Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/17090/2019 (V)

THE IMMIGRATION ACTS

Heard at Bradford by Skype for business	**Decision & Reasons Promulgated**
On the 9 September 2020	**On the 28 September 2020**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

AND

MR MD ASHRAFUL ISLAM

Respondent

Representation:
For the Appellant: Ms. R. Pettersen, Senior Presenting Officer
For the Respondent: Mr Biggs, Counsel instructed on behalf of the appellant

DECISION AND REASONS

Introduction**:**

1. The Secretary of State appeals, with permission, against the determination of the First-tier Tribunal (Judge Khosla) promulgated on 13 February 2020. By its decision, the Tribunal allowed the Appellant's appeal against the Secretary of State's decision, dated, 2 October 2019 to refuse his human rights claim. 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.

2. For the purposes of this decision, I refer to the Secretary of State for the Home Department as the respondent and to Mr Islam as the appellant, reflecting their positions before the First-tier Tribunal.

3. The hearing took place on 9 September 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. 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.

4. I am grateful to Ms Pettersen and Mr Biggs for their clear oral submissions.

Background:

5. The appellant's immigration history is summarised in the decision of the FtTJ at paragraphs 2-17. I also have copies of some of the documentary evidence relating to various applications made in the appellant's bundle. The appellant is a citizen of Bangladesh. He entered the UK as a Tier 4 General migrant in early 2010 and made an application to extend his stay in the UK under the Tier 1 entrepreneur arrangements. This was refused on 3 May 2013 with a right of appeal. The appellant lodged an appeal against the decision but withdrew the appeal on 12 March 2014. He thereafter lodged an out-of-time application as a Tier 4 general migrant which was refused on 9 September 2014 without a right of appeal. The papers refer to the respondent having made a decision to remove the appellant from the UK on 16 November 2014 on the grounds that he had relied upon a fraudulent English language certificate.

6. On 27 November 2014, the appellant lodged judicial review proceedings against the decision. The following history is taken from the statement of reasons at page 348 AB.

7. On the 14 January 2016, the Upper Tribunal refused permission on the basis that the appellant had filed grounds out of time nd that he had an out of country right of appeal against the removal decision. The UT certified the case as " totally without merit". The appellant sought permission to appeal to the Court of Appeal, but this was refused on 2 February 2016.

8. On 27 December 2016, the appellant lodged a claim for asylum. This was refused on 15 June 2017 with a right of appeal. The appellant lodged an appeal against the decision which was dismissed by the First-tier Tribunal on 11 August 2017.

9. The appellant sought permission to appeal the decision of the First-tier Tribunal which was granted. The application for permission to appeal went before Deputy Upper Tribunal Judge Lewis on 23 January 2018 who, by decision dated 19th February 2018 dismissed the appellant's appeal.

10. In the interim, the appellant had notified the respondent that he wished to voluntarily depart the UK taking advantage of the respondents assisted voluntary return scheme.

11. On 19th February 2018, being the same day his appeal was dismissed by the Upper Tribunal, he notified the respondent that he no longer wish to return to Bangladesh that wish to appeal the decision on his most recent Tier 4 application citing the decision in Ahsan.

12. On the 27 March 2018 he applied to the Upper Tribunal to reinstate the JR proceedings.

13. On the 23 April 2018, an application for permission was made to the Court of Appeal to re-open the proceedings and the decision of the Upper Tribunal made on 14 January 2016.

14. On 15 August 2018, the application was stayed pending the hearing of a number of linked cases to consider the issue of re-opening cases on the basis of a change in the common law. This was subsequently settled, and the hearing listed was vacated on the 6 November 2018.

15. On 17 January 2019, a consent order was sealed by the Upper Tribunal agreeing for the withdrawal of the re-instatement application on the basis that the respondent had made an offer of settlement.

16. The FtTJ states at paragraph 7 that it was then said that the appellant's judicial review claim was conceded. There is an order of the Court of Appeal confirming that the appellant's judicial review had been compromised. It is set out at page 347 AB.

17. The consent order makes reference to "the appellant having proposed to make or reiterate the human rights submission/claim that was submitted to the respondent on 27 December 2016 challenging his removal from the United Kingdom on the basis that it would breach his rights under article 8 of the ECHR and to provide further representations and evidence upon which he wishes to rely within 28 days of the consent order". The respondent agreed that he would use his best endeavours to decide any such human rights claim within three months thereafter.

