



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

**Appeal Number: IA/28704/2014**

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 5 May 2016**

**Decision &  
Promulgated  
On 19 July 2016**

**Reasons**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE L J MURRAY**

**Between**

**TAHIR SIDDIQ  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr Coleman, Counsel

For the Respondent: Mr Kandola, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellant is a Pakistani national born on 7 August 1989. On 28 February 2014 he applied for further leave to remain as a spouse of a person present and settled in the UK. That application was refused by the Respondent on 26 June 2014 and directions were given for his removal in accordance with section 10 of the Immigration and Asylum Act 1999.
2. The Respondent refused the application because it was concluded that the Appellant had obtained his TOEIC test result through deception. The

Respondent concluded that the Appellant was a person who had sought leave to remain by deception following information provided by Educational Testing Service (ETS) that on 21 November 2012 an anomaly with his speaking test indicated the presence of a proxy test taker.

3. The Respondent also concluded that the Appellant did not meet the requirements of the Rules for family life as a partner because he could not meet the eligibility requirements in the light of the fact that he had not satisfied the suitability requirements. The Respondent nevertheless considered paragraph EX.1 of the Immigration Rules and concluded that there would be no insurmountable obstacles to family life continuing with his spouse outside the UK. The Respondent also concluded that the requirements of paragraph 276ADE were not met.
4. The Appellant appealed against that decision under s82 (1) of the Act. His appeal was dismissed by the First-tier Tribunal on 19 August 2015. The Appellant then sought permission to appeal this decision which was granted on 16 December 2015. Permission was granted as it was found that it was arguable that any alleged deception was not in relation to the application and that it was not open to the Judge to rely on conducive grounds where these had not been the substance of the Respondent's decision. Further, it was arguable that the Judge failed to give adequate reasons for finding, principally on the strength of the Appellant's vague evidence that the Respondent had proved her case.

### **The Grounds**

5. The grounds contend that the Judge erred in his assessment of the applicability of the suitability criteria in paragraphs S-LTR.1.2-3.1 and its applicability to the Appellant's case. It is argued that it could be seen from the wording of the IS 151A dated 26 June 2014 that the Respondent's case was that the Appellant was considered a person who had sought leave to remain in the UK by deception. This allegation was specifically repeated in the RFRL. It was at no time alleged by the Respondent that the Appellant's presence in the UK was not conducive to the public good. It is asserted that the alleged deception was not in connection with the Appellant's most recent application but related to an earlier application made in or around 2012. It is submitted that the proper course was to find that the Appellant satisfied the suitability criteria and allow the appeal and not to do so was a material error of law.
6. It is contended that the Judge was not entitled to raise the issue of whether the Appellant's presence in the UK was conducive to the public good under paragraph S-LTR1.6 of his own volition and that it involved a careful consideration of numerous public policy considerations which ought not to have been the role of the First-tier Tribunal. Further it is submitted that even if the Judge were entitled to make such a finding he failed properly to do so.

7. It is also submitted that the Judge ignored the inherent weaknesses in the Respondent's evidence and the three reasons given in paragraph 17 of the decision that formed the basis of the adverse factual findings were not a sound basis for reaching the conclusion. It is also submitted that the Judge failed to take into account that the Appellant, having been notified of issues in relation to his ETS test, swiftly took another test with a different provider and passed the same. It is also submitted that the Judge failed to have regard to the fairly determined efforts of the Appellant through his solicitors to obtain the evidence from ETS upon which the Respondent's allegations were founded and the ETS's rather suspect reasons for refusing to provide such disclosure. It is submitted that the Judge should have had regard to the attempts to obtain exculpatory evidence which were a strong indicator of the Appellant's innocence.

### **The Rule 24 Response**

8. The Respondent submitted that it was open to the Judge to conclude that the requirements of S-LTR 1.6 pointed towards the Appellant remaining in the UK as being non conducive to the public good. The Judge noted that 77% of the tests conducted at Eden College were invalid and the Appellant's evidence was lacking in quality. The Appellant's attempts via his representatives to obtain copies of his test were not necessarily indicative of his innocence and could have been a ploy on his part. The evidence before the Judge was sufficient to support his conclusion and the grounds were a disagreement with the findings.

