



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/42545/2014

**THE IMMIGRATION ACTS**

Heard at Field House  
On 21<sup>st</sup> June 2016

Determination Promulgated  
On 8<sup>th</sup> July 2016

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR FIYAZBHAI RAJAKBHAI KADIVAR  
(ANONYMITY ORDER NOT MADE)

Respondent

**Representation:**

For the Appellant: Mr L Tarlow, Senior Home Office Presenting Officer  
For the Respondent: Mr R Sharma of Counsel, instructed by Hiren Patel Solicitors

**DECISION AND REASONS**

*Introduction*

1. The claimant is a citizen of India born on 12<sup>th</sup> October 1985. He arrived in the UK on 5<sup>th</sup> November 2009 with leave to enter as a Tier 4 general student. This leave was extended until 16<sup>th</sup> August 2014. On 4<sup>th</sup> July 2014 he made an application to

remain further as a Tier 4 student migrant but this application was refused without a right of appeal on 3<sup>rd</sup> October 2014, however in fact on 7<sup>th</sup> July 2014 he varied his application so that he applied for leave to remain as the dependent of his wife who had (and continues to have) leave under the points based system as a Tier 4 student migrant. This dependent application was refused on human rights grounds by the Secretary of State on 14<sup>th</sup> October 2014: it was said he did not qualify for leave either on the basis of his private life under paragraph 276ADE of the Immigration Rules or under Appendix FM as a partner because he had sought leave by deception and so was not "suitable" under the Immigration Rules. His appeal against the decision was: "allowed on human rights grounds allowed under the Immigration Rules" by First-tier Tribunal Judge Haria in a determination promulgated on the 11<sup>th</sup> June 2015.

2. Permission to appeal was granted by Judge of the First-tier Tribunal Grimmett on 21<sup>st</sup> September 2015 on the basis that it was arguable that the First-tier judge had erred in law in failing to refer to the specific evidence of deception relating to the claimant and the evidence of Mr Sartorius, and just referring to generic evidence in his findings. It was also found to be arguable that the First-tier Tribunal had failed to consider whether it would be a disproportionate interference with the right to respect for family life for the claimant and his wife to be separated for the last 3 months of her leave as a student.
3. The matter came before Deputy Upper Tribunal Judge Baird on 18<sup>th</sup> November 2015 when she decided that the First-tier Tribunal had erred in law and set aside the decision in its entirety.
4. The matter came before me pursuant to a transfer order to remake the appeal. Directions were given by Deputy Upper Tribunal Judge Murray on 5<sup>th</sup> May 2016 that the voice sample tapes used by TOEIC were to be served on the claimant by the Secretary of State 14 days prior to the next hearing or alternatively it was to be communicated if this was not possible. This direction was not complied with by the Secretary of State.
5. A number of preliminary matters arose at the hearing.
6. Firstly I enquired whether the direction above was pursued in any way. Mr Tarlow said his understanding was that the tapes could not be obtained. Mr Sharma pointed out that from paragraph 22 of SM and Qadir v SSHD (ETS-Evidence-Burden of Proof) [2016] UKUT 00229 that in the context of "judicial compulsion" ETS might supply voice recordings if requested to do so by the Secretary of State. However he did not wish to delay proceedings by pursuing the application for the tapes.
7. Secondly Mr Sharma raised a serious allegation that Mr Kandola, who had been the Secretary of State's representative at the last CMR hearing, had mislead the Tribunal. He had told the Tribunal that the expert report of Professor Peter French dated 20<sup>th</sup> April 2016 had been served on the claimant's solicitors, and this was

