



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

Appeal Number: HU/10545/2018

THE IMMIGRATION ACTS

**Heard at Bradford
On 10th December 2019**

**Decision & Reasons Promulgated
On 18th December 2019**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

**JABRAN NAZIR
(NO ANONYMITY DIRECTION MADE)**

Respondent

**For the Appellant: Mr Diwnycz, Senior Home Office Presenting Officer
For the Respondent: Mr Youssefian, Counsel instructed by House of
Immigration Solicitors**

DETERMINATION AND REASONS

1. The Respondent is a national of Pakistan born in 1983. On the 11th July 2019 his human rights appeal was allowed by the First-tier Tribunal (Judge Shamash). The Secretary of State now has permission to appeal against that decision.
2. Although the appeal was concerned with Mr Nazir's Article 8 rights the real matter in issue was whether the Secretary of State had proven her assertion that Mr Nazir had fraudulently obtained a TOIEC certificate by using a proxy to take his English speaking exam, and thereafter used that certificate to obtain an immigration advantage.

3. Having directed herself to the appropriate burden and standard of proof Judge Shamash did not find that the Secretary of State had produced sufficient evidence to discharge the evidential burden. It followed that the legal burden could not be discharged and so on the central matter in issue she found for Mr Nazir. The effect of this finding was that the Secretary of State had been wrong, back in 2013 to curtail Mr Nazir's leave to remain on the basis of the allegation; Judge Shamash found that in the circumstances it would be proportionate for the Secretary of State to grant Mr Nazir a short period of limited leave to return him to the position he had been in prior to that curtailment, namely a Tier 4 (General) Student Migrant with over a year left to run on his visa: see the decision in Khan v Secretary of State for the Home Department [2018] EWCA Civ 1684. It was on that basis that the appeal was allowed on human rights grounds.
4. The Secretary of State has appealed on the grounds that the decision is perverse and contrary to established caselaw on the 'ETS' scandal. In particular reliance is placed on the decision of Mr Justice McCloskey in SM and Qadir (ETS -evidence- burden of proof) [2016] UKUT 00229 (IAC). Although McCloskey J had found the Secretary of State's evidence to be deficient in many respects, he had found it to be sufficient generally to discharge the evidential burden of proof: the same type of evidence had been produced before Judge Shamash in the present case.
5. In fact that is not so. True, the Secretary of State had supplied what has become known as the 'generic' ETS bundle, and brief printouts from the 'lookup tool' relating to the appellant before the First-tier Tribunal. There was however a particular feature of the latter which had caused Judge Shamash great concern. That was this. 'Annex A' showed two test results for Mr Nazir. The first speaking exam was taken on the 1st August 2013, which he had failed. He re-took the test on the 22nd August, and passed. Both test results are recorded on the 'lookup' tool as 'invalid', a classification that the Secretary of State submits to indicate the presence of a proxy test taker. This troubled Judge Shamash, who reasonably wondered why Mr Nazir would have employed a proxy who was unable to pass a speaking exam in basic English. It was this peculiarity, coupled with the deficiencies in the 'generic evidence' identified by McCloskey J in SM & Qadir, that led her to find that the evidential burden was not discharged. The evidence was not therefore on all fours with the evidence presented in SM & Qadir. It contained a significant anomaly which the Judge was entitled to place weight upon. I am unable to find that this was a perverse decision and the appeal is dismissed.

Decisions

6. The appeal is dismissed.
7. There is no order for anonymity.

Upper Tribunal Judge Bruce
13th December 2019