Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/10409/2019

THE IMMIGRATION ACTS

Heard at Bradford by Skype for business On the 21st of October 2020 and further written submissions dated 27 January 2021.

Decision & Reasons Promulgated On the 17th of February 2021

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

AND

JAE BONG JUN

Respondent

Representation:
For the Appellant: Ms R. Petterson, Senior Presenting Officer
For the Respondent: Mr Maqsood, Counsel instructed on behalf of the appellant at the hearing and the written submissions of Counsel Mr Z. Malik.

DECISION AND REASONS

Introduction:

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal (Judge Mills) (hereinafter referred to as the "FtTJ".) By its decision, the Tribunal allowed the Appellant's appeal against the Secretary of State's decision, dated, 9 May 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 Jun as the appellant, reflecting their positions before the First-tier Tribunal.

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 21 October 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 Ms Petterson and Mr Maqsood for their clear oral submissions.

The background:

6. The immigration history of the appellant is set out in the decision letter dated 9 May 2019 and the decision of the FtTJ at paragraphs 8-18 although it does not refer to the judicial review proceedings and the decision reached by consent in 2019. I have taken the chronology from the papers in the appellant's bundle.

7. The appellant entered the UK with entry clearance as a student on 19 July 2005. His leave was valid until 30 September 2006.

8. On 2 October 2006, the appellant applied further leave to remain which was granted on 18 October 2006 until 30 November 2007.

9. On 30 September 2007, the appellant applied further leave to remain as a student was granted on 4 December 2007 until 30 September 2010.

10. On 30 September 2010, the appellant applied further leave to remain as a student was granted on 2 November 2010 until 4 February 2014.

11. On 7 January 2014, the appellant applied leave to remain as a Tier 4 student which is withdrawn on 14 January 2014. For the purposes of that application Mr Jun relied upon an English certificate which he had obtained after sitting the test at Cauldron College on 19 November 2013.

12. On 8 January 2014, the appellant applied for leave to remain as a student which was refused with a right of appeal on 6 March 2014.

13. On 14 March 2014, the appellant lodged an appeal which was dismissed by the First-tier Tribunal (Judge Ross) on 16 December 2014.

14. On 29 December 2014, the appellant sought permission to appeal to the First-tier Tribunal which was refused on 10 February 2015.

15. On 30 March 2015, the appellant sought permission to appeal to the Upper Tribunal which was refused on 18 June 2015. The appellant was "appeals right exhausted" following that decision.

16. On the 19 July 2015, the appellant reached his "ten -year anniversary" of residence in the UK.

17. On 20 July 2015, the appellant applied for leave to remain under 10 year-long residence rules which was refused and was certified as "clearly unfounded" under section 94 of the 2002 Act on 15 June 2016.

18. The decision of 15 June 2016 is set out in the papers at [154AB]. The decision sets out the appellant's immigration history as recounted above and included in it the circumstances following the refusal of his appeal to the FtT and that the appellant was "appeal rights exhausted" on 18 June 2015. The decision noted that he had made an application on 20 July 2015 for leave to remain under the 10 years long residence rule but that he could not satisfy the requirements of paragraph 276B (v) because the application was 31 days out of time. The second reason for refusal was that the Secretary of State was satisfied that the appellant had used deception in his application made on 8 January 2014 and that the scores taken for the test taken on 19 November 2013 was fraudulently obtained. His presence in the United Kingdom was not conducive to the public good because his conduct made it undesirable to allow him to remain in the UK (see paragraph 276 A1 and by reference to paragraph 276B (ii)). Other reasons for refusal under paragraph 276 ADE related to his failure to meet the suitability requirements and in any event could not meet those particular requirements given that there were no very significant obstacles to his reintegration (paragraph 276 (1) (vi)). Finally, the Secretary of State certified the application as "clearly unfounded under section 94 of the 2002 Act.

