Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/50181/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 2 February and 13 May 2016	**On 27 May 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR SUMIT LAMGADE
(ANONYMITY DIRECTION NOT MADE)

Respondent/Claimant

Representation:

For the Appellant: Mr P Nath (02.02.16) and Mr S. Kandola (13.05.16), Specialist Appeals Team
For the Respondent/Claimant: Mr V Makol, Solicitor, Maalik & Co

DECISION AND REASONS

1. The Secretary of State appeals from the decision of the First-tier Tribunal (Judge Kimnell sitting in Hatton Cross on 3 July 2015) allowing the

claimant's appeal against the decision of an Immigration Officer to refuse the claimant leave to enter, and to cancel his continuing leave to remain as a student, on the ground that false representations were employed or material facts were not disclosed for the purposes of obtaining leave, or that there had been such a change of circumstances in his case since the leave was granted that it should be cancelled. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the claimant should be accorded anonymity for these proceedings in the Upper Tribunal.

2. The claimant, who is a national of Nepal, had leave to remain in the United Kingdom as a Tier 4 (General) Student Migrant issued to him on 3 October 2013. On 27 November 2014 he was served with a notice of refusal of leave to enter at Heathrow Airport, Terminal 4. The notice said the Home Office had now identified that he had made false representations in the application which he had made for the purposes of obtaining leave to remain as a student. He had submitted a TOEIC certificate from ETS. ETS had a record of his speaking test. Using voice verification software, ETS was able to detect when a single person was undertaking multiple tests. ETS had undertaken a check of his test and had confirmed to the Secretary of State there was significant evidence to conclude that his certificate was fraudulently obtained. The scores from his test taken on 16 and 20 August 2013 at Premier Language Training Centre had now been cancelled by ETS. On the basis of the information provided to it by ETS, the Home Office was satisfied there was substantial evidence to conclude that the TOEIC certificate was fraudulently obtained. In light of this information, the Immigration Officer was accordingly satisfied he had utilised deception to gain leave to remain in the UK.

3. In his grounds of appeal, the claimant averred that he had not fraudulently obtained any documents in relation to his application. He further averred that the burden of proof was on the Secretary of State, and that the Secretary of State had not provided any evidence to discharge the burden of proof.

4. For the purposes of the appeal hearing, the Border Force Appeals Team compiled a Home Office bundle containing a detailed explanatory statement with a number of appendices.

The Hearing Before, and the Decision of, the First-tier Tribunal

5. At the hearing before Judge Kimnell, there was no Presenting Officer. Mr Makol, who appeared on behalf of the claimant, relied on a bundle of documents which he had assembled, which included an expert report from Dr Philip Harrison and a lengthy skeleton argument. In his subsequent decision, Judge Kimnell summarised Mr Makol's case in paragraph [10]. The statements submitted by the Immigration Officer were generic. There was nothing specific relating to the claimant in this case, and as a result the evidence tendered by the Immigration Officer was insufficient to discharge the burden of proof.

6. The judge agreed with Mr Makol's submission for the reasons which he gave in paragraphs [13] to [19] of his decision, which I reproduce verbatim below:

> 13. The evidence on which the respondent relies is, as Mr Makol submitted, largely generic though not entirely so.
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> 14. The respondent relies first on the witness statement of Rebecca Collings who sets out the background to the language testing policy that was introduced in 2008. It subsequently came to attention that there had been a serious breach of the system because individuals have been able to pay to pass English language tests with proxy test takers taking the speaking element of the test. In addition answers were seen to be read out in front of a class supposedly taking a multi choice element of the test.
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> 15. A process was set up whereby ETS informed the Home Office where they were able to identify impersonation and proxy test taking. The analysis was carried out by voice recognition software verified by special trained analysts.
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> 16. A second statement is made by Peter Millington, also of the Home Office, who again sets out the background. He has visited ETS premises where the process by which biometric voice recognition took place was explained to him. The basic technology extracts biometric features from an individual's speech to generate a voice print. That voice print was then run against samples to establish whether it was likely to be recorded by the same person. Further human verification of "flagged" matches then took place by staff who had received mandatory training in voice recognition analysis.
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> 17. Appendix F contains the prints of the tests set at the Premier Language Training Centre naming the appellant and giving his correct date of birth and nationality. I can find no legible evidence in the bundle however indicating that the appellant's language test certificate has been cancelled or giving any reason why. The Explanatory Statement at paragraph 22 records the fact that test results have been cancelled by ETS on the basis of their own analysis and that the Home Office was notified by way of an entry on a spreadsheet, an excerpt of which includes the appellant (Appendix G). I am afraid I can make no sense, however, of Appendix G a part of which has become illegible in the photocopying process. Without explanation of the screen prints I am not satisfied that they contain evidence that the appellant's language test was taken by a proxy or that the results of the test have been invalidated or cancelled.
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> 18. The respondent's bundle also contains a record of an interview held with the appellant in which he denies that he employed a proxy to take the language test on his behalf.
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> 19. I have to agree with the submission made by Mr Makol that the respondent has not discharged the burden of proof in this case. The appeal is allowed.