then put in writing by the Upper Tribunal to the claimant's solicitors in a notice dated 3<sup>rd</sup> May 2016. At the CMR hearing before Deputy Upper Tribunal Judge Murray Mr Kandola had then said that it had not in fact been served until the day of that hearing (the 5<sup>th</sup> May 2016). Mr Kandola said that this was because he had been corresponding by email and could not serve the claimant's solicitors by email. However there was an email address for correspondence on Hiren Patel's letter head which had been used to correspond with the Secretary of State. This was therefore also untrue. Mr Sharma argued that in the context of this "bad faith" I should not admit the report of Professor French. He said that Deputy Upper Tribunal Judge Murray had left this issue to be decided at the full hearing when it was raised at the CMR. Mr Tarlow submitted it was in the interests of justice to admit the report, and he would have to take instructions from Mr Kandola regarding the allegations of bad faith, and did not know if he was in the building. My decision was that I could not exclude the report of Professor French on the basis of bad faith without giving Mr Kandola the opportunity to explain his statements and actions to the Tribunal. This would therefore necessitate an adjournment of the hearing. Mr Sharma said in these circumstances he preferred that the report be admitted, as he did not wish the proceedings to be adjourned.

8. Thirdly Mr Sharma questioned whether the Secretary of State's evidence in the statements of Ms R Collings and Mr P Millington had been served on the claimant and First-tier Tribunal. The notes of Ms M Afzali, home office presenting officer, and notes in the Tribunal file indicated that they were, and Mr Sharma accepted that this had been properly done.
9. Fourthly Mr Sharma argued that the decision of Deputy Upper Tribunal Judge Baird, finding that the First-tier Tribunal judge erred in law and that their decision should be set aside with no preserved findings of fact, ought to be reviewed and set aside by me. He pointed out that in the concluding paragraph 13 of the decision on error of law Judge Baird had said that it was "arguable" that the decision that the claimant had used deception was unlawful. This was the test for a grant of permission to appeal and not for a finding that the First-tier Tribunal had erred in law. There was a one hour adjournment for the parties and myself to consider this matter further.
10. I decided that whilst s.10(4) of the Tribunals, Courts and Enforcement Act 2007 provided a power to review a decision of the Upper Tribunal and set it aside that this power was limited by the Tribunal Procedure Rules in accordance with s.10(3) of the 2007 Act. In accordance with Rule 46 of the Tribunal Procedure (Upper Tribunal) Rules 2008 this power could only be exercised in accordance with Rule 45(1), and thus only in the context of an application for permission to appeal to the Court of Appeal against a decision of the Upper Tribunal. Mr Sharma indicated that in his view this might not be correct, relying upon Patel v SSHD [2015] EWCA Civ 1175, but that he did not wish to pursue the matter and accepted that the Tribunal should now go on to simply remake the appeal.

*Evidence & Submissions - Remaking*

11. The claimant attended the Tribunal and gave oral evidence. He confirmed his identity, and adopted his witness statement confirming that it was true and correct.
12. In this statement and in oral evidence (given in response both to examination in chief and cross-examination), in summary, the claimant states as follows. He came to the UK in November 2009 as a Tier 4 general student migrant and have leave in that capacity valid until 16<sup>th</sup> August 2014. He married Mrs Rizwana Razak Samnani who had, and has, leave as a Tier 4 student migrant. At that time she was studying for a Master's degree (NQF level 7) at the University of Ulster, a course which had a duration of over 12 months. He made an application to remain as her dependent on 7<sup>th</sup> July 2014. He was refused on 14<sup>th</sup> October 2014 for reasons that he says are wrong.
13. The claimant says he did not use deception to take his ETS examinations, and the Secretary of State has provided no evidence to him that he had done so. He had taken his ETS tests at the London College of Social Studies on 21<sup>st</sup> March 2012. He had found this college via the internet and chose it as it could offer an early date for the tests, in the context of his having only 45 days to make a new student application following revocation of the licence of his previous college. On arrival he had given his name and address, and provided a copy of his passport (the original being with the Secretary of State). The test consisted of the following. He introduced himself. He had to read some text from a piece of paper. He was then asked some questions about himself which he answered. He was then shown a picture and asked to describe what was in the picture for 2 or 3 minutes. He was then given a topic, asked his opinion on this topic and been asked to talk for 3 or 4 minutes on the topic. In total the test lasted 15 to 20 minutes. He understood the test was recorded as there was a red button on the table which was pressed. He contended he had taken the speaking test himself and not, as the Secretary of State, maintained via a proxy. He had received his test results 12 working days later by post, having been told it would be between 10 and 15 working days later. He scored 170 out of 200 in this speaking test. On the same day he had also taken a writing test. He had also had to take a listening and reading test on another date. He had passed all sections of the test. He had first been informed about the allegation of cheating by the Secretary of State in the refusal letter of 14<sup>th</sup> October 2014. He asked his solicitors to contact ETS about the allegation of cheating, but did not do so himself as he did not know how to do so. He understood the solicitors had some correspondence relating to this in which ETS had refused to provide further details, which Mr Sharma then handed to Mr Tarlow and to the Tribunal. By the time he was refused the London College of Social Studies had been closed down and had its licence suspended so he could obtain no evidence from them.
14. The claimant says he had always abided by the conditions of his leave and undertook to abide by the Immigration Rules in the future.

