



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/25860/2014

THE IMMIGRATION ACTS

Heard at Field House  
On 15<sup>th</sup> March 2016

Decision & Reasons Promulgated  
On 20<sup>th</sup> May 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE L J MURRAY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

SHOHEL RANA  
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr Melvin, Senior Presenting Officer  
For the Respondent: Mr Islam of London Law Associates

Anonymity

*Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008*

No anonymity order was made by the First-Tier Tribunal. I find that no particular issues arise on the facts of this case that give rise to the need for a direction. For this reason no anonymity direction is made.

DECISION AND REASONS

1. The Appellant in this case is the Secretary of State for the Home Department and the Respondent was the Appellant before the First-tier Tribunal. For ease of reference I refer to them as the Secretary of State and the Claimant respectively.
2. The Claimant applied for further leave to remain in the United Kingdom as the spouse of a person settled here. The Secretary of State refused that

application in a decision dated 4 June 2014 on the grounds that the Claimant did not meet the suitability requirements for consideration of limited leave to remain in the UK as a partner under E-LTRPT. The Secretary of State also considered the Claimant's private life under paragraph 276ADE and concluded that the Claimant did not meet the requirements either within or without the Immigration Rules on the basis of **R (Nagre) v Secretary of State for the Home Department** [2013] EWHC 720 (Admin) exceptionality.

3. The Claimant appealed that decision and the matter came before First-tier Tribunal Judge Wilshire on 3 August 2015. In a decision promulgated on 17 September 2015 he allowed the appeal on the basis that the eligibility requirements were met. The appeal was therefore allowed under the Immigration Rules as a partner.
4. The Secretary of State took issue with that decision and sought permission to appeal. Permission was granted by First-tier Tribunal Judge Hollingworth on 19 January 2016 on the basis that an arguable error of law had arisen in relation to the construction placed by the Judge on the evidence made available by the Secretary of State appertaining to the question of whether deception had been used. It was arguable that the analysis set out by the Judge was insufficient in identifying deficiencies with such evidence and it was further arguable that the Judge took into account or attached an inappropriate degree of weight to other factors in reaching the conclusions set out.

### **The Grounds**

5. The Secretary of State asserts that the First-tier Tribunal failed to give adequate reasons for findings on a material matters. It is submitted that the decision of the First-tier Tribunal finding that the Secretary of State had not discharged the burden of proof in demonstrating that the Claimant had used deception was entirely inadequately reasoned. It is asserted in the grounds that the First-tier Tribunal found that the witness statements and the extract from the spreadsheets did not assist the Secretary of State's case. The Secretary of State asserts that this is incorrect as the witness statements when read in conjunction with the one another detail extensively the investigation undertaken by ETS on this Claimant's case along with thousands of other applicants and the process of identifying those tests were found to be invalid. It is asserted on behalf of the Secretary of State that it is clear from the statements that ETS identified this Claimant after a lengthy and systematic investigation.
6. The Secretary of State asserts that the First-tier Tribunal should have had due consideration to the specific evidence which identified this Claimant as an individual who had exercised deception together with the witness statements outlined in the investigation process and that the Secretary of State maintains that the Claimant does not meet the suitability requirements of Appendix

FM of the Immigration Rules and as such the Claimant's application cannot succeed with reference to the eligibility requirements.

7. It is further asserted in the grounds that in reaching a material finding the First-tier Tribunal relied on the Claimant's English ability and was satisfied that it was entitled to take this into account in determining whether the Secretary of State had to meet the evidential burden in this case. It is asserted that there may be reasons why persons able to speak the English language to the required level would nonetheless permit proxy candidates to take an ETS test.

