



**Upper Tribunal  
(Immigration and Asylum Chamber)  
HU/04873/2016**

**Appeal Number:**

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 15<sup>th</sup> January 2018  
Decision & Reasons given orally**

**Typed version promulgated  
On 8<sup>th</sup> February 2018**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MAHMOOD**

**Between**

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

Appellant

**and**

**MR SUNNAT RASULOV  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Mr P Duffy, Home Office Presenting Officer  
For the Respondent: Mr S Rasulov, the Respondent, in person

**DECISION AND REASONS**

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Cohen when the Respondent's (claimant) appeal had been allowed on human rights grounds at Taylor House on 18<sup>th</sup> July 2017.
2. The original grounds of appeal to the First-tier Tribunal were relied upon in the Upper Tribunal as well and in summary it had been said that the judge had applied the wrong standard of proof because it was said there was a "higher burden of proof" which was placed upon the Secretary of State and secondly, it was said that when following the Upper Tribunal's decision

in **MA Nigeria [2016] UKUT 450** that even though the First-tier Tribunal Judge was satisfied as to the Appellant's ability to speak English there may be other reasons why a person who was able to speak English to the required level would nonetheless call or permit a proxy candidate to undertake an ETS test on their behalf.

3. In brief but clear submissions today, Mr Duffy said he relied on the grounds of appeal to both the First-tier Tribunal and the Upper Tribunal and that the use or relevance of the ability to speak English was erroneous in the circumstances of this particular case when referring to the decision of the Upper Tribunal.
4. The claimant was previously represented but he appeared without legal representation today. Sitting beside him is his former partner, the mother of their children. The claimant had said he had passed his English test and any questions could be asked of him. He explained that the judge was right to make the decision that he did. The claimant did not seem to comprehend the nature of the hearing, so I sought to explain this to him in clearer terms, and I think one of the phrases used by his partner was "could we have that explained to us jargon-free?" referring to the submissions which Mr Duffy had made. I therefore sought to do that but it appeared to me that the claimant still did not understand the basis of the Secretary of State's case. Mr Duffy then assisted the claimant by providing him with a copy of Judge Cohen's decision and then I referred to and read out in particular paragraph 23 of the judge's decision.
5. It appeared to me the claimant may not have seen the judge's decision recently. He did not have a copy with him. Therefore, I adjourned the matter for a period of time to enable the claimant to read carefully the judge's decision and also to digest what had been said. Having returned to consider the matter further and when I asked him about paragraph 23 of the decision, the claimant said there was really very little that he could say about it.
6. Now, insofar as paragraph 23 of Judge Cohen's decision is concerned it says as follows:

"In the light of the evidence provided by the Appellant, which I find to be compelling, I find that the Respondent has not discharged the higher burden of proof placed upon her in respect of an allegation of deception and find that this has been rebutted by the Appellant in this case. I therefore find that the Respondent's refusal of the Appellant's application for leave to remain on this basis was wrong in all the circumstances."

7. The Secretary of State in the grounds of appeal had said at paragraph 2:

"The judge found that the Respondent had not discharged the legal burden. He states, 'I find that the Respondent has not discharged the higher burden of proof placed upon her'. It is submitted that the

judge errs in applying too high a standard of proof. The relevant burden of proof is the balance of probabilities.”

In my judgment that is a compelling ground of appeal. There is only one standard of proof which applies and that is the balance of probabilities. Where the judge was seeking to apply a higher standard, in my judgment, it is clear that there is no such higher standard which could have applied. I note that the judge in an otherwise careful decision explained and set out why he was making the findings that he did but unfortunately, I simply cannot ignore the quite fundamental error at paragraph 23 of the decision relating to the standard of proof.

8. I have also considered the decision in **MA Nigeria [2016] UKUT 450** and that also has some relevance but, in my judgment, the material error in respect of the standard of proof fundamentally undermines the judge’s decision. It means thereby that the decision of Judge Cohen has to be set aside. There will have to be a rehearing and that rehearing will take place at the First-tier Tribunal before a judge other than Judge Cohen and any other directions will be provided by the First-tier Tribunal.
9. As I have explained to the claimant, the effect of my decision is not that he is being asked immediately or otherwise to leave the United Kingdom, nor does it mean that he has succeeded in his appeal. What I am finding, and I am explaining this for his purposes again is that there was an error in Judge Cohen’s decision. There will have to be a complete rehearing and at that rehearing Mr Rasulov will be able to explain the basis of his case, the Secretary of State will be able to explain her case and the judge will make a decision. Judge Cohen’s decision on the law was wrong and is set aside. A different judge will decide the matter again. That will be at the First-tier Tribunal.

### **Notice of Decision**

There is a material error of law in the decision of the First-tier Tribunal and it is therefore set aside.

The Secretary of State’s appeal against the decision of the First-tier Tribunal is allowed.

There shall be a re-hearing at the First-tier Tribunal.

No anonymity direction is made.

Signed; A Mahmood

Date; 15 January 2018

Deputy Upper Tribunal Judge Mahmood