



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

Appeal Number: HU/10559/2019 (V)

THE IMMIGRATION ACTS

**Heard at Bradford IAC by skype for
business
On 18 November 2020**

**Decision & Reasons
Promulgated
On 30 November 2020**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

**Mr MD SAMSUL AREFIN
(NO ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Lemer, Counsel instructed on behalf of the appellant

For the Respondent: Mr Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of the First-tier Tribunal ((Judge Peer) (hereinafter referred to as the "FtTJ").) By its decision, the Tribunal dismissed the Appellant's appeal against the Secretary of State's decision, dated, 7 June 2019 to refuse his human rights claim.
2. The First-tier Tribunal did not make an anonymity order and Counsel did not seek to advance any grounds as to why such an order would be necessary.

3. In the light of the COVID-19 pandemic the Upper Tribunal issued directions, inter alia, indicating that it was provisionally of the view that the error of law issue could be determined without a face to face hearing and that this could take place via Skype. Both parties have indicated that they were content for the hearing to proceed by this method. Therefore, the Tribunal listed the hearing to enable oral submissions to be given by each of the parties.
4. The hearing took place on 18 November 2020, by means of *Skype for Business*. which has been consented to and not objected to by the parties. A face to face hearing was not held because it was not practicable, and both parties agreed that all issues could be determined in a remote hearing. I conducted the hearing from court at Bradford IAC. The advocates attended remotely via video as did the appellant and his solicitors. There were no issues regarding sound, and no substantial technical problems were encountered during the hearing and I am satisfied both advocates were able to make their respective cases by the chosen means.
5. I am grateful to Mr Lemer and Mr Diwnycz for their clear oral submissions.

The background:

6. The immigration history of the appellant is set out in the decision letter dated 7 June 2019 and the decision of the FtTJ at paragraphs 2-6.
7. The appellant entered the UK with entry clearance as a Tier 4 student on 13 October 2009. His leave was valid until 20 August 2012.
8. On 20 August 2012, the appellant applied further leave to remain which was granted on 16 October 2012 until 31 July 2014.
9. On 2 April 2013, the appellant applied further leave to remain as a Tier 4 student was granted on 31 May 2013 until 22 April 2104
10. On 18 April 2014, the appellant applied further leave to remain as a Tier 4 student was granted on 19 May 2014 until 24 August 2015.
11. On 29 January 2015, the appellant's leave was curtailed, and he was served with forms IS151A and Part 2 informing him of his immigration status and liability to detention and removal.
12. The appellant sent a PAP letter to the respondent on 9 February 2015.
13. On 13 February 2105, the respondent maintained the decision.
14. On 20 March 2015, the appellant commenced judicial review proceedings which concluded when the application was struck out on the 3 January 2017.

15. On 12 February 2019, the appellant requested the decision to withdraw leave to be revoked and further to the issue of a section 10 response form on 28 March 2019, the appellant submitted additional grounds in support of a human rights claim by letter dated 9 April 2019.
16. The decision letter is dated 7 June 2019. It refers to the appellant having made a human rights application on the 9 April 2019 and that it had been "refused." The decision letter began by setting out the appellant's immigration history which I have summarised in the preceding paragraphs. The decision letter made reference to there being no reference made about a partner, parent, or dependent children in the United Kingdom under the family life rules under Appendix FM and therefore his claim was only considered under the private life route.
17. When considering a private life rules under paragraph 276ADE (1) the respondent stated that his application fell for refusal on grounds of suitability set out in section S-LTR of Appendix FM. In particular the appellant did not meet the requirements of S-LTR 4.2 and therefore did not meet the requirements of paragraph 276ADE (1).
18. The reasons given in the decision letter stated that the appellant, in support of his Tier 4 (General) student application submitted on 2 April 2013 he submitted a TOEIC certificate from Educational Testing Service ("ETS"). He stated that he had attended London School of Technology on the 27 June 2012 and undertook the speaking component of the ETS TOEIC English language test.
19. The decision letter went on to state:

"ETS has a record of your speaking test. Using voice verification software, ETS is able to detect when a single person is undertaking multiple tests. ETS undertook a check of your test and confirmed to the SSHD that there was significant evidence to conclude that your certificate was fraudulently obtained by the use of a proxy test taker. Your scores from the test taken on 27 June 2012 at London School of Technology have now been cancelled by ETS.