The Application for Permission to Appeal

7. The Secretary of State applied for permission to appeal, contending that the judge had failed to provide adequate reasons for finding that the Immigration Officer had not discharged the burden of proof. She quoted various extracts from the witness statements of Mr Millington and Ms Collings. Taking account of this evidence, it was clear that in order to be categorised as invalid on the spreadsheet provided to the Home Office the case had to have gone through a computer programme analysing speech and then two independent voice analysts. If all three were in agreement that a proxy had been used, then the test would be categorised as invalid. The printout of the relevant section of the ETS spreadsheet was attached at Appendix F of the explanatory statement. The spreadsheet identified the claimant by name and recorded that the test taken on 20 August 2013 was invalid.

The Initial Refusal of Permission to Appeal

8. On 20 October 2015 First-tier Tribunal Judge Frankish refused permission to appeal for the following reasons:

> "The respondent's reliance on two standard form witness statements in every case and, as found here, illegible scrap of extract from a spreadsheet is a much vexed issue in allegations of dishonesty under 321A. It is a dilemma familiar to all First-tier Tribunal Judges and, to date, no legal guidance has been provided to support the respondent's approach to these cases."

The Eventual Grant of Permission

9. On a renewed application for permission to appeal to the Upper Tribunal, on 9 November 2015 Upper Tribunal Judge McGeachy granted permission to appeal as he considered it was arguable that the First-tier Tribunal Judge had erred in concluding that the Secretary of State had not discharged the burden of proof upon her to show that the claimant had used deception in the English language test which he had undertaken.

The Error of Law Hearing on 2 February 2016

10. At the hearing to determine whether an error of law was made out, I drew the parties' attention to the fact that there was legal guidance supporting the Secretary of State's use of generic evidence in ETS cases, albeit in the context of judicial review rather than in the context of statutory appeals. I refer to this guidance below. After hearing from both representatives, I ruled that an error of law was made out for reasons which I indicated in short form. My extended written reasons for finding an error of law are set out below.

11. On the topic of the forum for remaking the decision, Ms Holmes was neutral, whereas Mr Makol was insistent that fairness required that the

appeal be remitted to the First-tier Tribunal. I decided to reserve my decision on this question.

Reasons for Finding an Error of Law

12. The relevant legal guidance is **Gazi v Secretary of State for the Home Department (ETS – judicial review) IJR [2015] UKUT 00327 (IAC)** and **R (Ali and Mehmood) v SSHD [2015] EWCA Civ 744**.

13. Giving the leading judgment in the **Ali and Mehmood** case, Beatson LJ said at paragraph [24] that in February 2014 the television programme Panorama revealed, using covert recording, that there was widespread fraud in the taking of language tests, in particular by the use of proxy test takers. As a result of this, ETS reviewed all its tests. It did so using computerised voice recognition software and two reviews by anti-fraud staff trained in voice recognition. ETS concluded that thousands of tests, including Mr Ali's test, had not been taken by the person who was named on the certificate but by another person.

14. At paragraph [25], Beatson LJ noted that the Secretary of State relied on the witness statements, both dated 23 June 2014, of Rebecca Collings and Peter Millington, which had originally been filed in proceedings brought by Zaheer Hussain Mohammed, and which had subsequently been relied on in all cases in defence of challenges to removal decisions on the ground of deception in language testing and TOEIC certificates issued by ETS. Beatson LJ continued in paragraph [26]:

> "These statements describe the way anti-fraud measures (particularly online verification systems) were introduced, and the steps taken following the 'Panorama' programme and the Home Office's contact with ETS, and why the Home Office accepted that, where ETS had cancelled a test score because of impersonation and proxy test taking, that test score had been obtained by deception. Mr Millington stated that ETS's statistics bore out the underlying reliability of the voice biometrics technology, and the reason the Home Office considered that, where ETS identifies positive voice matches for two candidates with different names, it is because one person has sat the speaking and writing exam for both candidates. That, he stated, is clear evidence that both candidates have fraudulently obtained their TOEIC certificate and employed deception in their application for leave to remain. In **R (Gazi) v Secretary of State for the Home Department (ETS – judicial review) [2015] UKUT 00327 (IAC)** at 6 and 9, the President of the Immigration and Asylum Chamber of the Upper Tribunal (UTIAC) described these as 'generic' witness statements, because they did not show the exact reason why ETS invalidated the certificate of a particular person or provide evidence relating to the personal circumstances of an individual."

