



**First-tier Tribunal  
(Immigration and Asylum Chamber)      Appeal Number: IA/44915/2014**

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 17 March 2016**

**Decision & Reasons Promulgated  
On 20 April 2016**

**Before**

**JUDGE OF THE FIRST-TIER TRIBUNAL CHANA**

**Between**

**MR ZAHEER ARIF  
(No anonymity direction made)**

Appellant

**and**

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

Respondent

**Representation:**

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

For the respondent: no appearance

**DECISION AND REASONS**

1. The appellant in this appeal is the Secretary of State for the Home Department. The respondent is Mr Arif, a national of Pakistan born on 13 April 1983. However, for the convenience, I shall continue to refer to Mr Arif as the appellant and the Secretary of State as the respondent which were the designations they had in the proceedings before the First-tier Tribunal.
2. The respondent appealed to the Upper Tribunal against the determination of First-tier Tribunal Judge McDade allowing the appellant's appeal against

the decision of the respondent refusing his application to remain in the United Kingdom as a spouse of a British citizen pursuant to paragraph 321A of the Immigration Rules.

3. First-tier Tribunal Judge PJM Hollingworth granted the respondent permission to appeal in a decision dated 19 January 2016, stating that it is arguable that the error of law has arisen in relation to the construction placed by the judge on the evidence made available by the respondent.

### **First-tier Tribunal Judge's findings**

4. The First-tier Tribunal allowed the appellant's appeal for the following reasons which I summarise.
5. The respondent has completely failed to identify precisely what wrongdoing they allege of the appellant. It is said that the appellant has sat three tests; two are marked "questionable" and the other is marked as invalid. The burden is clearly on the respondent to prove exactly what this appellant was allowed to have done wrong. Time and time again appeals are brought on the same bases as this without cogent evidence to prove the case to the requisite standard, namely the balance of probabilities. If a computer system throws up irregularity in relation to a voice that appears to have been used in a number of different tests and this voice does not accord with the appellant's voice I do not understand, why given that all of this is recorded, such evidence cannot be put in a form that can be presented to the Judge at the hearing. Such evidence would then surely show, one way or the other, whether the allegation of fraud was well-founded. As it is I hold that the Home Office continues to fall far short of discharging its burden of proof.
6. The Judge allowed the appeal stating that it is not in accordance with the law and the applicable Immigration Rules.

### **Grounds of appeal**

7. The respondent in her grounds of appeal states as follows. The Judge has made a material error of law in the determination by stating that the Secretary of State has not discharged the burden of proof in demonstrating that this appellant used deception. The First-tier Tribunal Judge's reasoning for this is entirely inadequate.

### **The hearing**

8. At the hearing there was no appearance by the appellant or his representatives. I asked the usher to telephone the appellant's representatives and was informed that this said to her that I should proceed with the appeal on the papers.

### **Decision on error of law**

9. The ETS entity is one of a small number of Home Office suppliers of so-called "Secure English Language Testing" ("SELT") and was appointed in 2011. The test is taken by an applicant and he is notified by the ETS of their grades and ETS issue a certificate which is then forwarded to the respondent for further leave to remain.
10. In the recent case of **SM and Qadir v Secretary of State for the Home Department (ETS - Evidence - Burden of Proof) [2016] UKUAT (IAC)** it was stated in the headnote. *"The generic evidence upon which the Secretary of State has relied to date in all ETS cases has been held insufficient to discharge the legal burden of proof on the Secretary of State of proving that the TOEIC certificates were procured by dishonesty in circumstances where this evidence, via expert evidence and otherwise, was demonstrated as suffering from multiple shortcomings and frailties and, further, the evidence of the two students concerned was found by the Tribunal to be plausible and truthful"*.
11. The appellant did not give evidence at the hearing before the First-tier Tribunal. The question that has to be asked is whether the Secretary of State has discharged her evidential burden of proving that the appellant was guilty of dishonesty in respect of the alleged test. I find that in order to answer this question, the appellant must give evidence so that questions as to the proficiency of his English language and evidence of him having taken the test can be assessed.
12. I therefore set aside the decision of the First-tier Tribunal allowing the appellant's appeal and remit the appeal to the First-tier Tribunal for findings of fact to be made.

**DECISION**

I remit the appeal to the First-tier Tribunal

No anonymity direction is made

No fee order is made

Signed by

Dated this 18<sup>th</sup> day of April 2016

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A Deputy Judge of the Upper Tribunal Chana  
Mrs S Chana