19. The appellant sent a PAP letter to the respondent challenging the certification on 15 November 2016.

20. On 30 November 2016, the respondent agreed to reconsider the certification decision (see [AB 147]).

21. On 29 January 2017, the respondent maintained the original certification under Section 94 and the decision made reference to the application made on 20 July 2015 on the grounds of long residence and that it had been properly refused under paragraph 276B (ii); reference was made to the submission of the English test for the

purposes of the application made on 8 January 2014 and the following an interview that took place in February 2016, it concluded that the appellant obtained the ETS certificate by deception. Thus his presence in the UK was not conducive to the public good. He also could not meet the suitability requirements under the rules. The certificate was maintained.

22. On 22 February 2017, the appellant applied leave to remain under the family and private life route which was refused under paragraph 353 with no right of appeal on 7 November 2017.

23. In a decision dated 7 November 2017 but served on 29 March 2018, reference is made to the appellant seeking to challenge the decision on the ETS certificate and also for leave to remain outside the rules on the basis of his private life. The application was considered under Paragraph 353 having previously made a human rights claim which had been refused. Reference was made to the decision of 20 July 2015 for leave to remain on the basis of his long residence. The decision considered that the submissions had all been previously considered in a decision dated 29 January 2017 and that it had no realistic prospect of success under Paragraph 353. The certificate was also maintained in those circumstances.

24. On 15 November 2018, a decision was made (at [[AB 64]) making reference to the previous challenge to the ETS certificate and his application on the grounds of his private life but was found that the appellant could not meet the rules nor were there any "exceptional circumstances" for a grant of leave to remain.

25. On 2 December 2018, the respondent made removal directions.

26. On 22 January 2019, the appellant began proceedings for judicial review challenging the decision to remove the appellant, and also challenging the decision of 15 November 2018 as a fresh claim. The grounds lodged cited the decision in *Ahsan* (at paragraph 11).

27. On 23 January 2019, the removal directions were cancelled.

28. On 20 February 2019, a consent order was reached between the parties. The respondent agreed to withdraw the decision of 15 November 2018 and to reconsider the appellant submissions made on 29 March 2018. The respondent also agreed to review the initial findings on the TOEIC certificate in a letter dated 29 Jan 2017 and in the decision of 15 November 2018.

29. The respondent reconsidered the appellant's application and human rights claim made on 29 March 2018 in a decision dated 9 May 2019.

30. The decision letter refers to the appellant having made a human rights application on the 29 March 2018 and that it had been "reconsidered and 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.

31. 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).

32. The reasons given in the decision letter stated that the appellant, in support of his Tier 4 (General) student application submitted on 8 January 2014 he submitted a TOEIC certificate from Educational Testing Service ("ETS"). He stated that he had attended Cauldon College on 19 November 2013 and undertook the speaking component of the ETS TOEIC English language test.

33. 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 19 November 2at Cauldon College 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 8 January 2014.
>
> The Home Office had been informed by ETS that analysis of the claimants speaking test, taken on 19 November 2013 at Cauldon College, indicated that a proxy test taker had been used. Please see attached print out entitled "ETS lookup tool" **which links your case to the use of an invalid certificate.**
>
> Additionally, the Home Office has access to a "revised lookup tool" specifically developed within the Home Office using the same information provided to us by ETS which can identify the number of other tests taken at any given date/time slot and college by entering college name, date, and time slot.
>
> The results from the "revised lookup tool" show that on 19 November 2013 at Gordon College, a total number of 37 speaking and writing tests (including yours) were taken. The data shows that 30 (81%) of those results are deemed invalid i.e. obtained by the use of a proxy and seven test results (90%) were "questionable" i.e. that the school could not be relied upon due to the general practice of fraud. None of the results were "released" meaning that ETS consider them to have been legitimately obtained and therefore reliable.
>
> The evidence, taken in the round, demonstrates that Cauldon College was not operating under genuine test conditions at the date of your own test."

The decision letter then went on to make reference to a number of legal authorities including Qadir and SM (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."

The decision letter then went on to make reference to the interviews that were undertaken. "It is noted that in your case, you did attend such interview. The outcome of that interview was not credible. The interviewing officer did not accept your account that you take the test because you were unclear about the agent's name, you stated that each element of the test took 60 minutes and you also stated that the cost of the test was £85, which is much lower than the actual price."

