC certificate was procured by dishonesty". That does not disclose the "intrinsically fact sensitive" approach advocated in MA on which case Judge Andrew relied and in which, as I have already pointed out, on the basis of not dissimilar criticisms to those made by the APPG, the Tribunal did not depart from its previous guidance in SM that the Respondent's evidence discharged the evidential burden.

28. For those two reasons, which are essentially a failure to provide reasons for departure from previous guidance, a failure to explain why the Respondent's evidence did not meet the evidential burden based on that guidance and a failure to take into account

previous decisions in the Appellant's case, the Respondent's first ground is made out. I will turn to the effect of that error following consideration of the second ground.

Ground Two

29. Ms Everett very fairly accepted that the Respondent's second ground may not be as she put it "tenable" following the Tribunal's decision in JA. The guidance given in JA is as follows:

> "(1) Where a human rights claim is made, in circumstances where the Secretary of State considers the nature of what is being alleged is such that the claim could also constitute a protection claim, it is appropriate for her to draw this to the attention of the person concerned, pointing out they may wish to make a protection claim. Indeed, so much would appear to be required, in the light of the Secretary of State's international obligations regarding refugees and those in need of humanitarian protection.
>
> (2) There is no obligation on such a person to make a protection claim. The person concerned may decide to raise an alleged risk of serious harm, potentially falling within Article 3 of the ECHR, solely for the purpose of making an application for leave to remain in the United Kingdom that is centred on the private life aspects of Article 8, whether by reference to paragraph 276ADE(1)(vi) or outside the immigration rules. If so, the 'serious harm' element of the claim falls to be considered in that context.
>
> (3) This is not to say, however, that the failure of a person to make a protection claim, when the possibility of doing so is drawn to their attention by the Secretary of State, will never be relevant to the assessment by her and, on appeal, by the First-tier Tribunal of the 'serious harm' element of a purely human rights appeal. Depending on the circumstances, the assessment may well be informed by a person's refusal to subject themselves to the procedures that are inherent in the consideration of a claim to refugee or humanitarian protection status. Such a person may have to accept that the Secretary of State and the Tribunal are entitled to approach this element of the claim with some scepticism, particularly if it is advanced only late in the day. That is so, whether or not the element constitutes a 'new matter' for the purposes of section 85(5) of the Nationality, Immigration and Asylum Act 2002.
>
> (4) On appeal against the refusal of a human rights claim, a person who has not made a protection claim will not be able to rely on the grounds set out in section 84(1) of the 2002 Act, but only on the ground specified in section 84(2)."

30. As I have already noted, the Appellant's case in this regard is that he and his partner would be at risk on return to Pakistan both because they are not married and because they are of different religions. The Appellant's partner is also of Indian origin. The Appellant and his partner contend that they would be at risk of honour killing by the Appellant's family. The Appellant has not claimed asylum on this basis. He claims instead that it is relevant to the "insurmountable obstacles" to family life being enjoyed by the couple on return to Pakistan for the purposes of Paragraph EX.1. As Ms Everett again very fairly accepted, it is perhaps understandable that the case is put in that way here as it may be the Appellant's partner who faces the more significant risk as a

woman rather than the Appellant himself. As a British citizen, the Appellant's partner would have no basis on which to claim asylum. I also note that it is accepted by the Respondent that this part of the case does not constitute "a new matter". It was put to the Respondent who considered it in the decision under appeal albeit not under Paragraph EX.1. because of her conclusion on suitability (based on the ETS allegation).

31. I do not need to consider what is said by Judge Andrew about this aspect of the case which turns on her view of the Expert Report. The Judge reaches the conclusion at [27] of the Decision that the Appellant and his partner would face "very significant difficulties in continuing their family life in Pakistan".

32. The Respondent's second ground is based squarely on an error of the Appellant to raise his case as a protection claim. In light of the guidance in JA, that ground falls away. I have also explained why the way in which the case is put might have been the only way in which the risk could have been raised due to the nature and potential target of the risk. For those reasons, the Respondent's ground two is not made out.