### **The Hearing**

8. Mr Melvin made an application for an adjournment on the basis of the upcoming guidance from the Upper Tribunal and requested that the matter be adjourned pending the result, submitting that there would be no lengthy adjournment.
9. Mr Islam opposed that adjournment request on the basis that there would be further delay and that would affect the Claimant's family life. I found that there was no Upper Tribunal guidance indicating that "ETS" appeals should be adjourned pending further clarification and concluded that I was able to determine the appeal justly and fairly without an adjournment.
10. Mr Melvin submitted that there was substantial evidence before the First-tier Tribunal. There were witness statements from senior managers and there was part of a computer printout identifying this Claimant as someone who did not take the test himself. Mr Melvin submitted that the Judge had relied on the evidence of the Claimant and had not fully considered the evidence of the Secretary of State. Whilst the Judge took the point that it was not put to the Claimant that he used a proxy to sit the test he asked me to find that the Judge had not properly considered the evidence. He argued that the decision should be set aside and be reheard in the Upper Tribunal.
11. Mr Islam submitted that the Claimant had sat an IELTS test as a result of a request from the Secretary of State and that meant the matter was resolved in favour of the Claimant. He scored 6 in that test. He gave his evidence in fluent English and the Secretary of State had failed to provide credible evidence before the First-tier Tribunal in relation to the allegation of deception. The subjective evidence was necessary. He agreed that there were three witness statements before the First-tier Tribunal produced by the Secretary of State but it was submitted on behalf of the Claimant there was no evidence produced to demonstrate a proxy sat the test. The deception was not there and the Claimant therefore met the suitability requirements. There were no other aggravating features or factors and therefore there was no error of law in the decision of the First-tier Tribunal.

## Discussion and Findings

12. The First-tier Tribunal considered the evidence of the Secretary of State at paragraphs 13 to 15 the decision:

“13. I have (given) careful consideration to the evidence that I have seen filed in this case both oral and documentary. I turn first to the question of the validity of the appellant’s test score taken on 22 August 2012. I note that the methodology used by ETS to appraise tests taken under its umbrella is still the subject of ongoing litigation.

14. The most recent decision of the Upper Tribunal in Judicial Review proceedings was **R (on the application of Gazi) v Secretary of State for the Home Department (ETS – Judicial Review) (IJR) [2015] UKUT 327**. In that the President set out the summary of the evidence on behalf of both the Home Office and the expert opinion of Dr Harrison filed by a group of appellants at paragraphs 6-15 and 16-20 respectively.

15. Having considered that summary and it is plain to me that there are serious disputes as regards the methodology used. It is not for me to resolve the disputes however I must bear in that in mind when considering whether or not the Respondent has discharged the burden of proof based upon the evidence so far considered. I have reached the conclusion that the burden has not been discharged in this case on its own particular facts. I say this for several reasons.”

13. The First-tier Tribunal Judge then considered the evidence relied on by the Claimant. The First-tier Tribunal Judge correctly directed himself in relation to the burden of proof. What the First-tier Tribunal does not do is to engage with the evidence submitted by the Secretary of State in the form of three witness statements and in the form of print out sheets where it was stated that the Claimant’s test result was invalid.
14. The Upper Tribunal in the judicial review proceedings of **Gazi** did not pronounce on the generic evidence and there is nothing in that judgment that obviates the First-tier Tribunal from the need of addressing the specific evidence produced by the Secretary of State in such cases. It is clear from paragraphs 39 to 41 of **Gazi** that all the evidence must be engaged with, that is the evidence submitted both on behalf of the Secretary of State and on behalf of an appellant, and it is commented at paragraph 41 that it is “difficult to envisage how a single decision of the Upper Tribunal in a TOEIC judicial review might be determinative of large numbers of other such cases, the more so in the absence of a group or representative challenge.”
15. In these circumstances it was incumbent on the First-tier Tribunal to specifically engage with the evidence submitted by the Secretary of State in relation to this particular Claimant and the First-tier Tribunal failed so to do and that must amount to an error of law. That error of law must also be material because it cannot be said that the outcome would not have been

different had the First-tier Tribunal engaged properly with that evidence. That is not to say that the Claimant has used deception, it is just that no proper or adequate reasons have been found for deciding that the appeal should be allowed.

**Notice of Decision**

16. I therefore find having that there is a material error of law in the decision that the decision should be set aside. In the light of the ongoing litigation and in the light of the fact that guidance is likely to be given in the reasonably near future I consider that this is a case that should properly be reheard in the First-tier Tribunal having regard to Part 7.2 (a) of the Practice Statements for the Immigration and Asylum Chamber of the First-tier Tribunal and Upper-Tier Tribunal and the extent of fact finding required. No findings of fact are preserved.

Signed

Date 18 March 2016

Deputy Upper Tribunal Judge L J Murray