The decision letter went on to state:

> "in addition to the evidence and the ETS lookup tool revised lookup tool, the secretary of state together other evidence during the course of the ETS litigation and other high-profile cases. These are enclosed, listed below, and explained here:
>
> - witness statement from Rebecca Collings and Peter Millington on behalf the Secretary of State concluding that proxy test takers were used to sit examinations in place of applicants based on their discussions with ETS staff.
> - The expert report of Richard Heighway from Kroll Ontrack concluding that the TOEIC system attributing a genuine test takers recording to a different candidate over a genuine test takers recording to be reused by multiple candidates would be very unlikely.
> - A report from a Home Office analyst concluding that the test centre was not operating under genuine test conditions."

For those reasons, the Secretary of State therefore was satisfied that he had used deception in his application of 8 January 2014.

34. 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.

35. 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 South Korea having entered the United Kingdom on a Tier 4 student Visa on 19 July 2005. 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 South Korea having spent 30 years living in his home country prior to entry to the UK, without evidence to the contrary.

36. 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 South Korea. Consequently, his application was refused.

37. The appellant appealed that decision, and it came before the FtT (Judge Mill) on 6 November 2019. In a decision promulgated on 8 November 2019, the FtTJ allowed 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 use deception, but for the reasons set out at paragraph [22] –[28] 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.

38. The FtTJ then considered the period of time that the appellant had been lawfully resident in the United Kingdom. The judge found that the appellant did not become appeal rights exhausted until 18 June 2015 following his appeal before the tribunal on 16 December 2014 which was dismissed. The judge stated that the letter advising him of failing to obtain permission to appeal to the Upper Tribunal was in a letter of 18 June 2015 but deemed service would have been two working days thereafter and as 18 June 2015 was a Thursday, the deem service would have been on Monday which was 22 June 2015. The judge recorded "the appellant's evidence which is not contradicted is in fact that he received notice the following day, being 23 June 2015. He had section 3C leave until then". The judge concluded that the appellant made his application for 10-year long residence on 20 July 2015 which was 28 days thereafter thus his period of lawful residence did not end but continued. The application made on 22nd of July 2015 was, as a result of his findings was validly made as the appellant had accrued 10 years of residence in the UK by that time. The judge therefore found that having looked back at the application made on 20 July 2015 the appellant should have succeeded in that he met the immigration rules for 10-year long residence. The judge therefore considered this to be a "persuasive and weighty issue which favours the appellant in any ultimate proportionality balancing exercise " at [34] and that in any human rights appeal provided Article 8 (1) is engaged in the requirements of immigration law met, there would be no public interest in an appellant's removal from the UK (applying *TZ (Pakistan) and PG (India) v SSHD* [2018] EWCA Civ 1109 and *OA and others (human rights: "new matter": section 120) Nigeria* [2019] UKUT 000 65.

39. The judge reminded himself that this is an Article 8 appeal "outside the immigration rules" and applying the public interest considerations under S117, found that he had been in United Kingdom 14 years and that the lawful nature of that length of time was "significant and is a strong indicator of private life in the UK which engages Article 8". He was satisfied that the appellant could speak English and was not in receipt of state benefits but is not truly independent. The judge found that he was likely to be in a position to obtain employment and support himself in the event of his immigration status being resolved. He found that the weight should be attached to the private life of those who stated to be precarious however, weighing against that was the fact that he found the appellant did meet the immigration rules for 10 years long residence and that this was "a significant factor which ultimately determines the appeal positively in the appellant's favour."

40. Finally, the judge recorded at [40] that following the Upper Tribunal decision and *OA and others* which clarified that unless there was a discrete public interest factor making an appellant's removal portion, human rights appeal should be allowed where the judge finds that the 10- year requirement is satisfied and there is nothing to indicate an application for indefinite leave to remain by the appellant would likely be rejected by the Secretary of State. The judge found that that was the position in the present appeal.

41. The judge therefore allowed the appeal under the immigration rules and allowed the appeal under Article 8 of the ECHR.