15. The claimant explained that his wife has been studying for a MSc in accounting and finance at Kingston University (NQF level 7) since September or October 2015, and will finish those studies in September 2016, and has leave to remain as a student until 13<sup>th</sup> January 2017. He argues his appeal should be allowed.
16. Mr Tarlow submitted that he relied upon the reasons for refusal letter. This letter refuses the applicant as if he had applied to remain in the UK on the basis of his family and private life under paragraph 276ADE of the Immigration Rules and Appendix FM, although this is not the application the claimant made in his application dated 4<sup>th</sup> July 2014 (which was to remain as a points based system dependent spouse), or at any point. In summary the letter says the claimant is not entitled to remain as he cannot meet the suitability requirements of the Immigration Rules as he has sought leave to remain in the UK by deception by submitting a English certificate obtained by using a proxy test taker to take the speaking component of his TOEIC English language test. This contention was based on information provided to the Secretary of State by Educational Testing Service (ETS). In addition the claimant could not meet the other requirements of Appendix FM and paragraph 276ADE of the Immigration Rules. It was however accepted that he was genuinely married to Rizwana Razak Samnani who is an Indian citizen with a valid student visa, which at that time was valid until 29<sup>th</sup> September 2015. Consideration was given to the application on Article 8 ECHR grounds outside of the Immigration Rules but no exceptional circumstances were found warranting a grant of leave on that basis.
17. Mr Tarlow declined to make any submissions regarding the claimant's ability to meet the Immigration Rules at paragraph 319C, the relevant paragraph for points based system dependent spouses, and said he left that matter in the hands of the Tribunal. He did however add that the report of Professor French showed that the number of "false positives" likely in ETS's system of identifying proxy test takers was likely to be much lower than that estimated by Dr Harrison because of the intervention of linguistic experts. This meant that SM and Qadir should not be followed as the Secretary of State now had stronger evidence which satisfied the burden of proof that the claimant had used deception.
18. Mr Sharma submitted, in summary, as follows. The starting point was SM and Qadir. The evidence before this Tribunal was the same as in SM and Qadir with the addition of the report of Professor French. The evidence of the Secretary of State in SM and Qadir was characterised as having "paled and wilted" once that of Dr Harrison was considered. Most notable was the fact that there was no evidence from ETS themselves before the Tribunal. The evidence in this case, as in SM and Qadir, was all in the form of statements and spread sheets compiled by the Secretary of State. The Secretary of State must have had some evidence from ETS to make the spread sheet but had chosen not to release this to the Tribunal. It was submitted that the Secretary of State could not lawfully delegate a decision of deception to ETS, and had not discharged her burden of proof.