18. At paragraph 3 of the consent order the following is stated:-

> "3. The respondent agreeing that in the event that the First-tier Tribunal finds in an appeal from the refusal of such human rights claim that the appellant did not cheat:
>
> (a) the respondent will take reasonable steps to put the appellant into the position he would have been had the allegation under section 10 removal decision based upon it, not been made; and
>
> (b) should a further application for leave repeat all or part of the course that the appellant was studying when his leave was curtailed (or undertake a similar course at a different institution), and should that additional time raise any possible issue with

> regard to academic progression, (where the five year or otherwise), the respondent will take into account all the circumstances of the case, and in particular in deciding his application will act reasonably to ensure that as far as practicable, the appellant is not disadvantaged by an earlier wrong finding of deception."

19. As a result of the respondent's concession in the judicial review matter, a decision was taken by the respondent in the appellant's human rights claim.

20. The decision letter is dated 2 October 2019. It refers to the appellant having made a human rights application for leave to remain in the United Kingdom on the basis of his private life established since entering the United Kingdom. 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.

21. 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).

22. The reasons given in the decision letter stated that the appellant, in support of his Tier 4 (General) student application submitted on 18 March 2013 (2014?) submitted a TOEIC certificate from Educational Testing Service ("ETS"). He stated that he had attended London College of Media and Technology on 21 August 2012 and undertook the speaking component of the ETS TOEIC English language test.

23. 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 21 August 2012, London College of Media and 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. In fraudulently obtaining a TOEIC certificate in the manner outlined above, you willingly participated in what was clearly an organised and serious attempt, given the complicity of the test centre itself, to defraud the secretary of state and others. In doing so you displayed a flagrant disregard for the public interest, according to which migrants are required to have

a certain level of English-language ability in order to facilitate social integration and cohesion, as well as to reduce the likelihood of them being a burden on the taxpayer.

Accordingly, I am satisfied that you have made false representations in a previous application for leave to remain in United Kingdom. Your application is therefore refused at paragraph 276 ADE(1) (i) with reference to S-LTR 4.2 of the Immigration rules."

24. 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. It was noted that he was a national of Bangladesh having entered the United Kingdom on a Tier 4 student Visa valid from January 2010 until 31 December 2012. The respondent considered that it was reasonable for him to leave the United Kingdom because he had not held any legal leave to remain in the United Kingdom since 31 December 2012 and therefore the private life established has, for the most part, been illegally obtained. In addition, having entered as a student this was not a path to settlement and thus could have no reasonable expectation of acquiring further leave following the expiration of the student visa. The decision letter went on to state that there would be no very significant obstacles to his reintegration into Bangladesh having entered the United Kingdom aged 28 years old, having spent all of his life up to that point in Bangladesh, including all his childhood and formative years. He had not claimed to have an immediate family in the UK and it was not accepted that he had no ties to Bangladesh given the length of time he resided there.

25. 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 Pakistan. Consequently, his application was refused.

26. The appellant appealed that decision and it came before the FtT (Judge Khosla) on 13 December 2019. In a decision promulgated on 13 February 2020, the FtTJ allowed the appeal on Article 8 grounds. In summary, the FtTJ considered the evidence advanced on behalf the respondent to demonstrate that the appellant had use deception, but for the reasons set out at paragraph [63] –[68] reached the conclusion that the respondent had not discharged the evidential burden on her by reference to the generic evidence and also the specific individual evidence that related to this appellant. The judge also went on to make a number of adverse findings in relation to the appellant. In particular, the FtTJ found that the appellant's evidence concerning his application as a Tier 1 entrepreneur was "most unsatisfactory" and that he had not been entirely truthful about his motivations for sitting the TOEIC test in relation to that (at [72]). The judge also made a number of findings of fact concerning the appellant's English-language ability at paragraphs [77]- [81] and that he concluded at [82] that the appellant spoken English was below the level which would

have been expected him to meet the English language requirement to extend his stay under either the Tier 1 arrangements of the Tier 4 general arrangements. At [83] he found that at least one of the reasons did not complete his course was that he was unable to keep up with his studies due to his poor English. The consequence of this was that at [85] he would not have succeeded in his Tier 4 application. At [88] the judge considered the consent order but found that the appellant had not had his leave curtailed and that he had been an overstayer having made an out of time application for leave to remain and had not embarked on any course.

27. The FtTJ found that the appellant enjoyed a private life in the UK and accepted there would be an interference with the appellant's private life, but in the light of his conclusion that the respondent not made out the allegation of fraud against the appellant, the decision to refuse his application based as it was, on the unproved allegation of fraud, was not in accordance with the law (at [91]). He therefore concluded that in the light of his finding at [91] the appellant's removal was also not in accordance with the law. He therefore allowed the appeal on article 8 grounds but added the observation it [99] that whilst the case against the appellant was unproven, and that the appellant would not have been in a different position because of the allegation (that is Tier 4 general application would have fallen to refused due to his inability to communicate in English), that it would be a matter for the respondent "what she decides to do with the appellants matter in the light of my disposal of the appeal in his favour but that she may wish to take note of my findings". He therefore allowed the appeal under article 8 on the basis of the decision was unlawful under section 6 of the HRA 1998.

