



**Upper Tribunal
(Immigration and Asylum Chamber)
IA/02122/2015**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Field House
On 5 May 2016**

**Decision and Reasons
On 20 July 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE L J MURRAY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

And

Appellant

**AMITH NAMAL LEMBET SIMIYON
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr Kandola, Senior Home Office Presenting Officer
For the Respondent: Ms B Jones, Counsel

DECISION AND REASONS

1. The Appellant in this case was the Respondent before the First-tier Tribunal and the Respondent the Appellant. For ease of reference I refer to them as Secretary of State the Claimant and respectively. The Claimant is a national of Sri Lanka born on 25 September 1991. On 28 January 2013 he was given leave to remain in the UK as a spouse. In obtaining leave to remain he submitted a TOEIC Certificate from Educational Testing Services (ETS) in support of his application. On 27 December 2014 at Heathrow Airport a decision was made by the Secretary of State to refuse him leave to enter. His leave was cancelled because the Secretary of State was satisfied that false representations were employed and material facts not disclosed for the purpose of obtaining leave to enter granted on 28 January 2013.

2. The Claimant appealed that decision to the First-tier Tribunal under section 82 (1) of the Nationality, Immigration and Asylum Act 2002. His appeal was allowed under the Immigration Rules by First-tier Tribunal Judge J Connor in a decision promulgated on 25 September 2015.
3. The Secretary of State took issue with that decision and sought permission to appeal to the Upper Tribunal. Permission was granted on 12 February 2016 by the First-tier Tribunal Judge on the grounds that it was arguable that the First-tier Tribunal had provided insufficient reasons for its conclusions. In granting permission, it was considered that it was arguable that the Judge had made insufficient findings of fact as to the Claimant's language ability at the relevant time in contradistinction to the Judge's finding at paragraph 30 of the decision that given the Claimant's English speaking ability to the Tribunal it was not plausible if the Claimant had not taken a test.

The Grounds

4. The Secretary of State asserts in the grounds that the First-tier Tribunal had failed to provide adequate reasons for the finding that the Secretary of State had not discharged the burden of proof on her and that she found the Claimant's evidence to be credible given his English language ability. The Secretary of State set out the sections of the statements of Rebecca Collins and Peter Millington relied on and argued that in order to be categorised as "invalid" on the spreadsheet provided to the Home Office each case had to have gone through a computer programme analysing speech and then two independent voice analysts. If they were in agreement that a proxy test had been used they would be categorised as invalid. A print-out of the relevant section of the ETS spreadsheet was attached at Annex D of the explanatory statement which identified the Claimant by name and recorded that the test taken on 28 March 2013 was invalid. It is submitted that in the light of this evidence the First-tier Tribunal erred in finding that the Secretary of State had not discharged the burden of proof and failed to give adequate reasons for its findings to the contrary. The Secretary of State submitted that there may be reasons why a person who could speak English to the required level would nonetheless cheat or permit a proxy candidate to undertake an ETS test on their behalf.

The Hearing

5. The Claimant made an application to cite the case of **Qadir & SM v SSHD IA/31380/2014** and **IA/36319/2014**, an unreported decision, pursuant to paragraph 11 of the Practice Directions of the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal. The Claimant wished to reply on the proposition that "the generic evidence on which the Secretary of State has relied to date in all ETS cases has been demonstrated as suffering from multiple shortcomings and frailties".
6. Mr Kandola objected to the unreported case being relied on. He submitted that **Qadir** was fact specific and did not assist the court. Should **Qadir** be cited he would seek to rely on the report of Professor French to show that

the Secretary of State's evidence had always been good and adequate which was contrary to the case of **Qadir**.

7. Ms Jones submitted that it could not be said that because **Qadir** went in it followed that the Secretary of State should be able to rely on fresh evidence. She relied on **Qadir** for a judicial finding. This was not the ideal forum for a conflict of experts and the Tribunal was concentrating on error of law only. The SSHD did not put in expert evidence in **Qadir** until late. It was refused and it was not appropriate to undermine **Qadir** by evidence that could and was not adduced in that case. If Professor French's report was admitted she would seek an adjournment to prepare submissions.
8. Paragraph 11.1 of the Practice Directions provides that a determination of the Tribunal which has not been reported may not be cited in proceedings before the Tribunal unless the Tribunal gives permission. Ms Jones complied with the formalities and included a full transcript of **Qadir**, identified the proposition for which the determination was to be cited and certified that the proposition was not to be found in any reported determination and had not been superseded by higher authority. Paragraph 11.3 provides that permission will only be given where the Tribunal considers that it would be materially assisted by the citation of the determination, as distinct from the adoption in argument of the reasoning to be found in the determination. Such instances are said to be likely to be rare and that it will be rare for such an argument to be capable of being made only by reference to an unreported determination.
9. I decided not to give permission to cite the unreported determination. The Upper Tribunal in **Qadir** heard oral evidence from Secretary of State's witnesses Rebecca Collings and Peter Millington and from Dr Harrison who appeared on behalf of the Appellants. The conclusions of the Upper Tribunal were based on the totality of this evidence. In view of the fact that I had to consider whether there was an error of law in the decision of the First-tier Tribunal which came to its conclusions on the written testimony of those witnesses and the oral evidence of the Claimant I concluded that the conclusions in **Qadir** would not be of material assistance.
10. Mr Kandola relied on the grounds as lodged. The first ground was that adequate reasons were not given on a material matter. The main point was that the Judge did not give adequate weight to the Secretary of State's evidence. It was the combination of that evidence which went to show that a proxy was used rather than looking at the generic evidence in isolation. Even Dr Harrison accepted that there was inaccuracy in the system. Mr Millington's evidence showed that the tests were invalidated due to the proxy. If there was a match for proxy use then it was invalidated. The combination of Mr Millington's report and the certificate showed why it was invalidated. The First-tier Tribunal's conclusion was wrong on the facts and therefore it infected the Judge's conclusions on the law. The Judge then fell into another error noting that the evidence was vague and then at paragraph 28 noted that the Claimant was not able to give significant detail. He was vague in his evidence. The Judge concluded that given he spoke at the hearing and had taken a test in 2015 it was not plausible that he had

