Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/34426/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16th February 2018	**On 19th March 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

XU ZHANG
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr S Walker, Senior Presenting Officer
For the Respondent: Ms E Ikiriko, Solicitor

DECISION AND REASONS

1. The Secretary of State appeals against the decision of First-tier Tribunal Judge Wylie allowing the Appellant's appeal on the basis of his human rights in relation to his refused application for indefinite leave to remain having completed the requisite period of lawful residence.

2. For ease of comprehension I will refer to the parties by their designation before the First-tier Tribunal.

3. The Secretary of State was granted permission to appeal by Upper Tribunal Judge Gleeson. The grounds upon which permission was granted may be summarised as follows:

> "2. The First-tier Tribunal Judge found as a fact that it was likely that in January 2013, when he took his test, despite Project Façade evidence that 70% of the tests taken at Queensbury College on the same day were invalid, the applicant had discharged the burden of showing that a satisfactory explanation and had not used deception. However, instead of allowing the appeal under the Rules, the Judge went on to allow it on human rights grounds only and to make no decision at all under the Rules.
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> 3. The Secretary of State challenges that decision on the basis that it is perverse, that the First-tier Tribunal Judge failed properly to apply the decided cases in relation to ETS/TOEIC deception, and in particular, the guidance at [57] in the decision of Mr Justice McCloskey in *MA (Nigeria) v Secretary of State for the Home Department* [2016] UKUT 450 (IAC). She also contends that the Judge's decision provides no, or no adequate, reasoning regarding compelling circumstances for allowing the appeal outside the Rules on human rights grounds.
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> 4. The grounds of appeal are arguable."

4. I was not provided with a Rule 24 response from the Appellant's solicitor, however I was addressed by her in oral submissions.

Error of Law

5. At the close of the hearing I indicated that there was a material error in law in the decision, namely in relation to the second ground concerning the outcome of the appeal on a human rights basis, but that my reasons for so finding would follow. I shall now give my findings in relation to both grounds of appeal which are as follows.

6. In relation to the first ground of appeal, as Mr Walker accepted and as observed by First-tier Tribunal Judge Davies when refusing permission, the grounds – drafted by a Miss L Carroll – are similar to every appeal in relation to ETS/TOEIC claims, and I must say, having studied them with great care to search for any merit, the first ground which relates to an ETS claim, is the very definition of generic and *pro forma*. In relation to the first ground I can see no merit in the ground, primarily because no positive submission is made other than setting out the law in relation to the leading authorities concerning this genre of appeals. The only submissions that could perhaps be germane to the appeal are allegations that the First-tier Tribunal has failed to give adequate reasoning regarding the Appellant's qualifications which the judge notes at paragraph 20 of his decision, that the judge placed weight on the Appellant's ability to record the details in the examination process, and in relation to whether the Appellant took the ETS test despite having an ability in English and not needing to do so (as discussed in *MA (Nigeria)* although the grounds do not refer to it).

7. Taking those issues in turn, in terms of the Appellant's other qualifications at paragraph 20, those relate to his qualifications which he achieved in April 2012, namely his degree in Business Management from 2008 to 2012 and also at paragraph 11 the mention of his having studied for an HND in Computer Studies from 2006 to 2008 and a BTEC also. These were qualifications that the judge was entitled to take into account as they had all been achieved prior to the date upon which he allegedly cheated in his ETS/TOEIC test which was 7th January 2012 and 15th January 2013, thus this was evidence that the judge was entitled to take into account.

8. In relation to the second point regarding the Appellant's ability to recall details of the examination process and centre, the submission that a DVD had been allegedly 'circulated' to "every hearing centre" and therefore judges should all be aware of the methods used by candidates and that candidates apparently would know the details of the test centre even if not sitting the test themselves is not one that has any merit given that it was not shown that a DVD was provided to Judge Wylie, nor is there any evidence to indicate that he was given a circulated DVD, nor is it suggested that the Appellant would have had another individual sit the test for him other than the submission made in closing that it may have been easier for him to get someone else to do the test because he was 'short on time'. That submission was of course noted by the judge in his decision and was obviously known to him when reaching his conclusion on the Appellant's credibility and whether he had or had not in fact sat the test. Thus whilst the submission is an interesting one in that there could be evidence which a judge may arguably have to discount (albeit due to a DVD that has been circulated and not served as evidence in the context of an appeal which an appellant can know of and respond to), it has not been established that such evidence showing that the evidence should be discounted was placed before the First-tier Tribunal and consequently there can be no error arising from not having considered such evidence.

9. In relation to the third and final issue of the authority of *MA (Nigeria)* and sitting the test, this issue does overlap with the second, however it is clear to me that *MA (Nigeria)* was a very different case where the panel was quite unimpressed with the evidence of the Appellant, whereas the First-tier Tribunal here was persuaded by the oral evidence of this Appellant overall and consequently the finding that was made was not a perverse one or one that was not open to the judge to make in all the circumstances.

Re-making the Appeal

10. Turning to the second ground of appeal and the fact that the judge allowed the appeal on human rights grounds and failed to identify compelling circumstances to justify consideration of human rights outside the Immigration Rules, I am quietly surprised that a submission of this nature is still being made in light of the Supreme Court authorities of *Hesham Ali* and *Agyarko*, given that it has been established conclusively that if there is any *lacunae* in the Rules, or any issue which is not covered by them in a comprehensive fashion, consideration of any factors remaining must take place outside of the Rules, and the Tribunal must consider those matters

applying a fair balance approach and determining the issue in terms of proportionality of the outcome of the appealed decision.

11. Leaving that to one side for a moment, it is clear from Judge Gleeson's grant of permission that she noted that the appeal was allowed on human rights grounds and that no decision was taken under the Rules. I equally am struck by this issue, even though it is not a pleaded ground, I do see it as a material error of law in the outcome of the appeal and consequently for that reason I do find that there is an error of law in respect of paragraphs 34 and 35 alone of the decision, in that they perform an assessment of the appeal outside the Immigration Rules under Article 8.

12. In my view, any further consideration of the appeal in respect of Article 8 was not warranted given that the judge found that the Appellant met all of the requirements of the Immigration Rules for indefinite leave to remain in the UK. That separate finding is clear from the preceding paragraphs of the decision which remain intact. Thus, for the preserved reasons already given by Judge Wylie, I find that given that this is an old format appeal prior to the 6th April 2015 changes – in that it is an appeal which could theoretically succeed if the decision is not in accordance with the Immigration Rules – I find that the appeal should have been allowed on the basis that the Immigration Rules were not properly applied and that the discretion should not have been exercised against the Appellant in respect of paragraph 322(5) of the Immigration Rules. Consequently, no other issue being taken with the Appellant's application for indefinite leave to remain, the appeal falls to succeed under the Rules alone. There is no utility in going on to consider Article 8 and that portion of the decision is therefore set aside due to it being an unnecessary and discrete addition.

Notice of Decision

13. The appeal to the Upper Tribunal is allowed.

14. The decision of the First-tier Tribunal is set aside solely in relation to paragraphs 34 to 35 and the appeal is allowed under the Immigration Rules as indicated above.

15. No anonymity direction was requested and none is considered necessary.

TO THE RESPONDENT
FEE AWARD

I was not asked to make a fee award by the Appellant and given that none was made by the First-tier Tribunal and I am merely correcting the formal outcome of the appeal to reflect the findings already made by Judge Wylie, I see no reason to interfere with that decision and I do not see fit to make any fee award.

Signed Date 18th March 2018

Deputy Upper Tribunal Judge Saini