28. Permission to appeal was issued on behalf of the Secretary of State and on 21 May 2020 permission was granted by FTJ Fisher. There was no cross-appeal on behalf of the appellant.

<u>The hearing before the Upper Tribunal:</u>

29. 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.

30. Ms Pettersen relied upon the written grounds of appeal. There were no further written submissions.

31. No written submissions were filed on behalf of Mr Islam in the form of a Rule 24 response. However, at the end of his oral submissions Mr Biggs provided a copy of his speaking note (sent by email to the Tribunal and to Ms Pettersen).

32. I also heard oral submission from the advocates, and I am grateful for their assistance and their clear oral submissions.

33. The written grounds submit that the FtTJ made a material misdirection in law by failing to adequately correctly to assess the burden of proof in line with the case of SM and Qadir (ETS-Evidence -Burden of Proof) [2016] and that the judge failed to give adequate reasons for why he considered the respondent's evidence was insufficient to meet the burden required.

34. It is further submitted that the FtTJ "misinterpreted the evidence" and at the evidence relied upon by the respondent showed that the appellant's English language test had been invalidated.

35. The grounds rely upon the report relied upon which referred to the evidence of Prof French and had the FtTJ property considered the respondent's evidence it would have been clear that deception had been demonstrated to the standard balance of probabilities.

36. The grounds refer to the material findings of the judge at paragraphs 83 – 85 (that referred to his assessment of the evidence as to why he had not completed his course at Icon College, that he had found that the appellants written English is poor and that his spoken English was very poor and that even if he had taken a bona fides test, he would not have passed the test for the language requirement. The grounds submit that " it is respectfully submitted that the test is not whether the appellant speaks English poorly, but whether on the balance of probabilities, the appellant employed deception. The witness statement and the spreadsheet provided the necessary evidence to demonstrate that he did employed deception."

37. The grounds challenge the findings made at [67] which referred to the evidence submitted on behalf of the respondent and his conclusion that the respondent had not discharged the initial evidential burden. The grounds submit "there may be reasons why person it was not able to speak English to the required level would nonetheless cause or permit a proxy candidate to undertake a ETS test on their behalf, or otherwise to cheat" (citing the decision in MA (Nigeria)).

38. It was submitted that the appellant's difficulties within this language did not mean that the appellant personally took the test but that the programme shows students standing next terminals while proxy test-takers took the test for them and the methods used "would not preclude candidates and having travelled the test centre and having knowledge of procedures and content of the test itself, even though they not take it personally.

39. The grounds then refer to the conclusion made by the judge that "he was unable to say one way or the other that the appellant cheated given the lack of evidence specific to the appellant and the appellant's less than satisfactory evidence" but that the judge then stated at [99 – 100] that whilst he found the case against the appellant unproven, the appellant would not have been in a different position because of the allegation

because his tier 4 general application would have been refused due to his inability to communicate in English to the requisite standard. The judge stated “it will be a matter for the respondent what she decides to do with the appellant matter in the light of my disposal of his appeal in his favour, but she may wish to take a note of my findings in particular paragraph 88 of my decision and reasons.” The grounds submit that the judge erred in law by failing to give adequate reasons for holding that this appellant had a poor command of English would therefore have no reason to secure a test certificate by deception.

40. The grounds state “the judge is being ambiguous by allowing this appeal, despite not being satisfied at the level of evidence being provided by the appellant, then asking the respondent to grant a period of leave?”

41. In summary it is submitted that the evidential burden was met and that the evidential burden fell upon the appellant to offer an innocent explanation, he has not done so. The judge had not appreciated that the evidential burden was met and that had the judge properly considered the evidence deception, the tribunal would have reached a different conclusion.

42. The grounds then turn to the human rights claim and states that the judge was “overly generous” in his considerations as to his private life because the appellant had was a citizen of Bangladesh who lived there until adult hood, was in good health and has family in India, lingual (sic) and cultural ties to Bangladesh. Whilst the grounds then refer to him being in a relationship with a British citizen, Ms Pettersen indicated that that was in error.

43. In her oral submissions, she submitted that the FtTJ’s finding that his level of English was not to the requisite standard and considered his account of taking the test and the appellant’s evidence that it was not his voice on the records all went against his overall credibility and this was relevant to the FtTJ’s finding that the Secretary of State had not made a prima facie case of deception.