15. One of the issues in **Gazi** was whether the Secretary of State's reliance on the generic evidence of Mr Millington and Ms Collings was compliant with the following published guidance, which is quoted at paragraph [28] of **Gazi**:

> "The evidence must always prove to a high degree of probability that deception had been used to gain the leave, whether or not an admission of deception is made. The onus – as always in such situations – is on the officer making the assertion to prove his case."

The President said as follows at paragraph [35]:

> "In my view, taking into account Chapter 50 of the EIG, the respondent's evidence, summarised in Chapter II above, was sufficient to warrant the assessment that the applicant's TOEIC had been procured by deception and, thus, provided an adequate foundation for the decision made under Section 10 of the 1999 Act. True it is that, at this remove and with the benefit of Dr Harrison's report, there may be grounds for contending that said evidence is not infallible. And there may be sufficient material for a lively debate about its various ingredients … For the purpose of disposing of this ground of challenge and bearing in mind that the jurisdiction being exercised is one of supervisory review rather than merits appeal, it suffices for this Tribunal to be satisfied that the evidence upon which the impugned decision was made has the hallmarks of care, thoroughness, underlying expertise and sufficient reliability. The cornerstone of the applicant's case is that the evidence was insufficient for this purpose. I reject this challenge."

16. The claimant before me was pursing a merits based appeal, and so it was open to the First-tier Tribunal to find *on the particular facts of the case* that the Secretary of State had not discharged the burden of proving that the TOEIC certificate had been obtained through the use of a proxy test taker, and thus the claimant's leave to remain as a student had not been procured by deception.

17. But the judge was wrong in law to find that the generic evidence relied on by the Secretary of State, taken in conjunction with the evidence specific to the claimant in Appendix F, was insufficient to discharge the burden of proof. The judge ought to have directed himself that the Secretary of State's evidence established a prima facie case of fraud, and that the evidential onus shifted to the claimant to rebut fraud (although the legal burden to prove fraud continued to rest with the Secretary of State.)

18. The significance of Appendix F is that it contained the extract from the ETS spreadsheet showing that test numbers 130844 and 130845 taken by the claimant had been declared invalid by ETS. So this was evidence specific to the claimant.

19. The judge was wrong to hold that there was no legible evidence in the bundle indicating that the language test certificate had been cancelled or giving any reason why. The document at Appendix F is clearly legible, and it clearly shows that the test results have been declared invalid. The explanatory statement, and the generic evidence which accompanied it, explains very clearly the significance of a test being declared invalid. The import of the declaration is that the test has been cancelled because ETS is satisfied (as a result of the process described in paragraph [16] of the judge's decision) that the test has not been taken by the claimant, but by another person.

20. It was open to the judge to characterise Appendix G as being illegible, but Appendix G was not relied as containing evidence that the claimant's language test was taken by proxy or as showing that the results of the test had been invalidated or cancelled.

21. The judge also failed to engage with the circumstantial evidence relied on in the explanatory statement as reinforcing the case that the claimant's test had been taken by a proxy.

22. At paragraph [19] of the explanatory statement, the Immigration Officer drew attention to the fact that the claimant had been very vague as to where he had taken his TOEIC test, on the one hand saying that it was at a test centre five minutes from "Bakle Street" train station, and on the other hand saying it was possibly five minutes from West Ham station.

23. The claimant volunteered in the course of his interview that he had taken an IELTS test in June or July 2013 and the scores which he recollected obtaining were not high enough to allow him to continue studying in the UK. He gave this as the reason why he then undertook the TOEIC test. He said he had been told it was easier to pass.

24. In conclusion, the decision of the First-tier Tribunal was vitiated by a material error of law such that it must be set aside and remade.

Appropriate Forum

25. The practice statement provides that remaking rather than remitting will constitute the normal approach to determining appeals where an error of law is found, even if some further fact finding is necessary.

26. Some further fact finding is necessary in respect of the circumstantial evidence and the claimant's evidence in rebuttal. Its nature and extent is not such that, having regard to the overriding objective, it is appropriate to remit the case to the First-tier Tribunal.

27. The only possible justification for remitting the appeal to the First-tier Tribunal would be if the claimant had been deprived of a fair hearing in the First-tier Tribunal or other opportunity for his case to be put to and considered by the First-tier Tribunal.