The hearing before the Upper Tribunal:

42. Permission to appeal was sought on behalf of the Secretary of State and was granted on 7 April 2020 by FtTJ Osbourne who stated as follows:

> Permission is granted.
>
> "the grounds assert that the judge erred in law for the following reasons: misdirected himself in law in finding that the appellant meets the requirements of paragraph 276B 10 yours lawful continuous residence: at [32] the judge found that the appellant was "appeal rights exhausted" in June 2015 and that any 3C leave came to an end on 23 June 2015: wrongly found that the appellant's leave did not end on 23rd June because he made an application for further ILR on 20 July 2015: the appellant became an over stayer on 23 June 2015: following Ahmed[2019] EWCA Civ 1070 an exceptional period does not cure a break in continuity of lawful leave and appellant cannot rely on paragraph 276B (iv) to argue that any period of overstaying should be disregarded for the purposes of establishing 10 years continuous lawful residents. Failure to have regard to a material matter: ETS interview which is relied in upon the respondent's bundle.
>
> In an otherwise careful decision, it is nonetheless arguable that the judge failed to consider the ETS interview which material evidence is in the respondent's bundle: it is arguable a material error of law to have failed to consider that evidence: insofar as the authority of the above case of Ahmed is concerned, if the respondent wish to rely upon it, then they should have provided to the judge said that he could consider it: they failed to do so and cannot criticise the judge for their own failure.
>
> The above-mentioned arguably material error of law had been identified that ground is arguable.

43. Ms Petterson relied upon the written grounds of appeal. There were also further written submissions submitted by direction of the Upper Tribunal.

44. There were also written submission filed on behalf of the appellant dated 17 July 2020.

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

Preliminary issue:

46. Before dealing with the substantive grounds, it is necessary to address a preliminary issue raised by Mr Maqsood on behalf of the appellant. It had not been raised in the written submissions previously served on the Tribunal and the respondent however I am satisfied that Ms Petterson was able to provide her submissions on this issue.

47. It relates to the grant of permission. Mr Maqsood submitted that the FtTJ when granting permission considered that the arguable error related to the interview which related to the first ground. Whilst in the decision and set out above the line it is stated "permission is granted", the reasons later on making clear that permission was not granted in relation to the second ground. When looking at the decision of Safi and others, the judge in the "reasons part" of the decision states that he granted permission in relation to the ETS ground but not to the other. Therefore, this should be read as a limited grant of permission.

48. Ms Pettersen submitted that the decision did not say that the grant of permission was limited. Had that been the case, a different notice would have been sent to the Secretary of State making it plain that there had only been limited permission granted and giving the Secretary of State the opportunity and being put on notice to renew the grounds. Thus, she submitted the grounds were not limited.

49. I have considered the submissions of the parties. The relevant decision is that of Safi *and others (permission to appeal decisions) [2018]* UKUT 388 (IAC).

50. The headnote to that decision stated as follows:

> *(1) It is essential for a judge who is granting permission to appeal only on limited grounds to say so, in terms, in the section of the standard form document that contains the decision, as opposed to the reasons for the decision.*
>
> *(2) It is likely to be only in very exceptional circumstances that the Upper Tribunal will be persuaded to entertain a submission that a decision which, on its face, grants permission to appeal without express limitation is to be construed as anything other than a grant of permission on all of the grounds accompanying the application for permission, regardless of what might be said in the reasons for decision section of the document.*

51. The grant of permission purports to exclude permission for Ground 1 but not only it is unclear as to the basis of this but the FtTJ has not done so in a way which complies with Safi *and others (permission to appeal decisions) [2018]* UKUT 388 (IAC) as set out above. The FtTJ failed to incorporate his intention to grant permission on limited grounds within the decision section of the standard document, where it is simply stated, 'permission to appeal is granted'. If a judge intends to grant permission only on limited grounds, he or she must make that fact absolutely clear. That is not the position here and there is no reference to the appeal grounds being limited in the way set out by the Upper Tribunal in Safi (see paragraph 43). I am not satisfied that there are any exceptional circumstances that exist to limit the grant of appeal nor have any been identified by Mr Maqsood and I am further satisfied that there is no

unfairness to the appellant who has submitted written submissions dealing with all of the grounds and thus being able to engage with the issues raised.