44. She submitted that the judge had referred to the APPG report and that the criticisms were not addressed in the witness statements submitted on behalf of the respondent from Mr Vaghela (dated December 2019). However, it was irrelevant because the witness statement referred to the lookup tool and therefore the onus was on the appellant to provide a credible or legitimate explanation for the circumstances relating to the test.

45. Mr Biggs, Counsel on behalf of the appellant had not submitted a written Rule 24 response prior to the hearing but at the conclusion of his oral submissions sent by email a “speaking note”. This is replicated below.

46. There are no errors of law as pleaded in the grounds of appeal.

(1) There is no particularised "*misdirection*" of law (error of law), and in the light of the FTTJ's careful review of the relevant legal principles and authorities at paras. 19-32.

(2) In the light of the unchallenged (and unchallengeable) findings of the FTTJ as to the background to the respondent's "*specific evidence*" and it is clear flaws, at paras. 63-68 (also note the submission at para. 50-51 and 58, which submissions the FTTJ seems to have accepted) the judge was correct (or perhaps it was open to him) to find that the respondent had failed to provide the required "*cogent*" evidence to discharge the evidential burden in respect of the allegation of dishonesty.

(3) There is nothing in the point that the FTTJ held that the decision appealed against was not in accordance with the law. As a result of the respondent's reliance in that decision on the unestablished allegation of TOEIC cheating, it was clearly vitiated by a material public law error. As such removing the appellant pursuant to the decision would breach article 8, so that the ground of appeal available under s.84(2) NIAA was satisfied and the appeal fell to be allowed, applying s.85-86 of the NIAA: an unlawful decision cannot be justified pursuant to article 8 (2), (Lord Bingham's 3rd of the five-stage test at Razgar at para. [17] asks simply whether a decision is lawful under domestic law: a decision which is a nullity by virtue of a material public law error is not lawful, see Anisminic v. Foreign Compensation Commission [1969] 2 AC 147).

There is no authority for the suggestion in the grant of permission to appeal by the FTT that a decision taken in "*pursuit of the legislative framework*" is lawful for the purposes of Razgar step 3, and the suggestion is wrong.

For the avoidance of doubt, s.84 and s.85(4) of the NIAA makes clear that the FTT can consider the unlawfulness of the decision appealed against:

> *"On an appeal under section 82(1) ... against a decision the Tribunal may consider ... any matter which it thinks relevant to the substance of the decision, including ... a matter arising after the date of the decision."*

Charles (human rights appeal: scope) [2018] UKUT 00089 (IAC), correctly understood, does not hold that the FTT cannot allow an appeal on the basis the decision appealed against is unlawful and so cannot satisfy Razgar stage 3 (see Charles paras. [46]ff), otherwise it would be wrongly decided on this point.

47. Any error of law re disposal of the appeal is immaterial.

(1) Even if the FTTJ was not entitled to rely upon the finding that the decision appealed against was not lawful in allowing the appeal, in the light of the FTTJ's finding that the respondent had failed to prove TOEIC fraud 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 (or any of) the following: (a) the respondent's duty set out in Ahsan at para. [120], (b) the terms of the consent order (which applied in the light of the FTT's finding re TOEIC), and (c) (perhaps most clearly) the respondent's policy, (see Charles *supra* at paras. [59]-[60]ff).

48. In his oral submissions, he submitted that when looking at the detailed reasons at paragraph 63 – 68 of the decision, the judge had given adequate and sustainable reasons for the view that the specific evidence relied upon by the respondent was inadequate to discharge the evidential burden. The judge's reasoning within those paragraphs is informed by the submissions made at paragraphs 50 – 51 and at paragraph 58. He submitted that the point made is that the respondent had not provided evidence linking the voice recording obtained to the appellant himself and that this was something the APPG report and the lack of continuity considered which the judge was aware of. Whilst the judge did not look expressly at the continuity issue, he accepted that there was a problem with the continuity because there is a recognition that the evidence fell short both generally and in relation to the appellant.

49. Mr Biggs submitted that the "key point" were that the findings and analysis at paragraph 63 – 68 are unchallenged in the grounds and that the key argument made on behalf of the respondent is at the judge was wrong to conclude that the evidential burden was not discharged. However, looking at the grounds of appeal, the only argument made is that the legal authorities stated that the specific evidence was sufficient to discharge the evidential burden. However, there is no rule of law that in every case that the evidential burden will be discharged by looking at the lookup tool. He submitted that when looking at the judge's reasoning and findings it was appropriate to conclude that the respondent could not discharge the burden on the evidence provided. The authorities stated that the respondent must produce "cogent evidence" and here the judge was not satisfied that cogent evidence had been provided.