19. The report of Professor French does not advance the Secretary of State's case significantly. It had significant frailties. It relies upon information provided to the Secretary of State by ETS in the form of questions and answers but does not exhibit these questions and answers to the report. It has not been possible to respond to this report as an adjournment to do this was previously refused.
20. In relation to the issue of false positives the Professor French report concedes that there will have been false positives (para 3.2). It is clear ETS holds no data on the quality of the sound on the recordings (para 3.2.3). It is clear that no editing had been done on the records to improve the quality of the assessments (para 3.2.4). The reason for Professor French concluding that there would be lesser numbers of false positives was the role of trained listeners in the processing of the test checks. However it is unclear how much training these listeners had (para 3.3.2), and Mr Sharma questions the justifications for finding that they would be in a better position than untrained lay-listeners, particularly with reference to the idea that their abilities were improved by familiarity with foreign accented English (para 3.3.4). It is clear that they did not have degree qualifications in phonetics/ speech science (para 3.3.2).
21. At its highest this report shows that there is a lesser problem of false positives with ETS's identification systems than had previously be thought, but this does not mean the Secretary of State can show on the balance of probabilities that this claimant committed an act of deception when previously the evidence only was just sufficed to provide a case to answer, see paragraph 68 of SM and Qadir. It does not remedy the lack of any evidence from ETS that this claimant cheated. Such evidence that exists of cheating is simply generic, as was noted at paragraph 91 of SM and Qadir.
22. Further this new evidence does not address the issue of whether it was possible for a test centre to re-use a genuine test-taker's voice recording, without their knowledge, for subsequent test-takers. At point 2 on page 3 (at the top) of Professor French's report he clearly states that this issue is outside of his area of expertise and he provides no opinion on it. It remains totally possible therefore that even if this claimant's voice recording was used by others to obtain test results by deception, and there are matching voice recordings, that he did not himself commit any act of deception.
23. Mr Sharma concluded by stating that the claimant was entitled to succeed in his appeal under paragraph 319C of the Immigration Rules as for the reasons argued above he had not be shown to have used deception so did not fall to be refused under the general grounds of refusal and so fulfils paragraph 319C(a) of the Immigration Rules. He fulfils paragraphs 319C(b), (d) and (e) of the Immigration Rules as the respondent accepted that he is the spouse of a Tier 4 student migrant with valid leave with a genuine and subsisting marriage at paragraph 16 of the reasons for refusal letter, and he clearly intends to live with her throughout his stay. He fulfils paragraph 319C(f) because he has confirmed in his statement that he would abide by the Immigration Rules and so does not intend to stay beyond

the period of leave granted to his wife. He fulfils paragraph 319C(g) because in accordance with Appendix E he had submitted evidence to the respondent from the Halifax Building Society in the form of a letter dated 1<sup>st</sup> July 2014 and a bank statement for the period 1<sup>st</sup> April 2014 to 9th June 2014 showing a balance of £6170.83 which was in excess of the amount of £5535 which in turn was the maximum amount he could be required to show under Appendix E. This evidence was shown to me on a computer file in the claimant's solicitor's lap top, and corresponds to that set out in the application letter of 4<sup>th</sup> July 2014. Paragraph 319C (h) is satisfied as the claimant had last had leave as a Tier 4 student. Paragraph 319C(i) is satisfied as the claimant's wife satisfies paragraph 319C (i) (ii) (2) as she was a student at the University of Ulster, and is now one at the University of Kingston. Paragraph 319C (j) is satisfied as the applicant has not been in the UK in breach of the immigration laws.

24. The appeal should therefore be allowed. Mr Sharma indicated he intended to apply for a wasted costs order but would wait for my decision first. Mr Tarlow indicated any such application would be resisted.
25. At the end of the hearing I reserved my determination.

#### *Conclusions- Remaking*

26. I am satisfied for the reasons set out at paragraph 23 above that the claimant is entitled to succeed in his appeal in relation to all aspects of the Immigration Rules bar the issue of whether he falls to be refused under the general grounds of refusal for having previously obtained leave to remain by deception (and thus in relation to his ability to fulfil paragraph 319C (a) of the Immigration Rules). This is the issue therefore on which this appeal turns.
27. I follow SM and Qadir in finding that the Secretary of State's generic evidence, combined with her evidence particular to this appellant, suffices to discharge the evidential burden of proving that his TOEIC certificate had been obtained by deception.
28. The starting point of my analysis in deciding whether the Secretary of State has discharged the legal burden upon her of proving dishonesty on the part of this claimant are the findings in SM and Qadir. Clearly in that case the Secretary of State's evidence was found to be woefully inadequate, and once the evidence of Dr Harrison was heard it had "paled and wilted". I note that, as is said at paragraph 102 of SM and Qadir, every ETS/TOEIC case will be fact sensitive in that it will involve an evaluation of the individual claimant, and that in the light of this factor and the new expert evidence of Professor French that the outcome of this appeal may be different, see also paragraph 103 of SM and Qadir.
29. I therefore start my consideration of this appeal with an analysis of the report of Professor French who, like Dr Harrison, is clearly an appropriately qualified expert in the field of forensic speech science. My first observation is that in his report Professor French relies heavily upon information he was provided with by