52. I shall therefore deal with both grounds.

The "ETS "Ground:

53. Ms Pettersen relied upon the written ground and submissions in which it was argued that the FtTJ when he reached the conclusion that there was "nothing other than generic evidence which the respondent relies upon" (at [26]) failed to take into account the ETS interview transcript in the respondent bundle. The appellant was found not to be credible as a result of that interview therefore the lookup tool questionable result combined with the non-credible interview transcript was adequate enough to discharge the evidential burden of raising a prima facie case of deception. The judge consequently erred in law and it was material to the outcome as otherwise it would have been a public interest consideration to be weighed against the appellant's human rights and suitability bar under the rules.

54. In her oral submissions she submitted that the FtTJ made no reference to the credibility interview and that the failure to refer to it was material because it was before the judge and was therefore his conclusion was wrong. She submitted that the appellant was given the opportunity to explain how we took the test and how much it cost when interviewed but the interviewing officer found him not be credible.

55. Mr Maqsood submitted that the respondent had failed to appreciate the distinction between an "invalid" categorisation and that of a "questionable" categorisation. In this case the test results were "questionable", and the results are cancelled due to administrative irregularities at the test centre. The FtTJ was expecting to see in addition to the generic evidence, other evidence that that which stated the test results were "questionable" that is, evidence of it being categorised as invalid.

56. He submitted that the decision of the judge at [26] should be read to mean that there was nothing other than the generic evidence to show that there was an invalid test as opposed to a credible test to show deception. The failure to omit reference to the interview was not a material error.

57. Mr Maqsood refer the Tribunal to the decision in *Shehzad* and in particular paragraph 30 where the court contrasted "invalid" results with those of "questionable".

58. He submitted that the interview was not capable of changing the category of "questionable" into one that was "invalid".

59. He further submitted that it was important to note the decision letter and that it was clear in that document that the respondent's case was that they had received notification of invalidity from ETS, taken with the interview. He submitted the judge had omitted reference to the interview but "questionable" notification evidence for the respondent was an acknowledgement that the appellant did not use deception. If he had, the ETS lookup tool process explained in the respondent generic evidence

would have given a notification of validity rather than questionable and that the questionable notification did not add anything to the interview transcript and supports the appellant's case that it could not have been a proxy test taker because if it had been the notification would have been "invalid".

60. He submitted that the respondent had been misconceived as to the effect of a question or notification on the clear authority of the Court of Appeal and against the widely understood point of a questionable notification which could not show deception and cannot be combined with the interview as it did not support the interviewer's remarks that contradicted the remarks at the end of the hearing.

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

62. The first issue identified before 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.

63. At paragraphs [22]- [24], 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 albeit there is a three- stage process. The Secretary of State must first adduce sufficient evidence to raise the issue of fraud. The claimant has then a burden of raising an innocent explanation which satisfies the minimum level of plausibility. If that burden is discharged, the Secretary of State must establish on the balance of probabilities that this innocent explanation is to be rejected. There is one civil standard of proof (which is the standard to be applied). The seriousness of the consequences does not require a different standard of proof that flexibility in its application will involve consideration of the strength and quality of the evidence. The more serious the consequence, the stronger must be the evidence used for the necessary standard to be reached.

64. 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.

65. It is for the respondent to prove a prima facie case of deception for the appellant to answer ("the evidential burden") (see the decision in *Shehzad* paragraph 3 at [22]). Thus, the Secretary of State must first adduce sufficient evidence to raise the issue of fraud.

66. At [23] the FtTJ directed himself to the decision of Shehzad at paragraph 40 and the distinction made there between English tests are judged to be "invalid" as opposed to "questionable". Furthermore at [24] the FtTJ made reference to the "standard generic evidence" which the respondent relied upon including the witness

statements of Peter Millington and Rebecca Collings, and that in her statement at paragraph 9 it also highlighted the differentiation between invalid and questionable results. Having considered those matters the FtTJ concluded "questionable results do not of themselves raise issues of direct fraudulent practice."

67. On the facts of this appeal, the respondent relied upon the "standard generic evidence" and in relation to evidence that was specific to the appellant, the respondent relied upon the lookup tool evidence (page 8 of the bundle) and this clearly specified that the appellant's test results were "questionable".