Effect of the Error of Law under Ground One

33. Mr Sharma sought to persuade me that, having found there to be no error under Ground Two, the error under Ground One made no difference. I do not accept his submission for the following reasons.

34. First, as the Respondent points out at [5] of the grounds, the Judge has purported to allow the appeal solely on the basis that "there would be insurmountable obstacles to the Appellant and his partner carrying on family life together in Pakistan". Those are said at [29] to be the reasons why the appeal is allowed. As the Respondent points out, the Appellant's appeal cannot succeed solely on the basis that he meets Paragraph EX.1. The only basis on which the appeal can be allowed is that the Respondent's decision breaches the Appellant's human rights.

35. Although that might appear to be a purely technical error, it is not so in this case. That brings me on to the second reason why the error identified by Ground One makes a difference. Having reached her findings at [13] of the Decision concerning the ETS issue (where I have found the Judge to fall into error), she continues at [14] to say that "[e]ven if [she is] wrong about this" she turns to Paragraph EX.1. That ignores though that if the Appellant fails on suitability grounds under the Immigration Rules ("the Rules") as he would if the ETS issue is determined against him, Paragraph EX.1. cannot apply.

36. It might then be said, however, that the conclusion would be the same outside the Rules on a full proportionality assessment. Put another way, if, under the Rules, an applicant is entitled to succeed if there are insurmountable obstacles to family life being continued outside the UK (if the other criteria are met) on the basis that there would otherwise be a breach of Article 8 ECHR, then the same position should pertain on a proportionality assessment outside the Rules. However, as Ms Everett correctly pointed out, other considerations would then have to be brought into account such as

whether it would be proportionate for the Appellant to return to his home country to seek entry clearance to return to the UK to re-join his partner by making an application within the Rules. In this case, also, the Appellant's partner is of Indian heritage and may have a right to reside there (although I recognise that she asserts in her witness statement that she does not). There may need to be consideration to whether that is the case and whether the couple could reasonably be expected to return to India if it were found that they could not be expected to return to Pakistan. The public interest in removal would also be different if the Appellant fails under the Rules on suitability grounds based on a deception.

37. The Judge has reached her conclusion based solely on a finding (in effect) that Paragraph EX.1. is met which cannot be the case if the Appellant fails on suitability grounds. She has not conducted a balancing assessment under Article 8 ECHR outside the Rules as she should have done if she had recognised that the Appellant could not succeed under the Rules if she were wrong about the suitability ground (as I have found) based on the APPG Report. For those reasons, I am satisfied that the same conclusion might not necessarily be reached on a full evaluation of proportionality in this case, depending of course on a proper assessment of the ETS issue.

38. I therefore set aside the Decision. Mr Sharma asked me to preserve the findings made in relation to the Expert Report at [14] to [26] of the Decision. I decline to do so. I accept that the issue in relation to the position which the Appellant and his partner would face in Pakistan is capable of being separated from the ETS issue. However, I have decided that it would not be appropriate to bind another Judge to the findings of a previous Judge for the following reasons.

39. The impact of a second Judge's conclusion on the ETS issue will need to be taken into account in a full Article 8 evaluation. A Judge's assessment of that issue is also likely to need to take into account evidence from the Appellant and another Judge may wish to hear evidence from the Appellant and his partner on the issue of the circumstances they would face in Pakistan (or indeed India if the Appellant's partner has a right to return to that country) when considering the obstacles on return. Another Judge may well want to consider any such evidence when assessing the Expert Report and it would not be appropriate to restrict the assessment of the Expert Report in the context of all the evidence.

CONCLUSION

40. For the foregoing reasons, I am satisfied that there is an error of law disclosed by ground one. That error is capable of affecting the outcome of the appeal. For that reason, the Decision is set aside, and the appeal is remitted to the First-tier Tribunal for redetermination.

DECISION

The Decision of First-tier Tribunal Judge Andrew promulgated on 2 December 2020 involves the making of an error on a point of law. I therefore set aside the Decision and remit the appeal for re-hearing before a Judge other than Judge Andrew.

Signed: *L K Smith*

Upper Tribunal Judge Smith

Dated: 18 May 2021