ETS's solicitors (Jones Day) in the form of answers to a series of questions put by the Secretary of State. Some of these answers are referred to in Professor French's report: for instance at paragraph 3.2 there is a reference to ETS's response to SSHD question 24 in brackets after Professor French accepts that there will be some false positives in the automatic speaker recognition system software used by ETS. However the questions and answers themselves are not appended to the report and the precise statements from ETS or their solicitors (and it is not clear to me from whom the words in the answers came, although clearly the information is said to come from ETS) are not cited in the report. I consider that this is a serious defect, and as was said in SM and Qadir at paragraph 15 with reference to Ms Collings failure to append emails and letter referred to in her witness statement: "this is not harmonious with elementary good litigation practice and is in breach of every litigant's duty of candour owed to the court of tribunal:"

30. Professor French's report addresses some of the key issues found wanting with the generic evidence of ETS/TOEIC fraud identified at paragraph 63 in SM and Qadir. He clearly is a witness with the relevant expert qualification providing input into the Secretary of State's case. He also is able to address a key concern of Dr Harrison, set out at paragraph 36 of SM and Qadir, in relation to the issue of the lack of clarity as to the likely rate of false positives (persons wrongly identified as having cheated due to faulty voice matching) by virtue of his additional information (provided in the questions and answers document referred to above), and of course his own expert view and understanding of the science of forensic voice analysis.
31. Professor French makes it clear that the automated voice testing would have resulted in a number of false positives and states that this number cannot be estimated with any great degree of precision, see paragraph 3.2 of his report. He notes the information provided to him meant that the automated system identified 58,464 matches, but the trained listeners only confirmed 33,735. Therefore only 57.7% of the automated system matches were accepted, see paragraph 3.3.7 of the report. He sees this high revision of outcome rate as an indication that the listeners were applying very stringent conditions before confirming a match.
32. Professor French concludes that the number of false positives would have been largely reduced by the use of "trained listeners", or persons who had training in auditory phonetic analysis, i.e. to look for speaking features as set out at 3.3.1 of his report. Professor French notes potential limitations to this training: it lasted 3 days plus a period of mentoring, the people responsible for this training had no university education or training in phonetics/speech science, and at paragraph 3.3.6 the listeners were not tested to see if they became competent.
33. However on the positive side he notes that the areas of training were commensurate with those covered in university forensic speech science courses. He concludes that these listeners would be significantly less skilled than those with a Master's degree in this area and subsequent experience working under



supervision but would be distinctly better than untrained lay-listeners. They would also have benefited from having reviewed foreign accented English in the past, and from working independently in pairs with each pair including an experienced listener. Professor French believes that the time given by Dr Harrison for a forensic speech scientist to compare two records (10 to 15 hours) is excessive: and in any case a third of the time taken would be in note-taking and report writing. In this case report writing was not needed as all that was done by these listeners was to write the word "same" if the result was considered positive. He believes it is therefore likely that there was not such a disparity between the time spent by ETS listeners and other forensic speech scientists.