28. Mr Makol submitted that it had been unfair to the claimant that no Presenting Officer had appeared at the hearing before Judge Kimnell. But this submission does not stand up to scrutiny. The claimant was legally represented before the First-tier Tribunal, and the hearing was conducted on the ground chosen by Mr Makol. So he cannot be heard to say on behalf of his client that the hearing was unfair because there was not a Presenting Officer present. The claimant was not deprived of a fair hearing before the First-tier Tribunal or other opportunity for his case to be put to and considered by the First-tier Tribunal.

Directions for the Resumed Hearing

29. I gave permission to the claimant to serve further evidence, if so advised, to support his contention that he did not use a proxy test taker, provided that such evidence was contained in a paginated and indexed bundle and was served on the Specialist Appeals Team and the Upper Tribunal no later than seven days before the resumed hearing.

The Resumed Hearing on 13 May 2006

30. On 12 May 2016 the claimant's representatives faxed to the Upper Tribunal a letter dated 11 May 2016 in which they invited the Upper Tribunal to remake the decision on the papers. They confirmed that they would not be attending the resumed hearing. They went on to make lengthy submissions about the decision of the Presidential Panel in the test cases of **SM and Ihsan Qadir ("Qadir")**, which they acknowledged had not been reported. They quoted extensively from the decision, and from a summary of the decision handed down at the end of March 2016, in support of a submission that, on a proper reading of **Qadir,** the respondent's evidence against their client suffered from such manifest frailties that it was simply unreliable; and it was thus unreasonable for their client to be removed pursuant to the Secretary of State's evidence.

31. Meanwhile, on 11 May 2016 Mr Kandola emailed to the claimant's representatives and faxed to the Upper Tribunal a report on forensic speaker comparison tests undertaken by ETS. The report dated 20 April 2016 had been prepared by Professor Peter French on the instructions of the Government Legal Department, in response (I infer) to the criticisms of the Presidential Panel about the lack of expert opinion underpinning the generic evidence. In the covering letter, Mr Kandola said that the Secretary of State wished to rely upon the enclosed expert report of Professor French in the upcoming continuance hearing on 13 May 2016.

32. The Upper Tribunal subsequently received a letter from Malik & Co acknowledging receipt of Professor French's report, but not otherwise making any comment on the Rule 15(2A) application.

33. At the resumed hearing, Mr Kandola said he had been investigating whether the claimant had undertaken a voluntary departure. In the absence of confirmation of this fact, he invited me to remake the decision in the Secretary of State's favour. He submitted that as the decision of **Qadir** was unreported, it could not be relied on by the claimant. In any event, it did not decide that the Secretary of State's evidence was incapable of discharging the legal burden of proof, and moreover matters had moved on. The Secretary of State now relied on the expert evidence of Professor Peter French as fortifying the case against ETS claimants such as Mr Lamgade.

Discussions and Findings on Remaking

34. As the claimant's representatives have obtained sight of the unreported decision in **Qadir**, and as they rely on the decision as showing that their

client has no case to answer, I consider that it would be procedurally unfair and not in accordance with the overriding objective to shut out the claimant's case on remaking on the ground that the decision relied upon has not officially been reported.

35. **Qadir** does not purport to establish the proposition for which the claimant's representatives contend. The Presidential Panel did not find that the generic evidence relied on by the Secretary of State was incapable of discharging the legal burden of proof. Having heard rebuttal evidence from both claimants, the Presidential Panel was satisfied on the totality of the evidence that the Secretary of State had not discharged the legal burden of proof against those two claimants. It does not follow that the Secretary of State's evidence in this appeal does not discharge the burden of proof against Mr Lamgade, as the following passage from the decision makes clear:

> "67. We begin by asking ourselves whether the Secretary of State has discharged the evidential burden of proving that the Appellants were, or either of them was, guilty of dishonesty in the respects alleged. Bearing in mind that, as noted above, all of the Secretary of State's evidence was adduced first, reflecting the burden of proof, it is appropriate to record that at the stage when the Secretary of State's case closed there was no submission on behalf of either Appellant that the aforementioned evidential burden had not been discharged. We draw attention, *en passant*, to a procedural issue which may be worthy of fuller consideration in an appropriate future appeal, namely the question of whether in a case where the Secretary of State bears the evidential burden of establishing sufficient evidence of deception and, at the hearing, goes first in the order of batting, the Tribunal should invite submissions from the parties' representatives at the stage when the Secretary of State's evidence is completed.
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> 68. As our analysis and conclusions in the immediately preceding section make clear, we have substantial reservations about the strength and quality of the Secretary of State's evidence. Its shortcomings are manifest. On the other hand, while bearing in mind that the context is one of alleged deception, we must be mindful of the comparatively modest threshold which an evidential burden entails. The calls for an evaluative assessment on the part of the tribunal. By an admittedly narrow margin we are satisfied that the Secretary of State has discharged this burden. The effect of this is that there is a burden, again an evidential one, on the Appellants of raising an innocent explanation."