On the basis of the information provided to her by ETS, the Secretary of State is satisfied that your certificate was fraudulently obtained and that you use deception in your application of 2 April 2013.
20. The decision letter also noted that as he had been found unsuitable he could therefore not meet the rules on eligibility grounds. However, notwithstanding the above, consideration was given to his eligibility under Paragraph 276 ADE (1) on the basis of his private life.
21. It was noted that he was a national of Bangladesh having entered the United Kingdom on a Tier 4 student Visa on 1 October 2009. He had not lived in the UK continuously for at least 20 years, and that there would be no very significant obstacles to his reintegration into Bangladesh having spent 20 years living in his home country prior to entry to the UK and that

he would not encounter problems communicating upon return as records showed that he spoke Bengali and English. He had spent nine years in the UK compared to 20 years in Bangladesh and it was considered that he had significant experience of, and exposure to Bangladeshi culture, and would have no problems re-adapting into society there. He was currently aged 29 years old and had spent the majority of his life in Bangladesh, including his formative years. There was no evidence to show that he had any adult caring responsibilities in the UK, Bangladesh had a healthcare system which was accessible and capable of assisting him when necessary. Any relationships formed by in the UK could continue from overseas by modern communication methods. There was no evidence that he would be unable to maintain himself back in Bangladesh. It was clear from the length of time he spent in the UK that he had adequately maintained himself whilst residing in the UK. He was of working age and would be able to seek opportunities abroad therefore he could adequately support himself upon return. Having to seek employment and find accommodation in another country may be an inconvenience but it does not amount to a “very significant obstacle”.

22. The respondent went on consider whether there were any “exceptional circumstances” which would give rise to a grant of leave outside of the rules but for the reasons given in the decision concluded that it was reasonable to expect him to return to Bangladesh.
23. The decision letter then went on to make reference to a number of legal authorities including SM and Qadir (ETS - evidence - burden of proof) [2016] UKUT 0029 and cited part of the judgement dealing with the evidence of Dr Harrison and that subsequent to that decision those queries were considered an address by Prof French in a report dated 20 April 2016. It was therefore stated that in light of that, the Secretary of State maintained her view that the ETS verification system is “adequately robust and rigorous.”
24. For those reasons, the Secretary of State therefore was satisfied that his presence was not conducive to the public good because his conduct made it undesirable to allow him to remain in the UK, and his removal from the UK would be proportionate to the legitimate aim of maintaining effective immigration control.
25. It was noted that he would have been exposed to the cultural norms of that society in a significant manner and that it would not dissolve over a period of nine years in the UK. It was considered that his linguistic ties would not have been lost and whilst return to Bangladesh may initially be difficult, he would not suffer any greater hardship than other people of that nation. In addition, he had never possessed leave to remain which would have led to settlement in the United Kingdom. Consequently, he had no legitimate expectation to remain here indefinitely.
26. Consequently, his application was refused.

27. The appellant appealed that decision, and it came before the FtT (Judge Peer) on 18 October 2019. In a decision promulgated on 18 November 2019, the FtTJ dismissed the appeal under the Immigration Rules and on Article 8 grounds. In summary, the FtTJ considered the evidence advanced on behalf the respondent to demonstrate that the appellant had used deception, but for the reasons set out at paragraph [24] – [37] reached the conclusion that the respondent had discharged the evidential burden on her by reference to the generic evidence and also the specific individual evidence that related to this appellant but having considered the “innocent explanation” and weighed up the evidence, the FtTJ found that “it was more likely than not that the appellant did not use a proxy test taker” (at [37]).
28. However, in relation to the immigration rules, the FtTJ found that he could not meet paragraph 276 ADE either by reference to his length of residence or on the basis that there were “very significant obstacles to his reintegration into Bangladesh (see paragraph 39).
29. As to whether or not he should be granted leave to remain outside the immigration rules, the FtTJ addressed this at paragraphs [40 – 44].
30. At [40] the FtTJ took into account that there was no evidence as to any family life in the UK and that it was not argued on his behalf that there was family life with friends that the appellant currently lived with.
31. As to his private life the judge observed at [40] that whilst he had not provided any specific or concrete details of his private life or ties in the UK other than by reference to living with Mr Islam and his wife and child, the judge took into account that he had established a private life given the period of time he spent in the UK for the most part studying and that there would be an interference that private life if he had to leave the UK.
32. As to the issue of proportionality, the judge took into account that he lived in the UK for almost 10 years but that he had lived his majority of his life in Bangladesh and was an adult when he came to the UK to study in 2009. The judge took into account that the appellant was aware that he would be expected to return to Bangladesh at the end of his studies and there was no evidence to show that he would not be able to find employment in Bangladesh. The judge observed that the appellant had not said that he had no ties in Bangladesh but that it would be difficult as he had not told his family the full extent of the situation in the UK and as they had invested in him and supported his studies, they would not be able to support him on return. The judge found that the appellant had education and there was no evidence that he could not find work on return. The judge also found that the appellant had not given any particular or specific evidence of his private life ties in the UK, but he could retain those ties in any event through telephone and other forms of contact. The judge also took into account that his leave to remain at always been “precarious” only private life established during this time carry little weight the judge found that the “public interest lies expecting those who have no basis to