34. Professor French does not believe that the studies relied upon by Dr Harrison about unfavourable performance rates for human listeners undermine his conclusions as the details of the systems in these studies are unclear and they involved comparisons of telephone speech and directly recorded microphone speech.
35. Professor French concludes that in his opinion the number of false positives would be very small, and if similar to the TOEFL pilot then substantially less than 1%.
36. Professor French makes clear however that he has no expertise in the area of computer and systems security and thus could not give an opinion on whether it was possible that a test centre might take a recording of a genuine test-taker's voice and reuse it without their knowledge for subsequent test-takers, see paragraph 2 Material Received and Instructions – last paragraph on page 2 and first paragraph on page 3 of the report of Professor French.
37. Professor French's report also does not address (and this is not intended as a criticism of him) other matters of concern in respect of the weakness of the Secretary of State's case as set out at paragraph 63 of SM and Qadir. In summary the continuing lack of actual evidence from ETS themselves, and in particular the refusal to provide the claimant with his voice recording and the acknowledgement by the Secretary of State of her inability to obtain this on his behalf; the lack of any evidence of critical analysis by the Secretary of State of the ETS evidence; and the lack of supporting documentary evidence that could have been appended to the statement of Ms Collings.
38. In relation to the first of these above identified issues I do note that the Secretary of State has now provided an extract from the ETS spreadsheet, appended to the witness statement of a Mr M Sartorius, which provides this claimant's name and confirmation that his ETS test certificate (giving the number) has been designated invalid. In Mr Sartorius's statement he confirms this is the information which led to the refusal of this claimant. I have no reason to doubt this sequences of events.
39. In terms of the claimant in this case I note that his original statement was extremely short and lacking in detail. However in examination in chief he gave

significant details about the speaking test he says he took to obtain his TOEIC result, he also gave convincing details as to the reasons for choosing the particular test centre due to his need to make a reasonably rapid reapplication as a student following the revocation of the sponsor licence of his first college. His credibility was not challenged in any way by Mr Tarlow, and his evidence was entirely internally consistent and consistent with the documents which record when he took the test, where he took it and his scores.

40. The claimant's speaking ability before the Tribunal accords, I find, to a lay listener, to the description given by TOEIC of the ability of someone who has obtained his score in the speaking test and is given a level 7. He speaks suitable English for the workplace and is able to express his opinions but may have minor weaknesses in pronunciation, intonation, use of grammar and use of vocabulary. Of course the hearing has taken place two years after he took this test, however this claimant has not put forward that he has studied or worked in this period to improve his English, and I bear in mind that he simply wishes to remain as a dependent spouse of his Indian wife. I do not place significant weight on this matter but simply observe that his presentation before the Tribunal was not inconsistent with his having genuinely achieved the result he claims to have got in his speaking TOEIC examination.
41. The claimant arrived in the UK in 2009 with entry clearance as a student and would have had to show that he had the ability (including in the English language) to follow his proposed course. I have not been provided however with any historic English language qualifications (or indeed any academic qualifications) that he has acquired. The claimant says that he did ask his solicitors to challenge the allegation by ETS that he cheated, and they have provided correspondence from 2015 with Jones Day in which ETS have refused to provide voice recordings and other data relating to individuals. There is also a letter from the Chief Operating Officer Mr Mike Wells CBE dated 11<sup>th</sup> February 2015 which has been provided to ETS to send in response to such enquiries which confirms the Secretary of State's opinion that ETS should not provide these materials because it would be: "likely to prejudice the prevention or detection of crime and/ or the apprehension or prosecution of offenders." I am satisfied that the claimant did try what he could, through his solicitors, to seek the evidence of his cheating so that he might challenge it further and that this did not prove possible. I am ultimately satisfied that the claimant is generally to be considered a credible witness.
42. Considering all the evidence before me I am not satisfied that the Secretary of State has discharged the legal burden on her. The Secretary of State's evidence from ETS itself is a statement that the claimant's score is invalid, as set out in the spreadsheet appended to the statement of Mr Michael Sartorius. There is notably no statement from ETS that this means, in their eyes, that he used deception. At its highest the evidence of Professor French means that ETS's systems identified multiple test-taking voices with a good rate of accuracy and a low rate of false positives. There is still however the unanswered possibility that this claimant's

genuine recording was taken and used by others for deceptive purposes. In the context of his own credible evidence that he took the test and did not cheat I am not satisfied on the balance of probabilities that the Secretary of State has shown the claimant used deception with evidence of sufficient strength and quality.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
2. The decision of the First-tier Tribunal was set aside.
3. I re-make the decision in the appeal by allowing it under paragraph 319C of the Immigration Rules.

Signed: Fiona Lindsley  
Upper Tribunal Judge Lindsley

Date: 6<sup>th</sup> July 2016