68. The FtTJ found at [26] that other than the lookup tool evidence there was nothing other than generic evidence which the respondent relied upon. The judge noted that a transcript of the test had not been produced, no personal analysis had been undertaken nor had the test been made available to enable the appellant the fair opportunity of doing so. At [27] the judge reminded himself of the decision in *Shehzad* and that in the circumstances when the Secretary of State had the "questionable" result it did not discharge the initiating burden of proof. The judge concluded that "there is no case for the appellant to answer."

69. Whilst the FtTJ did not make reference to the interview that had taken place two years later, it was open to the FtTJ to conclude from the evidence that was before the FtTJ that the only evidence that related to the test and was specific to the Appellant and was identified as such was a "questionable" test and not an "invalid" one.

70. The respondent's case as set out in the decision letter is not in accordance with the actual evidence. As Mr Maqsood has pointed out, the decision letter proceeds on the basis that the appellant has an invalid test certificate which is not the case.

71. In this context I have considered the decision of the Court of Appeal (as cited above) in respect of the test results which are said to be "questionable". What is set out at paragraph [25 – 30] 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 were no individual evidence which shows that test results were invalid.

72. I am satisfied that the judge did properly apply that decision to the appeal before him and when reading the conclusions reached make it plain that his assessment of the evidence was to the effect that the only evidence before the Tribunal was in the form of generic statements and that there was no specific evidence to establish that the Appellant had obtained fraudulently the TOEIC certificate.

73. Whilst there was no reference made to the credibility interview, I am not satisfied that this was an error of any materiality. The interview that took place two years later on 22 February 2016. The conclusions of the interview were set out at p52 RB. The interviewer had to answer three questions; Was the applicant able to answer the questions in basic English? The answer recorded is "Yes". The next question was

"did the applicant answer in a fluent manner, suggestive of the fact that they had not been coached in providing specific answers by rote? The answer recorded is "yes". The last question was "Were there any points in the interviews where the applicant appeared to lack credibility?" The answer was "yes" and then set out "Applicant wasn't too clear about the agents name and the applicant said that each element of the test took about 60 minutes as well as the cost of the test to be at 85 pounds which is lower than the actual price."

74. Thus, the interviewer concluded positively for the applicant when considering his level of English but not in respect of the agent and the cost and length of the test. However, there was no evidence before the FtTJ of what the cost of the test or the length of the test to support the interview. That being the case, the FtTJ could not attach weight to that interview without any supporting material. The only evidence that was specific to this applicant related to the look up tool which had given a "questionable" result. Consequently, the judge concluded that the evidential burden on the Respondent had not been discharged. Given the evidence that I have set out above, that was a decision that was open to the judge to reach.

75. 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.

Ground 1: misdirection in law; Paragraph 276B continuous lawful leave.

76. I now turn to the remaining ground which is it asserted that the FtTJ erred in law in finding that the appellant met the requirements of paragraph 276B for 10 years continuous lawful residence.

77. Ms Pettersen relied upon the grounds. It is submitted that at [32] the FtTJ found that the appellant became appeal rights exhausted in June 2015 after his appeal was dismissed and PTA refused by the Upper Tribunal. Therefore, the FtTJ found that the appellant's section 3C leave came to an end on 23 June 2015 (see paragraph 32).

78. However, at [33] it is submitted that the judge erroneously went on to find the appellant's lawful leave did not end on 23 June 2015 because he made a further application for ILR on 20 July 2015. The FtTJ stated " the appellant made his application for 10-year long residence on 20 July 2015 which was 28 days thereafter. His period of lawful residence therefore did not end and continued. His application made on 22 July 2015 was, as a result of my findings, validly made as the appellant had accrued 10 years lawful residence in the UK by that time. He entered on 19 July 2005 and his 10-year long residence application was made on 20 July 2015".

79. The respondent's grounds submit that the judge plainly misdirected himself in law in finding that the appellant's lawful leave continued. The appellant became an over stayer after 23 June 2015 and is lawful continuous leave came to an end. It was not extended by the submission of a separate application for ILR on 20 July 2015. Even if based on the judge's finding that the ILR application had been made within 28 days

of the appellant's section 3C leave expiring but did not cure the fact that the appellant's continuous lawful leave had come to an end on 23 June 2015.