remain in the UK to leave the UK. The appellant currently has no basis to remain in the UK.”

33. At [43] the FtTJ addressed the submission based on the weight afforded to the public interest in the circumstances where the previous leave to remain was curtailed on the basis of an allegation of deception. The judge observed that his attention had been drawn to the respondent’s concession as recorded in the decision of Khan at paragraph 37.
34. The judge concluded at [44] as follows:

“the concession was made in the context of Khan and no such concession was put before me in this appeal by the respondent nor was it put me by the respondent that if I were to find the reception allegation was not made out that a decision overall would be withdrawn. It is not open to me to set aside the decision by way of remedy as he is open to the court on judicial review. The paragraph was not cited in full in Mr Lemer’s skeleton nor whether any detailed submissions or evidence as to whether the appellant circumstances fell within the scope of the concession and, if so, on what basis and I find that it would not be appropriate for me to make any specific findings in relation to the interpretation, scope or application of the concession in any event. Although, I have not upheld the allegation of deception. I further do not find that it is open to me to determine the public interest in immigration control carries less weight in the balancing exercise I am required to carry out. There is no evidence or indication before me that it would be unreasonable to expect the appellant to return to Bangladesh or of any exceptional circumstances. Taking account of all circumstances and evidence, I find that the respondent has shown that the decision is a necessary, justified and proportionate decision.”

The hearing before the Upper Tribunal:

35. Permission to appeal was sought and was granted on 17 April 2020 by FtTJ Boyes who stated as follows:

Permission is granted.

“the grounds assert that the judge erred in the assessment of proportionality under Article 8 outside the Rules and in relation to the Article 8 decision generally. I have had sight of the grounds and the judgment.

The grounds are clearly arguable for the reasons given in the application. I need say no more than that. “

36. Mr Lemer relied upon the written grounds of appeal. There were also further written submissions submitted by direction of the Upper Tribunal dated 22 July 2020.
37. There were also written submission filed on behalf of the respondent dated 6 July 2020. Mr Diwnycz on behalf of the respondent relied upon those written submissions.

38. I also heard oral submission from the advocates, and I am grateful for their assistance and their clear oral submissions. I intend to address the submissions made by the when addressing the grounds.
39. There is a preliminary point to determine. At the outset of the hearing, Mr Diwnycz stated that he applied for a stay of these proceedings. This was on the basis that the Upper Tribunal were to hear an appeal dealing with TOEIC issues. He was not able to provide any more information nor was he able to address why the issues in the forthcoming appeal impacted on this particular appeal.
40. Mr Lemer on behalf of the appellant resisted any such application on the basis that it had not been demonstrated why a stay was sought by reference to this particular appeal. He also stated that his instructing solicitors had been in recent contact with the respondent via another senior Presenting Officer and no reference was made to any application for a stay.
41. Having set out the basis of the stay application, I am not satisfied that it has been properly explained why a stay of these proceedings is appropriate. Notwithstanding the lateness of the application, there is no indication of how the forthcoming appeal affects this present appeal. I therefore refuse the application to stay these proceedings.