50. He submitted that it was clear that the judge reviewed the authorities and was aware of the correct approach (see paragraph 26 citing MA(Nigeria) and was aware that any deficiencies in the continuity of the evidence could be overcome in light of the appellant's evidence but the judge analysed the evidence and that he was fully aware that he should refer to all the evidence but was not persuaded that any inference from the appellant's poor English that he was not satisfied that he was a cheat and that was a decision plainly open to him.

51. In respect of the conclusion reached by the judge that it was "not in accordance with the law", Mr Biggs submitted that the judge had made a conclusion that was open to him. The grounds of appeal based on his human rights and the decision had to be contrary to section 6 of the HR Act and that the decision to refuse human rights claim was on the basis

that his removal would breach article 8. However if the decision for the basis of his removal is flawed, here being based on the assertion that he is a cheat, and is not supported by any evidence, then the decision is unlawful and therefore applying the third test in Razgar, the decision appealed is unlawful and is in breach of article 8.

52. Mr Biggs then amplified his submission. He stated that because the TOEIC allegation was central to the decision appealed against, and this decision was found to be unlawful therefore the entire decision was unlawful. If the error is a material public law error than the entire decision is a nullity because the respondent accepted in the consent order and also in the policy that if a person was found not to be a cheat, they will be given leave to remain. He submitted that looking at the decision in Razgar at stage III requires a lawful decision here there was a public law error which vitiated the decision and therefore was unlawful.

53. When asked about the terms of the consent order he referred the Tribunal to the decision in Ahsan at paragraph 120, and that it made reference to the obligation on the respondent to consider unwinding the "historic injustice". As to the FtTJ's finding that he would not have succeeded under tier 4, Mr Biggs submitted that there was an obligation and public law duty on the Home Office to consider whether any there was any historic injustice and what steps would be appropriate. Whilst Underhill LJ at paragraph 120 did not use the term "historic injustice" it was plain that the Home Office had an obligation to think about any injustice and whether there was one which could be "unwinded".

54. Mr Biggs in his submissions referred to the respondent's current policy (as set out in his speaking note replicated above). He submitted that all three versions include the passage at page 9 which makes reference to 60 days leave outside of the rules when application to be made and as a matter of policy that would be made in the appellant's case. He submitted that the Home Office had an obligation to look at the decision made by the FtTJ via the consent order. He accepted that the consent order was an inter-partes agreement to settle proceedings and would not be binding on the tribunal per se is recognised by the judge at [87] but this was relevant to the evaluation of proportionality.

55. He submitted that if the Home Office then decided to grant leave or review his circumstances then that was dispositive of the article 8 appeal.

56. Ms Pettersen in her reply stated that if the evidential burden had not been met and the FtTJ was not in error in finding that the evidential burden could not be met, the appellant's case would fall within the relevant policy.

57. At the conclusion of the hearing I reserved my decision which I now give.

Discussion:

58. I have carefully considered the written grounds and the oral submissions of Ms Petterson and Mr Biggs.

59. The question whether the decision contains a material error of law is not whether another Judge could have reached the opposite conclusion but whether this Judge reached a conclusion by appropriately directing himself as to the relevant law and assessing the evidence on a rational and lawful basis.

60. Dealing with the first ground relied upon by the respondent, the written grounds submit that the FtTJ made a material misdirection in law by failing to adequately correctly assess the burden of proof in line with the case of SM and Qadir (ETS-Evidence -Burden of Proof) [2016]. The grounds state that despite reference to the case and acknowledging the evidence provided from the respondent at paragraph 67 of the decision, the judge failed to give adequate reasons for why he considered the respondent's evidence was insufficient to meet the burden required and therefore, the judge erred in law.

61. It is submitted that the decision in SM and Qadir (as cited) makes it clear that the generic evidence combined with evidence particular to an appellant does discharge the evidential burden of proving that a TOEIC certificate had been procured by dishonesty. It is asserted that the FtTJ "misinterpreted the evidence" and the properly read, the witness statements and the spreadsheet extract showed that the appellant's English language test had been invalidated because of evidence of fraud in the test taken by the appellant.

62. I have carefully considered the decision of the FtTJ in the light of those submissions and the evidence that was before the Tribunal.

