



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

Appeal Number: IA/30023/2015

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice

On 19th July 2017

**Decision & Reasons
Promulgated
On 20 July 2017**

Before

UPPER TRIBUNAL JUDGE MARTIN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR HASSAN AKHTER
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr T Wilding (Senior Home Office Presenting Officer)

For the Respondent: Mr L Lourdes (Counsel)

DECISION AND REASONS

1. This is an appeal to the Upper Tribunal by the Secretary of State in relation to a decision of the First-tier Tribunal (Judge Oliver) promulgated on 14th November 2016 in which he allowed the Appellant's appeal against the Secretary of State's decision, taken on 20th July 2015, to refuse his application for leave to remain as a student on the basis that the Secretary of State had information to suggest the Appellant had used a proxy to take an English language test in October 2012.

2. The Judge, considered the Upper Tribunal case of *SM & Qadir (ETS - Evidence - Burden of Proof)* [2016] UKUT 229 and found that the generic evidence of Rebecca Collings, Peter Millington and Ms Singh, relied upon by the Secretary of State did not meet the burden of proof on the Secretary of State to establish fraud and allowed the appeal.
3. Since then the Court of Appeal have decided in *SM & Qadir (ETS - Evidence - Burden of Proof)* [2016] EWCA Civ 1167 that the generic evidence is sufficient to meet the evidential burden on the Secretary of State to raise a doubt such that the evidential burden shifts to the Appellant to proffer an innocent explanation. If he can then the Secretary of State may be unable to meet the legal burden of proof.
4. The Judge in this case considered only the burden on the Secretary of State, did not consider the evidential burden on the Appellant and did not consider the explanation and decide whether an innocent explanation had been provided. I do not criticise the First-tier Tribunal as at the date of the First-tier Tribunal hearing the Upper Tribunal case remained good law. However we have been informed by the Court of Appeal what the correct law is and so the Judge made a material error of law in allowing the appeal on the basis he did.
5. That being the case the First-tier Tribunal's decision is set aside. Although I was prepared to redecide the appeal, the Appellant was taken ill and so it was agreed by both representatives that the appropriate procedure would be to remit it to the First-tier Tribunal for a hearing de novo.

Notice of Decision

The appeal is allowed to the extent that the appeal is remitted to the First-tier Tribunal for a full rehearing.

Signed

Date 19th July 2017

Upper Tribunal Judge Martin