The grounds of challenge:

42. Whilst this is an appeal brought by the appellant, in the written submissions provided by the respondent, they raised grounds challenging the decision reached on the deception issue.
43. There is no dispute between the parties that the respondent is entitled to raise this issue in the light of the decision of The Secretary of State for the Home Department v Devani [2020] EWCA Civ 612 and as set out in the respondent's written submissions at paragraphs 15-16.

The ETS issue:

44. The written submissions submit that the decision of the FtTJ was flawed for three reasons. Firstly, in reaching a conclusion at [37] the judge failed to have regard to the respondent's evidence recorded at [31] that results of the tests at the test centre where the appellant undertook the test appeared to show widespread cheating. There was no evidence of any valid tests taken on that day. This was consistent with the decision in MA (ETS- TOEIC testing) Nigeria [2016] UKUT 450 at paragraph 44. As this was powerful evidence that showed prima facie the evidence of fraud on a significant level it should have been addressed by the judge.
45. The second error is the FtTJ's reliance on the appellant in this language ability at the appeal hearing. It is submitted that this was a highly material issue to the judge's assessment of the appellant's credibility (at [37]), where the judge stated "the appellant has provided oral evidence and

objective evidence pertaining to his competence in English at the time of the impugned test potentially raising an innocent explanation.” It is submitted that the FtTJ’s approach was flawed because the appellant’s oral evidence at the hearing which was over seven years after he took the test could not possibly pertain to his ability back then. As the Upper Tribunal has cautioned against placing much reliance on appellant’s ability in English before the FTT, the FtTJ here has not been cautious and there has been a substantial period of over seven years between the time when the appellant took the test and his evidence before the tribunal in which time one would have expected that having lived and worked in the UK spoken English would have improved significantly.

46. The last point relied upon by the respondent is that the judge erred in law in the approach at [37]. The FtTJ simply found the appellant did not cheat because he provided an innocent explanation but has not applied the “evidential boomerang” that was required which would have included the specific evidence about the cheating.
47. Mr Lemer addressed these points in his written submissions and his oral submissions. He submitted that the FtTJ heard extensive oral evidence from the appellant was cross examined. He reminds the tribunal that an appeal court should be reluctant to interfere with findings of fact made at first instance and on the present case, there is no such basis for interfering with the decision of the FtTJ.
48. In his grounds he cites the well-known cases of Datec electronic Holdings Ltd v UPS Ltd [2007] 1WLR 1325 [46] and the decision of the Supreme Court in McGraddie v McGraddie [2013] 1 WLR 2477 at paragraphs 2 – 3.
49. He further submits that the respondent is incorrect to suggest that the judge took into account the appellant’s English language ability at the hearing. He submits that the judge in fact placed reliance on the evidence as to the appellant’s English-language levels at the time of the impugned TOEIC test as set out at paragraph 37 of the decision. Any reference to the appellant’s English-language at the hearing related to a description of the manner in which the appellant gave his account of taking the impugned English language test which was set out at paragraph 35.
50. As to the submission that the judge applied the wrong approach the burden of proof, Mr Lemer submits that the FtTJ correctly applied the evidential “boomerang” as set out at paragraphs [34] and [37].
51. No further oral submissions were made in reply by the respondent; Mr Diwnycz relied upon the written grounds.
52. I have therefore carefully considered the written and oral submissions of the parties. Having done so I am not satisfied that the decision of the FtTJ discloses the making of an error on a point of law in the way advanced on behalf of the respondent.