63. The first issue identified by the FtTJ was whether the respondent had established that there was evidence, specific to this appellant, which was sufficient to found a suspicion that the appellant had cheated in his test (at [63]);

64. At paragraphs 19- 26, the judge properly directed himself to the case law and the burden and standard of proof in relation to the deception issue. The legal burden of proving that the applicant used deception lies on the Secretary of State (at[23]) and also that it is for the respondent to prove a prima facie case of deception for the appellant to answer (" the evidential burden") (see the reference made to the decision in Shehzad paragraph 3 at [22]) . Thus, the Secretary of State must first adduce sufficient evidence to raise the issue of fraud.

65. At paragraphs 24-26 the FtTJ addressed the relevant case law and contrary to the grounds expressly directed himself to the decisions of SM & Qadir and MA (ETS- TOEIC testing) Nigeria [2016] UKUT 450 along with the other relevant jurisprudence.

66. 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.

67. At paragraph [25] the FtTJ addressed the decision in The Secretary of State for the Home Department v Shehzad [2016] EWCA Civ 615 and whether the "evidence, together with evidence that the test of the individual under consideration has been assessed as "invalid" rather than as "questionable" because of the problems the test centre, suffices to satisfy the evidential burden of showing dishonesty that lies on the Secretary of State and to impose an evidential burden on the individual to raise an innocent explanation " (paragraph 19) and later at paragraph 31 " in circumstances where the generic evidence is not accompanied by evidence showing that the individual under considerations test was categorised as "invalid"…. The Secretary of State faces a difficulty in respect of the evidential burden at the initial stage." The FtTJ then addressed the decision in MA (Nigeria) at paragraphs 25-26.

68. Whilst the respondent's grounds assert that the FtTJ failed to give adequate reasons for reaching the conclusion that the respondent had not discharged the evidential burden, I am satisfied that on any fair reading of the decision the FtTJ addressed the evidence advanced on behalf of the respondent in his decision and gave adequate and sustainable reasons for reaching his conclusion. The relevant paragraphs of the FtTJ's decision are at [64] –[68] where he sets out his analysis of the evidence before reaching his conclusion that the respondent had not discharged the evidential burden. At paragraph [64] the FtTJ made reference to the "generic evidence" relied upon by the respondent which pointed to widespread cheating across a considerable number of TOEIC test centres observing that it was not the appellant's case that the TOEIC test had not been subject to widespread cheating. He then turned his consideration to the evidence before the Tribunal. This had been summarised at [33]. He began his consideration by considering the report of the All-Party Parliamentary Group (hereinafter referred to as the "APPG report"). The analysis and conclusions of that report was that the evidence relied upon by the respondent in individual cases was weak and that the internal procedures adopted by ETS to determine whether cheating had in fact taken place were not robust. He cited paragraph 2.3 of that report in full and at [66] he set out his analysis as follows:

> "66. The report is nothing short of damning of both the investigations undertaken by ETS and the respondent's reliance on the results of those investigations to underpin decisions to revoke visas. What is clear from the evidence given to the APPG is at the respondent closed their eyes to information which pointed to the unreliability of both ETS' and her own analysis, and has continued to do so even in the face of expert evidence pointing to significant problems with that analysis."

69. The FtTJ then turned to the evidence relied upon by the respondent to discharge the evidential burden which related to this particular appellant. He stated at [66];

> "what is particularly striking is that rather than acknowledge the fact that the lookup tool stated that the appellant was a United Kingdom national and could be seen as reflecting the concerns of the APPG, Mr Dingley had sought to explain this away by stating that his instructions are that this was a mistake."

70. When making an assessment of the evidence relied upon by the respondent to discharge the evidential burden, the judge took into account that the only documentation that the respondent had put before the tribunal was "the erroneous lookup tool information" which he had referred to at paragraph [66]. He identified that not only did the document erroneously refer to the appellant as a United Kingdom national (which the judge took to mean a British national) it told him nothing about the appellant's test from which he could draw any conclusions as to whether or not the appellant cheated. It was reasonably open to the judge to reject the submission made by the presenting officer which sought to explain away the content of the lookup tool on the basis that his instructions were that it was "a mistake". As Mr Biggs submitted this could not properly be considered as evidence. He considered the witness statement of Mr Vaghela which had been relied upon by the respondent but found that that witness statement did no more than simply "cross refer to the generic evidence of the appellant". The judge found that the statement was made on 4 December 2019 but that it failed to address the APPG's report which had been in circulation since July 2019. He therefore found that Mr Vaghela's evidence added nothing to the "generic evidence".

71. Whilst Ms Pettersen in her oral submissions argued that it was irrelevant that the witness statement of Mr Vaghela did not refer to the APPG report because the witness statement referred to the lookup tool, the judge gave reasons as to why the lookup tool had obvious errors in its content.