### **The Hearing**

9. Mr Coleman applied to cite the case of **Qadir & SM v SSHD IA/31380/2014** and **IA/36319/2014**, an unreported decision, pursuant to paragraph 11 of the Practice Directions of the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal. The Appellant wished to reply on the proposition that the generic evidence on which the Secretary of State has relied to date in all ETS cases has been demonstrated as suffering from multiple shortcomings and frailties.
10. Mr Kandola objected to the unreported case being relied on. He submitted that **Qadir** was fact specific and did not assist the court. Should **Qadir** be cited he would seek to rely on the report of Professor French to show that the Secretary of State's evidence had always been good and adequate which was contrary to the case of **Qadir**.
11. Paragraph 11.1 of the Practice Directions provides that a determination of the Tribunal which has not been reported may not be cited in proceedings before the Tribunal unless the Tribunal gives permission. Paragraph 11.3 provides that permission will only be given where the Tribunal considers that it would be materially assisted by the citation of the determination, as distinct from the adoption in argument of the reasoning to be found in the determination. Such instances are said to be likely to be rare and that it will

be rare for such an argument to be capable of being made only by reference to an unreported determination.

12. I decided not to give permission to cite the unreported determination. The Upper Tribunal in **Qadir** heard oral evidence from Secretary of State's witnesses Rebecca Collings and Peter Millington and from Dr Harrison who appeared on behalf of the Appellants. The conclusions of the Upper Tribunal were based on the totality of this evidence. In view of the fact that I had to consider whether there was an error of law in the decision of the First-tier Tribunal which came to its conclusions on the written testimony of those witnesses and the oral evidence of the Appellant I concluded that the conclusions in **Qadir** would not be of material assistance.
13. Mr Coleman relied on the grounds settled by Counsel particularly in relation to the suitability point. He submitted that it was clear that he was refused on a discretionary and not a mandatory ground. The Judge determined in the decision that he was going to widen it out and decide it on conducive grounds. This was not considered at the hearing. He went from discretionary to mandatory without telling the parties. At the very least he should have given the Appellant an opportunity to deal with that and potentially grant an adjournment. As the refusal stood the allegation of deception was not made out in respect of this application because it related to an earlier application. The Tribunal did acknowledge that scores had to be authenticated but did not take it into account in relation to the balancing exercise as to whether they had satisfied the requisite standard. He did not state what the standard of proof was. Mr Coleman relied on the arguments advanced in **Qadir**. The Appellant had done another English language test. The failure to have regard to this made the decision unsafe. It was a serious matter. This was a test he did several years beforehand which he detailed in his witness statement. At paragraph 6 it stated that he took a new English test. There was nothing vague about the Appellant's evidence. He was clear about where he went and that he did not cheat. The Judge had not balanced the evidence. All of these points were strong points. The overall impact was that the parties were not given an opportunity to deal with the points.
14. Mr Kandola relied on the Rule 24 response. He submitted that the case turned on credibility and the sustainability of the finding on deception. The Judge had said at paragraph 17 that the Respondent had made good her allegation and gave reasons. At paragraph 17 (b) and (c) a fact sensitive assessment of the evidence in this case was carried out. He had regard to **R (on the application of Gazi) v SSHD (ETS - judicial review) IJR [2015] UKUT 327** and Dr Harrison's report and the short-comings of the evidence. He found against the Appellant and found that he exercised deception and that was a sustainable finding. The grounds were a disagreement. The Judge was entitled to look at the consequences of the deception finding and look at all of the requirements. The RFL did not pin point which of the suitability criteria was relied on and at paragraph 7 the Respondent said that in order to be eligible he must not be excluded and cited the whole breadth the Rule. The Appellant was told that he could not fall foul of any of these provisions

and the Respondent's case was wide in the RFRL. All the grounds were cited and although the Respondent was not specific in the RFRL the Appellant was on notice that if he fell foul then he would be refused.