53. I shall set out my reasons for reaching that decision.
54. The respondent submits that the FtTJ failed to apply the correct legal approach when reaching a decision on the issue of whether the appellant engaged in deception. In the decision of SM & Qadir [2016] EWCA Civ 1167 the three-stage approach was summarised. That involves considering, first, whether the Secretary of State has met the burden on her of identifying evidence that the TOEIC certificate was obtained by deception; second whether the claimant satisfies the evidential burden on her of raising an innocent explanation for the suggested deception; and third, if so, whether the Secretary of State can meet the legal burden of showing, on the balance of probabilities, that deception in fact took place. Contrary to the written submissions, and when reading the decision as a whole, I am satisfied that the FtTJ did apply the correct approach. I do not find that there is any error in the judge's assessment of the correct legal test or the evidence. At [34] the FtTJ set out the jurisprudence and expressly made reference to the "boomerang" approach and the shifting burden.
55. It is plain from reading the decision that the judge properly reached the conclusion at paragraph [34] that the respondent had discharged the initial evidential burden. Whilst the FtTJ was critical of the evidence advanced on behalf of the Secretary of State, which was either illegible or missing, it was open to the FtTJ to consider that the information in Annex A and Annex B when taken together indicated that the results for tests taken on 27 June 2012 by a person with the appellant's name and date of birth at the London School of Technology were considered invalid.
56. It is also plain from reading the evidence referred to in the decision that the appellant had offered an innocent explanation thus the judge was required to consider the evidence as a whole to consider whether the respondent discharged the burden on him to demonstrate that deception had taken place on the balance of probabilities. At [37] the FtTJ carried out that exercise as can be seen from his conclusion "*...the Respondent has not proved to the required legal standard that the appellant has used deception in the past to obtain leave to remain in the UK*".
57. The respondent also asserts that the FtTJ erred in the reliance placed on the appellant's English Language ability at the appeal hearing. However, the submissions made on behalf of the respondent fails to properly consider the FtTJ's decision and in particular paragraph [37]. The FtTJ was not referring to his level or proficiency in English at the date of the hearing but was in fact referring to the level of English at the time of the impugned test and placing reliance on other material relevant to the issues. At [35] the FtTJ identified that evidence- that in August 2012 he was awarded a level 5 HND in business and in 2013-2104 he as studying for a degree with the University of Sunderland.
58. At paragraph [36], the FtTJ directed himself to the decision of MA Nigeria [2016] UKUT 450 and expressly paragraph [57] which states; "second, we

acknowledge the suggestion that the Appellant had no reason to engage in deception which we have found proven. However, this has not deflected any way from reaching our main findings and conclusions. In the abstract, of course, there is a range of reasons why persons proficient in English may engage in TOEIC fraud. These include, in exhaustively, lack of confidence, fear of failure, lack of time and commitment and contempt for the immigration system. These reasons could conceivably overlap in individual cases and there is scope for other explanations the deceitful conduct in the sphere. We are not required to make a further finding of why the Appellant engaged in deception and to this we add that this issue was not explored during the hearing. We resist any temptation to speculate about this discrete matter.”

59. The decision in MA was a statutory appeal and the evidence before the Upper Tribunal was more extensive than it had heard before in SM and Qadir. In particular, the ETS voice files of the appellant had been obtained and it was agreed that the voice was not his. However, he challenged whether the file was indeed a recording of the test he had taken and there was evidence from three experts exploring the issues of how the wrong file may have been supplied. At [47] the Upper Tribunal acknowledged that there were “enduring unanswered questions and uncertainties relating in particular to the systems processes and procedures concerning TOEIC testing and in the subsequent allocation of scores in the later conduct and activities of ETS.” Accordingly, much still turned on the Upper Tribunal’s assessment of the appellant’s oral evidence. They found his evidence to be a fabrication. Both parties have therefore emphasised that “the question of whether a person is engaged in fraud in procuring a TOEIC in this language proficiency qualification will invariably be intrinsically fact sensitive.”
60. As Mr Lemer submits, the FtTJ reaching an overall conclusion, the judge was entitled to take into account the appellants English language ability at the time of the impugned test. It was open to the FtTJ to reach the conclusion that it was not credible that he would use a proxy in an area of skill in which he was proficient (at [37]). When applying the dicta in MA (Nigeria) are set out above, it was open to the judge to conclude that in the light of his experience and ability there was no reason why he needed to cheat.
61. The last point raised submits that the FtTJ erred in not considering that there were no valid tests at the centre. As Mr Lemer submitted, the evidence was set out in the FtTJ’s decision at [31] where the FtTJ expressly made reference to that evidence and recorded that the test centre look up tool showed that 190 tests had been undertaken on 27 June 2012 and 89 were invalid and 101 were questionable. In this context I have also considered the decision of the Court of Appeal to the decision in The Secretary of State for the Home Department v Shehzad [2016] EWCA Civ 615 and in particular paragraph 30 where the court contrasted “invalid” results with those of “questionable”. What is set out at paragraphs [25 - 30] of that decision is that a questionable designation means there may

not have been deception because unlike where there has been an invalid designation, there was not a matched voice with the person who took a test using a different name. The Court of Appeal concluded that the Secretary of State would face difficulties in respect of the evidential burden if there is no individual evidence which shows that test results were invalid.