36. Accordingly, I find that my legal analysis in my error of law decision still holds good. The Secretary of State has established a prima facie case of dishonesty, so that the evidential burden shifts to the claimant to raise an innocent explanation.

37. The claimant was called as a witness before the First-tier Tribunal, but his witness statement has not been re-served for the purposes of the

remaking of the decision in the Upper Tribunal; and the claimant has not been tendered as a witness to be cross-examined on his witness statement. The case against the claimant is not solely based on the generic evidence of Rebecca Collings and Peter Millington. In the Immigration Officer's Explanatory Statement, the Immigration Officer at paragraph 19 referred to some of the answers which the claimant had given in interview. At paragraph 23, he said that his conclusion as to the claimant's dishonesty, derived from the generic evidence, was supported by the vagueness of the claimant's account of taking the test, "which lacks a level of detail and a recollection which would be expected if the [claimant] had genuinely been undertaking the test in person". The Immigration Officer further observed that the conclusion of dishonesty was supported by the claimant's admission that he only undertook the ETS test following two attempts at the IELTS test where he failed to achieve a high enough mark in order to rely on the IELTS test for the purposes of his leave to remain application.

38. I consider that the matters relied on in paragraph 23 of the Explanatory Statement fortify the case of dishonesty against the claimant, and I find that the claimant has not provided credible evidence in rebuttal of the prima facie case that he used a proxy test taker in order to obtain his TOEIC certificate. So I find that the decision should be remade in the Secretary of State's favour on the documentary evidence that was before the First-tier Tribunal and that it is not necessary to pray in aid the expert evidence of Professor French. However, if his report is taken into account, the case against the claimant is significantly reinforced.

39. The claimant's representatives did not object to the very late introduction of the report from Professor French. I consider that it is appropriate to admit the report into evidence for the following reasons: firstly, it is highly pertinent; secondly, it was reasonable for the Secretary of State not to seek to rely on such a report before the First-tier Tribunal as it was not until the recent decision of **Qadir** that the shortcomings in the generic evidence became manifest; and thirdly the delay in its production is not unreasonable.

40. The matters on which Professor French was asked to opine was whether on the balance of probabilities, ETS's methodology is likely to result in any false positives, i.e. speaker comparison tests results indicating that different speakers are the same person. If he considered false positives were likely, he was asked to estimate how many.

41. In the course of his report, Professor French, comments extensively on the expert evidence of Dr Harrison, who gave oral expert evidence to the Presidential Panel and upon whose expert opinion the Presidential Panel drew heavily in identifying shortcomings in the generic evidence.

42. Professor French's conclusions include the following:

> '(1) The conditions used for trained listeners compare confirmation, in conjunction with the (albeit unspecified) conservative threshold set for ASR match

identification (witness statement of Peter Millington, para 31), would, in my view, have resulted in substantially more false rejections than false positives. …

(3) If a 2% error rate established for the TOEFL pilot readings were to apply to the TOEIC recordings, then I would estimate the rate of false positive to be very substantially less than 1% after the process of assessment by trained listeners had been applied. …

(4) Even if the TOIEC recordings were on average somewhat shorter and poorer in quality than the TOEFL pilot test recordings, on the basis of the information that has been provided, I would still estimate the number of false positives emanating from the overall processes of ASR analysis followed by assessment by two trained listeners to be very small.'

43. The Secretary of State only has to establish her case on the balance of probabilities, not beyond reasonable doubt. In the light of the expert report of Professor French, read alongside the expert evidence of Dr Harrison as rehearsed in **Qadir**, it is very unlikely that this claimant is the victim of a false positive test result. Although there is a huge divergence between the two experts on the likely number of false positive test results, even on Dr Harrison's figures in a worse-case scenario the cumulative rate will be less than 15%, with over 85% of the final positive results being sound. This assumes a rate of 30% false positives at stage one (automated voice recognition) and a rate of 36% false positives at stage 2 (human checking).

44. In conclusion, for the reasons given above, I find that the Secretary of State has discharged the legal burden of proving that the claimant procured his TOIEC certificate by deception.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law, accordingly it is set aside and the following decision is substituted:

This appeal is dismissed.

No anonymity direction is made.

Signed Date 27th May 2016

Deputy Upper Tribunal Judge Monson