



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

Appeal Number: IA/30692/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 8th September 2017**

**Decision & Reasons
Promulgated
On 26th September 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE MAHMOOD

Between

**MR MATLOOB AHMED RAJA
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No Appearance

For the Respondent: Mr S Walker, Home Office Presenting Officer

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Phull sitting at Taylor House. By way of a decision promulgated on 1st December the judge had allowed Mr Raja's appeal against the Secretary of State's decision to refuse to vary his leave to remain. The basis of the rejection of the Appellant's application by the

Secretary of State had been well encapsulated in the judge's decision at paragraph 7 when she said the following:

"The Presenting Officer relied on her written submissions that the Appellant's English language test certificate was a false document. The Respondent has filed ETS data and two witness statements from Home Office personnel in support. The Appellant can return to Pakistan his appeal should be dismissed".

2. Then the judge set out at paragraphs 11 and 12:

"11. I do not have all the evidence from the Respondent to make an assessment of the English language certificate. I am also concerned that the Appellant has not had the opportunity to attend court and be tested on his evidence because I cannot be satisfied without more that he was notified of the hearing date by his representatives. The Appellant has a right to a fair hearing this includes having the opportunity to consider all the evidence the Respondent seeks to rely on. I cannot make any findings on a document referred to in the refusal or which the Respondent has failed to file because to do so would lead to unfairness to the Appellant.

12. In a recent decision by the Court of Appeal in **Qadir v Secretary of State [2016] EWCA Civ 1167** (20th October 2016). The Respondent agreed that their appeal should be dismissed. The Respondent was relying on the generic evidence of ETS as alluded to at paragraph 9 above. It is for the Respondent to file all the evidence they seek to rely on in this case".

3. The judge's decision is fair and well reasoned as far as it goes but through no fault of hers, it appears that there has been a procedural error namely that although the documents that the judge was seeking were not part of the file presented to her, it appears that the Secretary of State had filed those very documents with the Tribunal Office. Unfortunately, those documents did not make their way to the judge's file.

4. When First-tier Tribunal Judge Robertson granted permission on 17th July 2017 she said in part as follows:

"What is apparent from the Tribunal file is that the evidence was faxed to the Tribunal by the Presenting Officers' Unit on 17 October 2016 but it does not appear to have found its way to the file before the hearing on 20 October 2016. It is therefore arguable that there has been a procedural irregularity in that the judge was not provided with the evidence which was in fact submitted on behalf of the Respondent and that this reflected her assessment on the evidence pursuant to the guidance in **SM and Qadir (ETS - Evidence - Burden of proof) [2016] UKUT 00229**".

5. So the point is the evidence was there. It was filed late, but it was there. Now Mr Walker in brief but clear and helpful submissions says he relies on the grounds of appeal but he also showed me the minutes that the Presenting Officer prepared after the hearing before Judge Phull. Mr Walker says ultimately this is evidence that is used in ETS cases when there is a proxy tester allegation. The generic evidence had been submitted. The Home Office Presenting Officer said it is not clear why the judge did not ask for them. It may well be that because of the date of the decision in **Qadir** that this was all relatively new in terms of the timing of the case law, but ultimately one simply cannot get around the fact that the Secretary of State did submit the evidence.
6. In the circumstances there is an error of law through no fault of the judge. It means that the decision has to be set aside. I have considered as to what ought to happen next in terms of the justice of the case. I am well aware of the state of ETS cases but in my judgment even in such a case such as this where the Appellant has not appeared today and he did not appear on the previous occasion there has to be the opportunity for the Appellant to have a fair hearing. Therefore, albeit with considerable reluctance I have concluded that the appropriate course is for the case to be remitted to the First-tier Tribunal. There will be a rehearing on all matters. None of the current findings shall stand.

Notice of Decision

- 1. There is an error of law in the decision of the First-tier Tribunal.**
- 2. The decision is set aside.**
- 3. There shall be a re-hearing on all issues at the First-tier Tribunal.**

No anonymity direction is made.

Signed

Date 8 September 2017

Deputy Upper Tribunal Judge Mahmood