62. Therefore, even if there were “questionable” results that was not sufficient to demonstrate that those tests were the results of deception.
63. The FtTJ had the advantage of hearing the appellant give oral evidence and for that to be the subject of cross-examination. As Mr Lemer set out both in his written and oral submissions, the Upper Tribunal should not interfere with a decision of the FtT unless satisfied that there is an error of law. In my judgment, it is plain from reading the decision that the FtTJ did identify some matters that troubled him when considering the appellant’s account (set out at [35] and returned to at [37]) but I am satisfied that the FtTJ carefully weighed up the evidence as a whole before reaching his final conclusions at [37].
64. In this context I remind myself of the words of Lord Justice Underhill in Ahsan (as cited) at paragraph 33 and that although it seems clear that deception took place on a wide scale it does not follow that every person who took the TOEIC test was engaging in deception.
65. Given the evidence that I have set out above, that was a decision that was open to the judge to reach. Having considered the evidence that was before the Tribunal and in the light of the grounds, I am not satisfied that the judge erred in law in reaching that decision.
66. I now turn to the grounds advanced on behalf of the appellant.

The appellant’s grounds:

67. In the original grounds, it is submitted that it had been argued before the FtTJ that in the event of a finding that the appellant had not used deception, the appellant would have accrued 10 years lawful residence and that this was of material relevance to the question of proportionality and that the weight attached to the public interest would be reduced.
68. It is further argued that the FtTJ erred in his conclusions set out at paragraphs [42-44] of his decision when addressing the decision of Khan.
69. Thus, Mr Lemer challenges the FtTJ’s consideration of the decision in Khan. He submits that the FtTJ failed to properly address the concession and that he erred in law in his assessment that the public interest should not be reduced in the light of the favourable outcome on the issues of deception.
70. The third point made on behalf of the appellant is that the FtTJ failed to make any findings as to the relevance of having potentially satisfied the

ten years lawful residence requirement but for the unlawful curtailment of his leave.

71. In the written submissions relied upon by the respondent, there was no engagement with the points made in the original grounds advanced on behalf of the appellant. This was set out in the response by Mr Lemer at paragraph 4. The only submission made is that at paragraph 17 which states that in the event that the Upper Tribunal declined to find that the FtTJ erred in law (in relation to the ETS issue) and also agrees with the respondent that the Judge did not err in dismissing the appellant's article 8 claim, the respondent accept the appellant still falls be granted a period of 60 days leave to enable him to make a fresh application pursuant to the respondent's own policy guidance, and thus invites the tribunal to dismiss the appeal but to issue a short form of wording to give effect to the policy.
72. I shall deal with the third point raised by Mr Lemer first. Whilst it is submitted that the appellant satisfied the ten years lawful residence requirement (see appellant's written submissions), as Mr Lemer effectively conceded in his later written submissions and his oral submissions, the respondent is correct to state that at the date of the application , the appellant had not accrued ten years residence. Nor would he be able to argue before the FtTJ that in the event of having been found not have used deception, that he should have succeeded on the basis of having ten years lawful residence as this would constitute a " new matter" and would have required the consent of the respondent. Furthermore, as the respondent's written submissions point out, the appellant had not provided evidence that he met the other requirements necessary, for example, that he had demonstrated sufficient knowledge of life in the UK in accordance with Appendix KoLL.
73. That said, I am satisfied that the FtTJ erred in his assessment as to how his finding that the appellant had not used deception in his previous application should be taken account of in the proportionality assessment. I am also satisfied that in this context he did not properly apply the decisions in Khan and Ahsan.
74. Paragraph 37(ii) of Khan stated that for those whose leave was curtailed "a further opportunity for the individuals to obtain leave" would be provided "with the safeguards in paragraph (iii) below". Paragraph (iii) confirmed that in making any future decision the Respondent would "not hold any previous gap in leave caused by an erroneous decision in relation to ETS against the relevant applicant and will have to take into account all the circumstances of each case". Further, whilst paragraph 37 records the respondent's undertakings, the clear ratio of both Khan and Ahsan is that a person who has been subject to an erroneous decision in relation to an ETS decision must not be put in a worse position than if the adverse decision - in this case a curtailment decision - had not been made.
75. Paragraph 120 of Ahsan v SSHD [2017] EWCA Civ 2009 reads as follows;