not undertaken the TOIEC test. It was wrong of the Judge to concentrate on the ability to speak English as of the date of hearing rather than when the test took place. The Judge should have been looking at whether deception was used when the test took place rather than his English ability at the date of hearing. The test was taken in June 2012 and it was wrong of the Judge to concentrate on the Claimant's ability three years on. It was not something that the Judge cautioned himself against doing and for those reasons and the reasons in the grounds it was said that there was a material error of law.

11. Ms Jones submitted that generic evidence was one reason for the Judge's findings. The case law which was cited in **Qadir** showed that forgery must be shown. First, the Claimant had discharged his part of the burden by providing an explanation as to what occurred. The technology was imperfect and part of what made the evidence not cogent. There was no witness evidence or cogent evidence even connecting the process. The evidence was unsigned and unauthenticated. There was nothing from anybody attesting that this Claimant went through this process. In respect of whether the process was satisfactory, that was discussed in in **R (on the application of Gazi) v SSHD (ETS - judicial review) IJR [2015] UKUT 327**. It was obiter but nevertheless persuasive and it was clear that the Judge considered it at paragraph 23 and said that the evidence was lean in detail and that Mr Millington had no expertise. There was no perversity challenge. It was clear why the Judge reached the conclusion that he did. There was no evidence linking this Claimant with the process and the witness statements were generic and were insufficiently detailed to show cogent evidence. The Secretary of State's grounds were a disagreement with the findings of fact. The fact that the Claimant could speak English was not the only the matter to be considered and his O' level was passed well before the time he took the test. He gave evidence about the test and that he paid in cash and it was not as though that there was no evidence The Judge had given sustainable reason why there was some vagueness. The Judge had reached adequately reasoned conclusions that were open to him and set out the reasons for those conclusions and this was a disagreement with the finding that he was a credible witness.

12. Mr Kandola did not have anything to add. I reserved my decision.

Discussion and Findings

13. The Secretary of State's sole ground of challenge is that the First-tier Tribunal failed to give adequate reasons on a material matter. The First-tier Tribunal set out the Secretary of State's evidence and his findings in relation to it at paragraphs 20 to 26 of the decision. He set out the shortcomings that he found to exist in that evidence. He considered the contents of the statement of Rebecca Collins and Peter Millington. He concluded that the statements were generic and did not state in any more than general terms the reasons ETS invalidated the certificate of the Claimant. He considered the specific evidence in relation to the Claimant which consisted of a print out to show that through voice recognition software the Claimant's test had been identified. At paragraph 25 he stated:

“Having considered the case of Gazi, and on the evidence before me, I am satisfied the evidence from the Respondent is generic and does not show the exact reason why ETS invalidated the certificate of the Appellant in particular and provides no evidence relating to the Appellant’s circumstances.”

14. I do not consider that the Judge can be criticised for his conclusions on the shortcomings in the Secretary of State’s evidence. He was entitled to take account of the comments on that evidence in **R (on the application of Gazi) v SSHD (ETS - judicial review) IJR [2015] UKUT 327** that the Secretary of State’s evidence in relation to what actually occurred with voice recognition is lean in detail and that Mr Millington has no relevant credentials in voice recognition. In the light of these shortcomings he was not obliged to find that the Secretary of State had satisfied the burden of proving deception by way of cogent evidence.
15. He then addressed the Claimant’s evidence at paragraphs 27 to 30 of the decision. Although he found that the Claimant was vague in his evidence in relation to the circumstances of the test he gave adequate reasons for concluding that he had not practised deception. He found that his memory of events was clouded by the effluxion of time, that he had passed an O’level in English in Sri Lanka prior to his arrival in the UK and the ESOL skills for life speaking and listening English test in July 2015. He also found that he spoke reasonable English in answering questions before the Tribunal. He found him to be a credible witness who gave consistent evidence. I find therefore that the First-tier Tribunal did not accept that the Claimant did not practice deception purely on the basis of his oral evidence some three years after the impugned examination result and took into account relevant factors before reaching a conclusion that was open to her on that evidence.
16. I find therefore that the First-tier Tribunal adequately addressed the Secretary of State’s evidence and gave sufficient reasons as to why he accepted the Claimant’s innocent explanation and found that the Secretary of State had not discharged the burden of proof. His conclusions accorded with the assessment of that evidence in **Gazi** and the approach to the burden of proof set out in the cases of **Muhandiramge (S-LTR.1.7) [2015] UKUT 675**.

Conclusions:

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision.

I dismiss the Secretary of State’s appeal in those circumstances.

No anonymity direction is made.

Signed

Date **20 July 2016**

Deputy Upper Tribunal Judge L J Murray