80. The grounds make reference to the sub provision within paragraph 276B which refers to exceptions or periods disregarded by the Secretary of State for the calculation of ILR by reference to paragraph 34E does not cure a break in continuity of lawful leave relying on the decision of the Court of Appeal in *Ahmed, R (on the application of) v the Secretary of State for Home Department* [2019] EWCA Civ 1070 at paragraphs 15 – 17.

81. The written submissions at paragraph 10 submit that in light of the decision in Ahmed, paragraph 276B (v) does not cure a break in the continuity of lawful leave. Periods of overstaying that fall within paragraph 39E cannot be counted towards establishing a period of 10 years continuous lawful residence.

82. Therefore, the FtTJ erred in law in finding that the appellant could satisfy the terms of paragraph 276B.

83. It is also submitted that the judge erred in law by allowing the appeal under the Immigration Rules as the appellant did not meet the rules and secondly the judge did not have jurisdiction to allow the appeal under the Rules against a decision dated 9 May 2019.

84. The error is material to the outcome of the human rights appeal because it plainly affected the judge's reasoning in that regard, and it is pivotal to the judge's decision in allowing the human rights appeal where at paragraph 34 the judge described his finding under the rules as "persuasive and weighty".

85. On behalf of the appellant, written submissions were provided by his previous counsel Mr Malik dated 17 July 2020. Mr Maqsood relied upon those grounds.

86. At paragraph 15 it is submitted that the Secretary of State submissions in relation to paragraph 276B are misconceived and do not meet the real point made by the appellant or the reasons given by the judge for allowing the appeal.

87. The written grounds go on to state that the appellant had no difficulty in accepting that he became an over stayer on 23 June 2015. At that point he was short of around 25 days of completing his 10 years in the United Kingdom. He completed his 10 years on 19 July 2015. However, the Secretary of State refused his application made on 20 July 2015 on the basis that he relied on a fraudulently obtained TOEIC certificate. The Secretary of State is certified that decision under section 94 of the Nationality, Immigration, and Asylum Act 2002 so there was no in country right of appeal.

88. By applying the decision of *Ahsan v Secretary of state for Home Department* [2017] EWCA Civ 2009 at [120], and in the light of the finding that the appellant did not commit TOEIC fraud, the secretary of state is obliged to put the appellant into the position he would have been had the allegation and earlier decisions based upon it

not been made. This will result in a grant of leave to remain or reasonable opportunity to make or vary an "in time" application for leave to remain.

89. This is a material bearing on the proportionality assessment under Article 8 and in the light of the Court of Appeal guidance in *Ahsan* at [120] the public interest did not require the appellant's removal from the United Kingdom. He is in the position he is due to an unfounded allegation of TOEIC fraud against him in response to his 2015 application and then maintained that unfounded allegation in the decision that triggered the appeal. His removal therefore would not be justified and proportionate.

90. The judge at [31] followed the guidance given by the Court of Appeal in *Ahsan* at [120]. The respondent's grounds do not engage with the approach taken in *Ahsan and* that the outcome of the appeal was "inevitable" that the appeal had to be allowed in Article 8 grounds given the finding that the appellant did not commit TOEIC fraud.

91. Mr Masqood in his oral submissions stated that he agreed that the second sentence of paragraph 33 was incorrect this is where it was stated "his period of lawful residence therefore did not end and continued." He also stated that he accepted that allowing the appeal under the Immigration Rules was erroneous but that both errors were not material to the outcome.

92. He submitted that he accepted that the appellant's section 3C leave ended on 23 June 2015 as noted in the permission grounds and that the section 3C leave was not resurrected under 276B on 20 July 2015. He submitted that the parties would agree that the appellant had lived in the UK lawfully for nine years 11 months and four days and was therefore short of the 28 days to complete 10 years on 16 July 2015.

93. He submitted on 20 July 2015 application it is accepted that it was an in-time application as it was made within 28 days and this is not challenged in the grounds. The respondent's case is that even if TOEIC allegation had not caused the application to be refused the application made on 20 July 2015 would not have succeeded due to the decision in Ahmed.