72. As to the issue of the voice files, I accept the submission made by Mr Biggs that in light of the submissions made at paragraphs 50 – 51 and paragraph 58 which refers to the absence of evidence linking the appellant to the voice files, which the FtTJ appears to have accepted, it was therefore open to the judge to reach the conclusion that there were deficiencies and it was sustainable decision to therefore conclude on the whole that the evidential burden had not discharged.

73. I cannot accept the submission made on behalf of the respondent that the judge "misinterpreted the evidence" that had been advanced on behalf of the respondent. It was reasonably open to the judge to reach the conclusion that the individual evidence relied upon in respect of the appellant which comprised of the lookup tool was not evidence upon which he could place any weight in the light of that document referring to the appellant as a "United Kingdom national". It was also open to him to find

that the lookup tool told him nothing about the appellant's test from which he could draw any conclusions.

74. The Tribunal has not been directed to any evidence that the FtTJ had failed to refer to nor has there been any challenge made to the Judge's analysis of the APPG report. That report post- dates the decisions in SM and Qadir and MA (Nigeria). It also post-dates the report of Prof French set out as item 6 of the respondent's bundle. The evidence given by Prof French before the APPG was at his estimate of the rate of false positives is less than 1% but this was qualified because it depended on the result from ETS to the Home Office being correct. The APPG report concluded that there was a significant doubt as to the usefulness of the statistic so every relied upon by the respondent. The experts before the APPG all agreed that there had been a worrying lack of scrutiny of the evidence supplied by ETS (set out at paragraph 2.3 and cited by the FtTJ. In the light of that evidence and by considering his analysis of the evidence, I accept the submission made by Mr Biggs in behalf of the appellant that the judge was entitled to find that the respondent has not discharged the evidential burden to prove that the TOEIC certificate was procured by dishonesty.

75. The written grounds advanced on behalf of the Secretary of State are not clearly drafted and much of those grounds appear to be directed to the first ground which is whether the FtTJ gave adequate and sustainable reasons for reaching the conclusion that the respondent had not discharge the evidential burden. In summary there were three features, deficiencies and general problems of the evidence set out in the APPG report, specific deficiencies in the lookup tool and the absence of evidence linking to the appellant to the test recordings. Thus, I am satisfied that when taken together the conclusion reached by the FtTJ was sufficient to demonstrate that the evidential burden had not been discharged.

76. As Mr Biggs submits the other principal ground that is identified in the written grounds and relied upon by Ms Pettersen argues that the FtTJ erred in law by concluding the decision was "not in accordance with the law."

77. Ms Pettersen directed the Tribunal to paragraph [87] where the judge stated "I am simply unable to say one way or the other that he did (cheat) given the lack of evidence before me specific to the appellant and the appellant's less than satisfactory evidence". She submitted that the primary difficulty is that the FtTJ unlawfully stated at [91] that the decision was "not in accordance with the law" which was not a finding open to him. She submitted that under the present appeal regime, this was not an outcome open to him and the judge was making an inference that it should go back for reconsideration.

78. She submitted that the judge clearly found that he could not meet paragraph 276 ADE (1) and gave reasons for this and at [98] made the same conclusion that the decision was "not in accordance with the law". She submitted that his findings and conclusions were "muddled" and that even if the ETS evidence did not discharge the burden on the respondent,

the judge was against the appellant in relation to the rules and therefore is not clear why the case succeeded under Article 8.

79. As to whether there was any inconsistency in the judge's approach and his findings as to whether the appellant had cheated, Mr Biggs submitted that at [87] the judge agreed with the submission that he had made that if he had found that the respondent did not discharge the burden on her to prove deception (i.e. that the appellant cheated) there is effectively "no case to answer". Therefore, the judge had stated that there was no sufficient evidence to raise the issue of deception.

80. He submitted also that the issue of cheating did not arise because of the legal analysis. At [91] the judge stated that the respondent had not made out the allegation of fraud against the appellant and that meant that the decision to refuse his application which was based on an unproved allegation of fraud was "not in accordance with the law". That was consistent with his finding at paragraph 87 that the evidential burden had not been discharged. There was therefore no legal error.

81. I have considered the submissions and in particular whether there was any lack of consistency in the FtTJ's reasoning or as Ms Pettersen submits any conclusions that were "muddled."

