



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

Appeal Number: IA/31386/2015

**THE IMMIGRATION ACTS**

**Heard at Birmingham Employment Centre**

**Decision &  
Promulgated**

**Reasons**

**On 15<sup>th</sup> March 2017**

**On 6<sup>th</sup> July 2017**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE JUSS**

**Between**

**MISS SADIA KANWAL  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr N Ahmed (Counsel)

For the Respondent: Mrs R Pettersen, (Senior HOPO)

**DECISION AND REASONS**

1. This is an appeal against a decision of First-tier Tribunal Judge Robertson promulgated on 18<sup>th</sup> June 2016, following a hearing at Birmingham Sheldon Court on 17<sup>th</sup> June 2016. In the determination, the judge allowed the appeal of the Appellant, whereupon the Respondent subsequently

applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

### **The Appellant**

2. The Appellant is a female, a citizen of Pakistan, and she was born on 9<sup>th</sup> March 1983. She appealed against the decision of the Respondent to refuse to vary her leave to remain in the UK, dated 7<sup>th</sup> September 2015, on the basis of her alleged deception exercised of the taking of the Educational Testing Service (ETS) scores. The relevant Rules are paragraph 322(2) and paragraph 245ZX(a) of HC 395.

### **The Appellant's Claim**

3. The Appellant's claim is that she came to the UK as a Pakistani national in July 2011, on a student visa. She made her claim in June 2014. She was allowed to continue her studies by the Centre for Teaching and Management on condition that she provide a valid visa. She chased up her application. There was no response. She ultimately had to cease her studies in March 2015. During this entire period, she received no correspondence from the Home Office. The Sponsor subsequently surrendered their licence but she was unaware of this until she received a decision seventeen months later after the application. The Appellant states that the documents she submitted are genuine including the ETS, TOEIC certificate, which she obtained on merit of her English language skills. The Respondent was alleging that the evidence she had submitted was fraudulent but there was no proof provided of this by the Respondent. She had personally sat her test. She had looked it up on the internet. She had chosen the test centre that was closest to her home and the date that was most convenient to her. The test was in four parts, including listening, speaking, writing and reading. There were multiple choice questions and there was writing.

### **The Judge's Findings**

4. The judge heard submissions from the Respondent's representative that the Respondent had acted on information provided by a third party and was not at fault. The issue was not the broad question of the ETS testing but the specific circumstances of the Appellant. She had failed to fully address the basic questions. No evidence had been submitted as to why she had chosen that particular centre to sit the test. She had made no enquiries or challenged it on learning that the test result had been held to be invalid.
5. The judge's findings were that the Appellant was a credible witness. She gave evidence without an interpreter. She spoke English. The judge held that, "she had little difficulty under cross-examination but I am cautious to conduct an assessment of her language skills on the basis of her fluency at the hearing. I am not a linguistic expert ..." (paragraph 13). Nevertheless the judge went on to hold that the Appellant has "already successfully

completed elements of her diploma having passed four out of the six modules before the revocation of the licence which are considered to be a better indication of her language skills” (paragraph 13).

6. The judge also noted that the Appellant’s leave was curtailed following the ETS findings. It was alleged that she had fraudulently obtained her results by using a proxy test taker. The judge observed that, “the only basis for this assertion is information provided by the ETS. There is no expert linguistic assessment of the Appellant’s test results available. I have only a computer printout which provides no information as to how this Appellant’s test result was invalid” (paragraph 14).
7. It was, of course, true that there was now an additional expert’s report from Professor French and this was “in respect of the likelihood of false positives” (paragraph 15). Nevertheless, the judge, having considered the evidence comprehensively came to the conclusion that she found the Appellant’s explanation to be plausible, that she had taken the test at a particular centre in Soho Road, as it was near her home in Smethwick, and she had looked on the internet and chosen this centre as it was only 20 to 30 minutes away on the bus (paragraph 16). The judge’s conclusion was that the Respondent had not discharged the legal burden of proving that this Appellant’s TOEIC certificate was procured by dishonesty. The evidence relied upon was generic evidence (paragraph 18).

### **Submissions**

8. At the hearing before me, Mrs Pettersen, relying upon the Grounds of Appeal by the Respondent Secretary of State, submitted that the judge had not done enough to come to the conclusion that she had. It is true that reliance was placed upon the case of **Qadir** by the judge, but there had since then been the expert report of Professor Peter French, and this document was in the evidence, “but the judge has ignored it completely and failed to consider its contents” (paragraph 2 of the grounds). Professor French had commented on the large number of rejected matches by trained listeners which indicated that the ETS system was robust. Only 55.7% of matches out of 58,464 were accepted by trained listeners. This was indicative of the stringent conditions of declaring an invalid result and any doubt resulting in the match being rejected (see paragraph 11 of the grounds).
9. For his part, Mr Ahmed submitted that this appeal by the Secretary of State could not succeed because there was no challenge to the credibility findings of the judge. Professor French’s report was not specific to the Appellant. The evidential burden remained upon the Appellant, but the legal burden was on the Secretary of State. Paragraph 102 of the **Qadir** decision makes it clear that the assessment of any situation is fact-sensitive. In this case, the HOPO at the hearing had undertaken extensive cross-examination and yet the judge had found the Appellant to be entirely credible. The appeal could not succeed.

10. In reply, Mrs Pettersen submitted that the credibility findings are not the relevant question. The judge should have looked at Professor French's report.
11. Following the Hearing, at the end of the day, I drafted my determination.

### **No Error of Law**

12. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should aside the decision. My reasons are as follows. The Grounds of Appeal are extensive and place overwhelming reliance upon Professor French's report, and the suggestion is that the judge had "ignored it completely and failed to consider its contents" (paragraph 2). Nothing could be further from the truth.
13. The judge very early on has regard to the evidence, which has included Professor French's report (see paragraph 8). The judge then goes on to make findings of fact, where she again does not ignore Professor French's report, and indeed indicates that this report is "in respect of the likelihood of false positives" (paragraph 15), which is the clearest indication of the judge having appraised herself of the report by Professor French. Having done so, the judge then provides her reasoning for why the report cannot be of assistance in this particular case by quoting at length what Mr Justice McCloskey in **Qadir** had to say about the "unknown number of false positive results".
14. As against this, the judge had the evidence that the Appellant had given evidence in English herself, had passed four out of the six modules before the revocation of the licence (paragraph 13) and had provided a credible reason for why she had chosen to sit the test on Soho Road, close to her home.
15. The challenge in this case amounts to nothing more than a disagreement with the findings of the judge. I have had regard to the helpful Rule 24 response by Mr Ahmed dated 14<sup>th</sup> March 2017 and I have accordingly come to the conclusion that this appeal by the Secretary of State cannot succeed.

### **Notice of Decision**

There is no material error of law in the original judge's decision. The determination shall stand.

No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Juss

6<sup>th</sup> July 2017