15. Mr Coleman submitted that the first time the conducive criteria were applied was when the Judge decided to write the decision up. It was not raised by the Respondent in the appeal, there was no reference to it in the court of proceedings. The Judge should have given the parties an opportunity to make submissions. It was not fair to raise that at a much later stage when no one had the opportunity to deal with it and that the refusal would be mandatory. He was going off on a jolly of his own. He concluded that "arguably" past conduct was conducive to public good. It was a major error and a fairness point. There was no consideration of the behaviour of the Appellant in relation to trying to get the test scores and in relation to the quality of his English in Court. He asked me to find an error and remit it back to the First-tier.
16. I reserved my decision in relation to whether there was an error of law in the decision of the First-tier Tribunal.

### **Discussion and Findings**

17. I find that there is force in the Appellant's first ground in relation to the suitability requirements of the Immigration Rules. It is not evident from the RFRL which of the 'suitability' grounds the Respondent relied on. All are set out in the RFRL. Paragraphs S-LTR.1.1 to S-LTR.1.7 are mandatory and S-LTR.2.1 to 2.4 are discretionary. Whilst the Respondent did not cite a specific paragraph the Appellant was informed at paragraph 9 of the RFRL that he was considered to be a person who had sought leave to remain in the United Kingdom by deception. The same wording was used in the IS.151A, the notice informing him of his liability to removal.
18. There is no suggestion in the RFRL nor in the submissions of the Respondent as recorded at paragraph 11 of the decision of the First-tier Tribunal that the Appellant was considered to be a person whose presence in the UK was not conducive to the public good. At paragraph 15 of the decision the First-tier Tribunal concluded that once the facts were in play that might found exclusion from an immigration route, any of the suitability criteria within that route must fall for judicial consideration. The Judge concluded that "arguably" past conduct in obtaining leave to remain by deception amounted to conduct rendering a person's exclusion from leave to remain under the Immigration Rules conducive to public good.
19. The reason for the switch from one paragraph to another was the fact that the Judge found the Appellant could not be considered to have fallen foul of the suitability requirements in paragraph S-LTR.2.2, a discretionary ground for refusal, because the Rule related to the submission of false information or a failure to disclose material facts in relation to "the application". The test

results which the Respondent alleged were obtained by deception related to a previous application.

20. There is clear authority to support the contention that if the Respondent has failed to consider the relevant rule it is the tribunal's task to construe it. The Appellant has cited no authority for the assertion in the grounds that the tribunal should not be the primary decision maker in relation to a conducive grounds refusal. However, an Appellant may require an adjournment to respond to the new issue. That was effectively the Tribunal's view in **CP (Dominica) 2006 UKAIT 00040**. The significance in the instant case of the fact that the Appellant did not appear to know that he had a case to answer in respect of the "conductive" paragraph is that it is not a matter that was addressed by him in submissions. Whilst a finding of deception may well warrant a refusal on conducive grounds it is a matter which is open to argument. I therefore find that the allegation of procedural unfairness is made out.
21. The Judge gave his reasons for finding that the Respondent had discharged the burden of proving that the Appellant had used deception at paragraph 17 of the decision. Whilst he gave sound reasons for finding that he could place weight on the Respondent's evidence in relation to a high rate of dishonesty at Eden College and it was open to him on the evidence he heard to find that the Appellant's evidence was vague, he did not engage with the two points raised in the Appellant's submissions, namely that he had taken and passed a language test at the Respondent's behest and assiduously pursued ETS to provide the voice recordings that were said to found the case against him.
22. The Appellant produced an English language certificate from Trinity College London at page 34 of his bundle showing that he had been awarded Grade 2 in Spoken English with distinction in April 2014. The Appellant also produced in an additional bundle containing evidence of correspondence between himself and ETS dating January 2015 asking whether and why his test certificate had been cancelled and asking for full and complete details. This was evidence that was certainly capable of raising an innocent explanation and needed to be addressed. The Judge did not allude to this evidence in coming to his conclusions or give reasons for not finding it of relevance.
23. In the circumstances I find that there was a material error of law in the decision of the First-tier Tribunal.

### **Conclusions:**

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision.

I remit the decision to the First-tier Tribunal for rehearing.

No anonymity direction is made.

Signed

Date **19 July 2016**

Deputy Upper Tribunal Judge L J Murray