82. As with any judicial decision, the decision of this FtTJ should be read as a whole. Upon doing so it is plain in my judgement that the overriding finding or conclusion reached by the judge was that the respondent had not discharged the evidential burden upon her. This is plain from his conclusion at [68] and [87] where again he referred to the "respondent has not discharged the burden on her to prove that the appellant cheated". This is also underscored by his final conclusion at [91] where he stated ".. My finding that the respondent has not made out the allegation of fraud against the appellant means that the decision to refuse application, being based, as it was, on the unproved allegation of fraud, was not in accordance with the law." Whilst the use of the phrase "that does not mean that I find the appellant did not cheat" and reference to the case against the appellant being "unproven", may be unfortunate, it does not undermine the core decision reached which can be clearly discerned from his decision as a whole. On any view of the factual findings made by the judge, he plainly found the appellant to have been an unsatisfactory witness in a number of aspects but this did not demonstrate that the evidential burden which lay on the Secretary of State had not been discharged.

83. I have set out in the preceding paragraphs the submissions made by Mr Biggs and in particular his submission that as a result of the respondent's reliance in that decision on the unestablished allegation of TOEIC cheating, it was clearly vitiated by a material public law error. As such removing the appellant pursuant to the decision would breach article 8, and that this an unlawful decision cannot be justified pursuant to article 8 (2), (Lord Bingham's 3rd of the five-stage test at Razgar).

84. In the alternative, he submitted even if the FtTJ was not entitled to rely upon the finding that the decision appealed against was not lawful in allowing the appeal, in the light of the FtTJ's finding that the respondent had failed to prove TOEIC fraud 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 (or any of) the following: (a) the respondent's duty set out in Ahsan at para. [120], (b) the terms of the consent order (which applied in the light of the FTT's finding re TOEIC), and (c) the respondent's policy.

85. When looking at the legal framework, I do not think it necessary to consider the first submission made by Mr Biggs as I consider that the FtTJ did not allow the appeal on the basis that the decision was "not in accordance with the law". He allowed the appeal because he found the decision was in breach of article 8 of the Human Rights Convention (The only ground of appeal available to the appellant is that the respondent's decision is unlawful under s6 of the Human Rights Act 1998). Whilst he made reference to the decision as "not in accordance with the law" (at [91]), when seen in the context of his decision I take it that he meant that because the respondent had not discharged the burden of proof that the appellant had used deception, that the appellant's removal was not lawful in the sense that it would be disproportionate to remove someone when the integral part of the decision (i.e. that he had engaged in deception) fell at the first stage given that the evidential burden had not been met and thus there would be no public interest in his removal. That is set out at paragraph [98]. In my view, the judge allowed the appeal on article 8 grounds on the basis that it was disproportionate to remove the appellant by considering this issue through the prism of the respondent's policy which was in essence reflected in the consent order.

86. In his submissions, Mr Biggs directed the Tribunal to paragraph 120 of Ahsan v SSHD [2017] EWCA Civ 2009 which reads,

> "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.)"

87. Both the decisions in Ahsan and Khan [[2018] EWCA Civ 1684] 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]. 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)"

88. Neither of the decisions are comparable to the factual matrix of this particular appellant in view of the other findings made by the FtTJ (which have not been challenged by the appellant) and specifically those at [88] and [99]. Nor do the decisions 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, I would accept the submission made by Mr Biggs supported by his reliance on paragraph 120 of Ahsan, 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.

89. This was reflected in the case of this appellant in the consent order reached between the parties at paragraph 3. Whilst the consent order is not binding upon the Tribunal, and that this was recognised by the FtTJ at [87], Mr Biggs places reliance upon the respondent's policy.

90. The policy 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."

91. Whilst this is not the policy in force at the date of the decision, it appears to be agreed that the relevant paragraph set out above was similarly set out in the earlier policy. Ms Petterson in her reply acknowledged that if the

Tribunal found that the respondent had not discharged the evidential burden (first stage) then the appellant would fall within the policy and that 60 days leave would be granted in order for the appellant to make any application. In my judgement this is reflected in the overall decision reached by the judge where he allowed the appeal on article 8 grounds and in the light of his conclusion at [100] where he stated :“ it will be a matter of the respondent what she decides to do with the appellant’s matter in the light of my disposal of his appeal in his favour, but she may wish to take note of my findings, in particular at paragraph 88 of my decision and reasons”.

92. As the respondent has indicated that she would consider the findings made by a FtTJ in an appeal such as this relating to the issue of deception, it must also be right that the Secretary of State will also take into consideration any other findings that have been made. In this case, the judge made a number of adverse findings of fact which have not been subject of challenge in these proceedings. As the judge stated, it will be a matter for the respondent.

93. Consequently, for those reasons I am not satisfied that the decision of the FtTJ demonstrates any error on a point of law and therefore the decision to allow the appeal shall stand.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law and therefore the decision of the FtTJ shall stand.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or his family members. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Upper Tribunal Judge Reeds
Dated 23 September 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