



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

Appeal Number: IA/50038/2014

THE IMMIGRATION ACTS

Heard at Stoke

On 14th April 2016

Determination

Promulgated

On 3rd June 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

BIN CHEN

Respondent

Representation:

For the Appellant: Ms C Johnstone, Home Office Presenting Officer

For the Respondent: Mr C Timson, instructed by Taylor Rose Solicitors

DETERMINATION AND REASONS

1. Although this is an appeal by the Secretary of State I refer to the parties as they were in the First-tier Tribunal.
2. The appellant, a citizen of China, appealed to the First-tier Tribunal against a decision of the Secretary of State dated 9 December 2014 to refuse his application for leave to remain in the UK as the spouse of a person with indefinite leave to remain. The application was refused on the grounds that the English language test undertaken by the appellant on 12 December 2012 had been cancelled and he had therefore sought leave to remain by deception and accordingly did not meet the suitability requirements of Appendix FM of the Immigration Rules. The appellant's

appeal was allowed by First-tier Tribunal Judge Manuel and the Secretary of State appeals with permission to this Tribunal.

3. The First-tier Tribunal Judge allowed the appeal on the basis that there was insufficient specific evidence identifying the appellant as one of the candidates who is alleged to have used a proxy test taker in the ETS test. The Judge concluded that the decision of the Secretary of State was not in accordance with the law and allowed the appeal.
4. In her grounds of appeal the Secretary of State contends that the First-tier Tribunal Judge erred in failing to provide adequate reasons for finding that the Secretary of State has not discharged the burden of proof upon her to establish that this appellant used deception. It is contended that, when read in conjunction with one another, the witness statements detail the investigations undertaken by ETS on this appellant's case and the process of identifying those tests to be invalid.
5. At the hearing before me Ms Johnstone submitted that the reasons given by the judge in paragraphs 16, 17 and 18 of the decision are inadequate. She relied on the ETS SELT Source Data document at Annex A of the bundle beginning with the witness statement of Hilary Rackstraw which, she submitted, related to this appellant. Although she accepted that the version before the First-tier Tribunal Judge did not show the appellant's name, she submitted that his passport number was on it. She submitted that the judge erred in failing to refer to that document. She relied on the decision in **SM and Qadir v Secretary of State for the Home Department (ETS - Evidence - Burden of Proof)** (which has yet to be reported) and submitted that it was for the appellant to rebut the evidence submitted by the Secretary of State.
6. Mr Timson submitted that the ETS source data document is a red herring as those print outs were available to the Tribunal in **Qadir** where concerns were raised about the quality of the evidence submitted as to the allegation of deception. He highlighted the issues raised in relation to the generic evidence at paragraph 63 of the decision in **Qadir**. He submitted that the judge in this case took account of the appellant's evidence, including the evidence as to the other tests taken and the fact that the appellant gave evidence in English.

Error of law

7. In my view it is clear from reading the decision as a whole that the judge took account of all of the evidence submitted by the respondent. Whilst I accept that the judge did not specifically refer to the ETS source data document she refers to the witness statement of Hilary Rackstraw to which it was appended. Further, the copy appended to that witness statement is poor and does not identify the appellant by name nor does it state that his test results were invalid or give reasons for any such conclusion and was therefore of limited evidential value. Any failure to refer to that document was not therefore a material error here.

8. Also, it is clear that the judge took account of the appellant's own evidence including the evidence as to the further English tests he undertook in January 2013 and July 2014.
9. I am satisfied that the judge considered all of the evidence and reached a conclusion open to her on the basis of this evidence. There is no material error in the judge's consideration of this evidence.
10. The grounds of appeal put forward by the Secretary of State have not been made out. I conclude that there is no material error of law in the decision of the First-tier Tribunal.

Conclusion

11. The making of the decision of the First-tier Tribunal did not involve the making of a material error on a point of law.
12. The decision of the First-tier Tribunal shall stand.
13. I make no anonymity direction.

Signed

Date: 14 April 2016

Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT
FEE AWARD

I maintain the fee award made by the First-tier Tribunal.

Signed

Date: 14 April 2016

Deputy Upper Tribunal Judge Grimes