



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/02305/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 28<sup>th</sup> August 2018

Decision & Reasons Promulgated  
On 14<sup>th</sup> September 2018

Before

UPPER TRIBUNAL JUDGE MARTIN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

IMRAN ALI  
(ANONYMITY DIRECTION NOT MADE)

Respondent

**Representation:**

For the Appellant: Mr L Tarlow (Senior Home Office Presenting Officer)  
For the Respondent: Mr J Plowright (instructed by Thamina Solicitors)

**DECISION AND REASONS**

1. This is an appeal to the Upper Tribunal by the Secretary of State in relation to a judgment of the First-tier Tribunal, Judge Sweet, promulgated on 15<sup>th</sup> March 2018 when he allowed the appeal. It was an appeal against an immigration decision

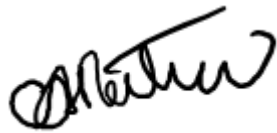
predating the new restricted rights of appeal. The Appellant had made an application for leave to remain as a student. That application was refused by the Secretary of State on the basis that it was alleged that the Appellant had cheated on an English language test and that essentially was the issue to be decided before the First-tier Tribunal.

2. The Secretary of State produced the usual bundle of evidence, which in this case included statements from Sanja Vaghela, Rebecca Collings and Peter Millington, the ETS record from the college and an expert report of Professor French dated April 2016.
3. The judge was required, in accordance with case law, in particular SM and Qadir [2016] EWCA Civ 1167 to undertake a certain process in considering this, namely firstly to consider whether the Secretary of State had met the initial evidential burden of establishing that there was reason to believe the Appellant had cheated, and if so the burden then shifted to the Appellant to proffer an innocent explanation for the evidence provided and if he could, then the Secretary of State had not satisfied the legal burden, and if he could not, she had.
4. The judge has made an extraordinarily brief decision considering the complexity of the findings to be made and in fact his reasoning appears in one short paragraph at paragraph 21. He has not followed the process SM and Qadir informs that he should, and indeed at paragraph 19 he identified the burden and standard of proof incorrectly. It is right of course that in stating that the burden of proof was on the Appellant any error favoured the Secretary of State rather than the Appellant. However, his consideration of what should have been the innocent explanation is woefully inadequate. It is telling that nowhere in the Decision and Reasons does he refer to what the ETS findings actually were. The evidence is there in the bundle but it is not referred to by the judge. The judge looked, very briefly, at the Appellant's evidence about how he got to the test centre, what took place when he got there, and the fact that he studies in and can speak English. All of that completely fails to take into account what is known about the way the cheating took place, namely that applicants attended test centres with a proxy and were there with a proxy while the proxy took the test. He has failed to take that into consideration at all and the Appellant in fact had not adduced any evidence from the test centre itself in terms of the voice recording.

### **Notice of Decision**

5. The Upper Tribunal Judge who granted permission to appeal gives detailed reasons, in similar terms as I have set out above, why permission was being granted and I find that the First-tier Tribunal judge's reasoning is woefully inadequate, has not followed the guidance of SM and Qadir and other case law concerning these issues and is therefore tainted by a material error of law and must be set aside.
6. In terms of it being redecided I will remit it to the First-tier Tribunal for a full rehearing. The initial hearing centre was Taylor House so it should be reheard at Taylor House.

7. No anonymity direction is made.

A handwritten signature in black ink, appearing to read 'Martin', written in a cursive style.

Signed

Date 12th September 2018

Upper Tribunal Judge Martin