



**Upper Tribunal  
(Immigration and Asylum Chamber)**

**Appeal number: HU/02168/2019**

**THE IMMIGRATION ACTS**

Heard at: Field House  
On: 14 August 2019

Decision & Reasons promulgated  
On 21<sup>st</sup> August 2019

Before

Upper Tribunal Judge Gill

Between

The Secretary of State for the Home Department

Appellant

And

Nikhilkumar Kanaiyalal Sheth  
(ANONYMITY ORDER NOT MADE)

Respondent

**Representation:**

For the appellant: Mr S Kotas, Senior Presenting Officer.

For the respondent: Ms A Basharat, of Counsel, instructed by A & P Solicitors.

**Decision and Directions**

1. The Secretary of State appeals against a decision of Judge of the First-tier Tribunal M R Oliver who, in a determination promulgated on 9 May 2019 following a hearing on 15 April 2019, allowed the appeal of Mr Sheth (hereafter the "claimant"), a national of India born on 24 February 1973, against a decision dated 17 January 2019 to refuse his human rights claim.
2. The decision letter states that the Secretary of State considered that the claimant's presence in the United Kingdom was not conducive to the public good and that he had therefore concluded that the claimant did not satisfy the suitability requirement in S-LTR.1.6 of Appendix FM of the Immigration Rules. The decision letter states that

this was because the Secretary of State considered that the claimant had used a proxy taker to take an English test on 17 April 2012 at Premier Language Training Centre and that he had therefore fraudulently obtained his TOEIC certificate. The decision letter then provides detailed reasons under the heading "*Consideration of the evidence in relation to your ETS test*", which includes details from a "Revised Lookup Tool".

3. The claimant and his wife attended the hearing before the judge. Both gave oral evidence. He was represented by Ms Basharat. There was no representation on the Secretary of State's behalf.
4. At para 8, the judge noted that, on 14 March 2019, the Tribunal had requested the Secretary of State for service of the Secretary of State's bundle; that the hearing listed for 26 March 2019 was adjourned the day before "*presumably as a result of a request by the [Secretary of State] on 25 March 2019 for the case, which had been listed for float, to be moved to a list with a presenting officer*"; that the hearing was adjourned and a direction made that the Secretary of State's bundle be served before 4 p.m. on 10 April 2019; that the Secretary of State had not sent a Presenting Officer to the hearing on 15 April 2018; and no bundle had been received by the Tribunal or the claimant's representatives.
5. The judge then proceeded to consider the claimant's Article 8 claim. He said, *inter alia*, that the Secretary of State had made a very serious allegation against the claimant but had not provided any evidence in support, "*not even the minimal printout of the lookup tool*"; that "*in the absence of such evidence, there is no evidence of adverse immigration history*" and that "*In these compelling circumstances I must consider the appeal outside the rules*". He then proceeded to the balancing exercise and said that "*the allegation of deception was the only reason given for the refusal of his application; in its absence it would appear that he satisfied the requirements and the usual public interest in the maintenance of fair but firm immigration takes a less important role when compared against his private interests*".
6. The judge therefore allowed the appeal on human rights grounds.
7. There are two grounds, the first of which was that the judge had failed to consider the evidence in the PF1 bundle which contained, *inter alia*, the ETS test analysis, the "*ETS look up tool print out*", "*CID notes print out*", "*Revised look up tool print outs*", witness statements of Peter Millington, Rebecca Collings, Adam Sewells and a report on Premier Language Training Centre; and that there was therefore no need to serve an additional ETS bundle.
8. The second ground was that the judge had allowed the appeal outside the Immigration Rules but gave no reasons.
9. At the hearing, I asked Mr Kotas whether he had any evidence that the PF1 bundle, which was date-stamped by the Tribunal as having been received on 2 August 2019, was before the judge. Mr Kotas informed me that he had accessed the Secretary of State's "*Case Information Database*" ("CID") system and noted that there was an entry that stated that the direction for the PF1 bundle to be served had been noted but there was no entry that indicated that the direction had been complied with or that the PF1 bundle had been served.

10. Mr Kotas then said that, on the information he had available, he would have to accept that the direction of 26 March 2019 for the PF1 bundle to be served by 10 April 2019 had not been complied with. Accordingly, he agreed that the Secretary of State could not complain about the fact that the evidence in the PF1 bundle had not been taken into account by the judge.
11. Accordingly, I have concluded that ground 1 is not established.
12. However, I noted that the judge's manuscript record of the proceedings ("RoP") says:

"I've not seen RFRL"
13. Ms Basharat then confirmed that neither the judge nor she had had a copy of the Secretary of State's decision letter dated 17 January 2019.
14. I ascertained that there was on file a copy of the decision letter dated 17 January 2019 stamped as having been received by the Tribunal on 5 February 2019. This letter was therefore before the judge. Plainly he did not consider it because he said in his RoP that he had not seen it.
15. It seems to me astonishing, as I said at the hearing, that the hearing before the judge proceeded when neither Ms Basharat nor the judge had had sight of the decision letter, from which it must follow that neither party had any idea what the Secretary of State's case was. In these circumstances, I simply cannot see how the judge felt able to say that "*the allegation of deception was the only reason given for the refusal of his application*". It plainly was not. The Secretary of State gave reasons why he considered that the eligibility requirement was not satisfied, why the family life claim was refused, why neither the claimant nor his wife would experience very significant obstacles to their reintegration in India and why there were no exceptional circumstances for the grant of leave outside the Immigration Rules.
16. Ms Basharat did not raise any objection to my raising this issue, rightly so in my judgment. Since the Secretary of State was not represented at the hearing before the judge, he could not have known that the judge had stated that he had not seen the decision letter. He therefore could not have raised in his grounds that the judge had only considered the claimant's case.
17. For the reasons given at paras 12-16 above, I am satisfied that the Secretary of State has been deprived of a fair hearing of his case. Even if I were to leave to one side the fact that the decision letter in the instant case sets out specific evidence taken from the "*ETS look up tool*", it is impossible to avoid the conclusion that the fact that the judge did not look at the decision letter means that he did not have in mind the case of one party to the appeal; he only had in mind the case of the claimant. If one then takes into account the fact that the decision letter in the instant case sets out specific evidence concerning the deception allegation, the already determinative case in the Secretary of State's favour becomes wholly unanswerable. There is therefore no need to consider ground 2.
18. I am grateful to Ms Basharat who did not seek to try and defend the judge's decision.

19. For the reasons given above, I set aside the judge's decision and remit the appeal to the First-tier Tribunal for a fresh hearing on the merits by a judge other than Judge of the First-tier Tribunal M R Oliver.
20. I record that Mr Kotas submitted a copy of the determination of Judge of the First-tier Tribunal Manyarara on the papers, promulgated on 22 March 2017.

**Notice of Decision**

The decision of Judge of the First-tier Tribunal M R Oliver involved the making of errors on points of law such that the decision is set aside. This appeal is remitted to the First-tier Tribunal for a fresh hearing on all issues on the merits by a judge other than Judge of the First-tier Tribunal M R Oliver.



Signed  
Upper Tribunal Judge Gill

Date: 16 August 2019