"The starting-point is that it seems to me clear that if on a human rights appeal an appellant were found not to have cheated, which inevitably means that the section 10 decision had been wrong, the Secretary of State would be obliged to deal with him or her thereafter so far as possible as if that error had not been made, i.e. as if their leave to remain had not been invalidated. In a straightforward case, for example, she could and should make a fresh grant of leave to remain equivalent to that which had been invalidated. She could also, and other things being equal should, exercise any relevant future discretion, if necessary "outside the Rules", on the basis that the appellant had in fact had leave to remain in the relevant period notwithstanding that formally that leave remained invalidated. (I accept that how to exercise such a discretion would not always be easy, since it is not always possible to reconstruct the world as it would have been; but that problem would arise even if the decision were quashed on judicial review.) If it were clear that in those ways the successful appellant could be put in substantially the same position as if the section 10 decision had been quashed, I can see no reason in principle why that should not be taken into account in deciding whether a human rights appeal would constitute an appropriate alternative remedy. To pick up a particular point relied on by Mr Biggs, I do not regard the fact that a person commits a criminal offence by remaining in the UK from (apparently) the moment of service of a section 10 notice as constituting a substantial detriment such that he is absolutely entitled to seek to have the notice quashed, at least in circumstances where there has been no prosecution. (It is also irrelevant that the appellant may have suffered collateral consequences from the section 10 decision on the basis that his or her leave has been invalidated, such as losing their job; past damage of that kind cannot alas cannot be remedied by either kind of proceeding.)"

76. Both the decisions in Ahsan and Khan are primarily concerned with the availability and nature of a right of appeal in which the respondent's allegation of proxy test taking could be fairly considered on the merits. The decision in Ahsan involved direct challenges to decisions to remove taken under s.10 of the Immigration and Asylum Act 1999, as it was prior to the amendments wrought by the Immigration Act 2014. The decision in Khan, was concerned with the appeals regime introduced by the Immigration Act 2014, involved direct challenges to curtailment decisions in respect of which there were no rights of appeal. A compromise was reached by the parties in Khan in which the appellants would make human rights claims and, if they were successful in a subsequent human rights appeal on the basis that they did not cheat, save in the absence of a new factor, the respondent would rescind her curtailment decisions and afford them a reasonable opportunity to secure further leave to remain [23].
77. The Court of Appeal set out the Secretary of State's written position at [36] and [37]. Paragraph [37] reads,

"Further, at para. 8 of the note, it was stated:

"Nonetheless, for the avoidance of doubt, the SSHD confirms that:

- (i) For those individuals whose leave was curtailed, and where that leave would still have time to run as at the date of an FTT determination that there was no deception, subject to any further appeal to the UT, the curtailment decision would be withdrawn and the effect ... would be that leave would continue and the individuals would not be disadvantaged in any future application they chose to make;
- (ii) For those whose leave has been curtailed, and where the leave would in any event have expired without any further application being made, the Respondent will provide a further opportunity for the individuals to obtain leave with the safeguards in paragraph (iii) below.

For those whose leave had expired, and who had made an in time application for further leave to remain which was refused on ETS grounds, the effect of an FTT determination that there was no deception would be that the refusal would be withdrawn. The applicant in question would still have an outstanding application for leave to remain and the Respondent will provide them with a reasonable opportunity to make any further changes to their application which would be considered on the basis of them not having employed any deception in the obtaining of their TOEIC certificate, and they would in no way be disadvantaged in any future application they chose to make.

- (iii) In all cases, the Respondent confirms that in making any future decision he will not hold any previous gap in leave caused by any erroneous decision in relation to ETS against the relevant applicant, and will have to take into account all the circumstances of each case.

However, the Respondent does **not** accept that it would be appropriate for the Court now to bind him as to the approach that he would take towards still further applications in the future, for example by stating that each applicant has already accrued a certain period of lawful leave. The potential factual permutations of the cases that may need to be considered are many and various. In some cases, for example, it will be apparent that, whilst on the facts as presented at the appeal an appellant's human rights claim is successful, he would not have been able to obtain leave at previous dates. Again, this issue will have to be dealt with on a case by case basis." (Bold in original)"

78. The decisions do not set out how a human rights application should be decided in the event of a finding, such as in this appeal, that the respondent has not discharged the burden and thus deception has not been proven. However, when reading paragraph 120 of Ahsan, it states that in the light of any judicial finding made, the respondent would provide that person with a further opportunity to make any application or to be put in the position they would have been.

