



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/14352/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 21 June 2018

Decision & Reasons Promulgated  
On 24 July 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MISS MERJEN ARAZOVA  
(ANONYMITY DIRECTION NOT MADE)

Respondent

**Representation:**

For the Appellant: Mr I Jarvis, Senior Presenting Officer  
For the Respondent: Mr Allan Van As of Visa Inn Immigration

**DECISION AND REASONS**

1. In this decision the Appellant is referred to as “the Secretary of State” and the Respondent is referred to as “the Claimant”.

2. The Claimant, a national of Turkmenistan, date of birth 12 December 1981, appealed against the Secretary of State's decision, dated 2 June 2016, to refuse an application for ILR made on 27 November 2015. Her appeal came before First-tier Tribunal Judge Mailer (the Judge) who determined the matter on the papers on 27 November 2017.
3. Permission to appeal was given by First-tier Tribunal Judge Lambert on 23 April 2018 who said this:-

“The grounds argue lack of adequate reasoning leading to the conclusion that the Appellant had rebutted the Respondent (sic) assertion of having fraudulently obtained an English language test result. The Judge's reasoning limited to 5 very brief paragraphs (44-49) renders the grounds arguable.”

4. The Judge did not hear evidence and accepted that it was an appropriate case to deal with on the papers. The Judge had submissions concerning the taking of the language test, the subject access information relating to the Claimant's case and a statement with which almost all Immigration Judges would be familiar from Rebecca Collings and Peter Millington from the Home Office who provide background information to the ETS testing and the history of the use of ETS and its abuse. It does not appear from the papers that the report of Professor French which is usually produced in a supplementary bundle was before the Judge, but this experienced Judge would have been well-aware of the general thrust of that evidence which has itself been directly addressed in a variety of cases but overall including *SM and Qadir* [2016] UKUT 00229 (IAC), *MA (ETS - TOEIC testing)* [2016] UKUT 00450, *Qadir and Majumder* [2016] EWCA Civ 1167 and *MA* [2016] UKUT 00450.
5. *MA* reminds Tribunal Judges that a person may have a variety of reasons why they use a proxy test taker: whether it is financial, or the fear of failure, or to ensure success, whatever may be their reasons. As is identified in *Qadir*, and indeed others, the process leaves the burden upon the Secretary of State to establish at least the prima facie likelihood that a proxy test taker has been used. If that burden is established, the

burden then transfers to the Claimant to adduce evidence of what is called an “innocent explanation”, which may then encounter why the likelihood is that in fact the test centre was attended and the test taken by the Claimant.

6. In this case the Judge had taken into account the fact, or what he took to be the fact, that a request had been made and directions given, but with which the Secretary of State had not complied, to produce more evidence relating to the particular Claimant’s test. The matter was argued before me and I have to say, having looked at the directions that were sent out by the IAC, there was no specific direction to produce the particular test results of this Appellant, as assessed in the ETS process. Nor, after the request had been made was the matter followed up with the Tribunal in connection with the failure, if that was what it was to be taken to be, of the Secretary of State to produce the claimed documents for evidence.
7. In my view the Judge, if he was led to that view, was mistaken but it does not seem to me ultimately to be germane to the decision or demonstrate a reason why the Secretary of State’s challenge is sustainable. Rather, the Judge had the information before him from the Appellant’s evidence as to attendance at the ETS centre taking the test and so on and so forth. The Judge noted at paragraph 48:-

“I have had regard to the Appellant’s evidence relating to the actual taking of the test. I am satisfied that she has given satisfactory evidence regarding the venue, dates and times of the test. Moreover, she has been able to identify the layout on three floors where the test took place.”

At 49 the Judge said:-

“She has accordingly provided a positive case in rebutting the Respondent’s assertions. None of that evidence has been challenged.”

8. One would have to say, given that it was a decision on the papers, it is perhaps unsurprising, but the fact is that if the Claimant's evidence was served, as I understand it to be, then it was open to the Secretary of State to seek a hearing of the issues and to make application to the Tribunal to do so. No such application was made.
9. The Judge also took into account that disclosed material showed that in 2008 the Claimant had been interviewed at some form of entry into the UK and been found to have "excellent" English abilities. That assessment by UK Visas significantly predated the date of the test which was in November 2012.
10. I remind myself in the light of the case of *MD (Turkey)* [2017] EWCA Civ 1958 that the Upper Tribunal should be slow to interfere in a decision of a First-tier Tribunal unless clearly an error of law has been made including a lack of sufficient and adequate reasons being given for the decision. The fact I might have expressed the matter myself more fully or differently does not demonstrate an error of law, rather it demonstrates the likelihood that in an appellate system as complex as this the difficulties in finding a measure of consistency of expression is all too obvious.
11. I take the point Mr Jarvis makes with some force that the Judge did not set out the other possibilities that might underlie the Claimant having not taken the test but used a proxy test taker. It seemed to me that was a point, but ultimately the Judge was taking a view on the evidence as to whether it was sufficient to discharge that burden on the Claimant to provide an innocent explanation. I conclude that the Judge could have picked up those various points and if he wished to, discounted them, but it seemed to me that was inviting, in many respects, a Judge to do more than was necessary, which was to provide adequate and sufficient reasons for the decision.
12. I find this is a marginal case and in the circumstances it will be wrong for me to interfere with the decision, even though I might well have reached a different decision myself. I find the error complained of demonstrates the fragility of decision making and its susceptibility to challenge: Which I accept in this case has been done on a proper

basis, not least in the light of the clear conclusion that was reached on the ETS test itself by the Secretary of State in the light of the information provided that is the starting point as *SM and Qadir* makes plain. However, for the reasons I have given I find the Original Tribunal made no material error of law in providing sufficient and adequate reasons. The brevity of them does not necessarily mean they are not adequate, it may simply reflect a conclusion that the Judge was entitled to reach on the papers. Accordingly, I also do not agree with the First-tier Tribunal Judge who granted permission if it said the brevity of explanation means there is a lack of adequate reasons.

### **NOTICE OF DECISION**

13. The appeal of the Secretary of State is dismissed. The Original Tribunal's decision stands.
  
14. No anonymity direction is made.

Signed

Date 4 July 2018

Deputy Upper Tribunal Judge Davey