79. This is consistent with the respondent's own policy which is set out at **Educational Testing Service (ETS): casework instructions, Version 3.0 (published 28 August 2020)**, page 9:
- “If the appeal is dismissed on human rights grounds but a finding is made by the Tribunal that the appellant did not obtain the TOEIC certificate by deception, you will need to give effect to that finding by granting sixty days leave outside the rules. This is to enable the appellant to make any application they want to make or to leave the UK.”
80. Whilst this is not the policy in force at the date of the decision, the relevant paragraph set out above was similarly set out in the earlier policy and reference is made in the respondent's written submissions.
81. Whilst the respondent submits that it was open to the FtTJ to dismiss his article 8 claim on the basis of the wording of the policy in which the respondent would accept that the appellant still falls to be granted a period of 60 days leave, I do not think that that submission properly takes account of the binding authorities. Nor do I consider that that is a proper assessment of the Article 8 claim.
82. If the binding authority were followed by the FtTJ in the appellant's case the FtTJ should have properly taken account of the favourable finding on the issue of deception. The FtTJ was in error by stating at [44] that he did not have evidence of the appellant's position. The FtTJ had earlier set out the appellant's immigration history and was thus aware that his leave had been curtailed as a result of the allegation of deception being made.
83. In the light of the FtTJ's finding that the respondent had failed to prove TOEIC fraud the FtTJ should have taken that into account in his assessment of proportionality and if he had done so would have likely to have found that it would be disproportionate to remove the appellant pursuant to the decision appealed against, because there would be no public interest capable of justifying removal in the light of the respondent's duty set out in Khan, and Ahsan at para. [120].
84. The judge's error was plainly material because it led him to attach no significance when conducting the Article 8 proportionality assessment to the legal significance (following Ahsan and Khan) of the erroneous decision to curtail the appellant's leave. I am therefore satisfied that the FtTJ fell into error in the way submitted by Mr Lemer and set out in the original grounds. Accordingly, I set aside the decision of the judge.
85. Consequently, as I have found that the FtTJ's findings on the ETS issue were open to the FtTJ to make and there is no error of law as asserted on behalf of the respondent, I have considered the appropriate outcome on the facts and in the light of the jurisprudence set out above. Having done so and applying the five-step approach set out in Razgar I am satisfied that Article 8 is engaged and that there is an interference with the appellant's private life and that it is not in accordance with the law, in

the light of the decision in Khan and Ahsan. Even if I were wrong about that, I am satisfied that when considering the issue of proportionality, that it constituted a very compelling circumstance going directly to the issue of the public interest consideration and thus his removal would be disproportionate. It therefore follows that the outcome should be to allow the appeal. It is clear from the reasoning set out above that, pursuant to section 8 of the Human Rights Act 1998, the appropriate remedy is for the respondent to grant a short period of further leave to remain, not less than 60 days, together with confirmation that previous gaps will not be held against him. Such a remedy would be consonant with what was envisaged as appropriate in the decisions of Ahsan and Khan and would enable the appellant to make any necessary further application.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law.

The decision is set -aside and I re-make the decision. I allow the appeal on human rights grounds.

No anonymity direction is made.

Signed Upper Tribunal Judge Reeds

Dated 19 November 2020

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be received by the Upper Tribunal within the appropriate period after this decision was sent to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent.
2. Where the person who appealed to the First-tier Tribunal is in the United Kingdom at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is 12 working days (10 working days, if the notice of decision is sent electronically).
3. Where the person making the application is in detention under the Immigration Acts, the appropriate period is 7 working days (5 working days if the notice of decision is sent electronically).
4. Where the person who appealed to the First-tier Tribunal is outside the United Kingdom at the time that the application for permission to appeal is made, the appropriate period is 38 days (10 working days, if the notice of decision is sent electronically).
5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday, or a bank holiday.
6. The date when the decision is "sent" is that appearing on the covering letter or covering email.