94. However, he submitted that if the TOEIC allegation was not made out, the appellant should be put in the position as if that allegation had never been raised. His argument runs thus that he would have succeeded in June 2016 if the respondent had not made the allegation regarding TOEIC.

95. Mr Maqsood referred the tribunal to the decision made on 15 June 2016 (p150) where the long residence application was considered. In relation to that decision the application for leave to remain was submitted on long residence grounds on 20 July 2015 31 days out of time. The Secretary of State was not satisfied that 10 years long residence under paragraph 276A (i) with reference to 276B (v) and because of the TOEIC allegation.

96. He submitted that at the time of the refusal of his application, the decision in *Ahmed* was not known and therefore the respondent was considering the application under paragraph 276B(a) (i) with reference to paragraph 276B (v). After *Ahmed*, the

respondent adopted the position as upheld by the Court of Appeal and that paragraph 276B(v) does not cure the defect under 276B(a) (i). When the decision was made it was 31 days as opposed to 28 days, but according to the finding made by the FtTJ, the application was made within 28 days and thus the reference to 31 days in the decision letter was wrong if taking into account the tribunal's findings.

97. The respondent takes no issue with the judge's findings that the application was made within 28 days and the respondent made a decision under paragraph 276A(i) with reference to 276B(v). Thus, he submitted the respondent cannot say that the point would have counted against the applicant when the decision was made because the decision was made on the understanding of the provisions before the decision in *Ahmed.*

98. He submitted that if the TOEIC allegation had not been made and the application was refused because of 31 days (rather than 28 days) the decision would not have been certified and he would have had a right of appeal and the Tribunal would have found that the application was made within 28 days. Therefore, he submits the respondent cannot say that the application would have been refused at the date the decision was taken because of Ahmed. He submitted that Ahmed would not have mattered in 2016 and that the appellant was entitled to be put in the position as if the TOEIC allegation not been made. Therefore, there was no material error at paragraph 33 or in allowing the appeal under the Immigration Rules.

99. As to the materiality point, he made reference to the policy guidance. He accepted that neither advocate before the FtTJ made any reference to the policy guidance nor was a copy of the policy put before the Tribunal. Similarly, no policy was put before this tribunal. However, he submitted that as the respondent had a policy of granting 276B leave to every person completed nine years 11 months and two days in the UK, the policy at page 14 was clear. The policy had not changed he submitted in regard to this aspect of the grounds.

100. Mr Maqsood returned to the decision of *Ahsan.* He submitted that the respondent had completely missed the point of that decision and that the context of *Ahsan* can only be appreciated if you look at it in 2016 when the decision of *Ahmed* was not available.

101. In his reply he submitted that the appellant was entitled to be put back in the position he would have been had the TOEIC allegation not been raised and that the judge was right to allow the appeal on Article 8 grounds and that it would be for the respondent to exercise her discretion bearing in mind that finding.

102. At the conclusion of the submissions I reserved my decision.

Discussion on ground 2:

103. The following day on the 22nd of October 2020 the Court of Appeal handed down its judgment in in *Hoque and others v The Secretary of State for the Home Department* [2020] EWCA Civ 1357.

104. In light of its relevance to the issues that I have to decide in this appeal, I invited the parties to make further written representations in the light of that decision.

105. Following the service of those directions, there has been no compliance on behalf of the Secretary of State. Further correspondence was sent by the Tribunal to elicit reasons for the delay and the provision of further time. By the 15 January 2021 there had been no reply or provision of further submissions on behalf of the Secretary of State and therefore further directions were served upon the parties which required the submissions of the appellant to be filed.

106. In compliance with those directions, written submissions were sent to the Tribunal on 25 January 2021 and were settled by new Counsel Mr Z. Malik. Those written submissions refer to the decision of *Hoque* at paragraph 2 and that the cases concerned were described as cases of "open ended overstaying". The submissions accept that a person with "open ended overstaying", without more, does not qualify for indefinite leave to remain under paragraph 276B of the immigration rules. It is also stated that the appellant became an overstay on 23 June 2015 and was short of completing his 10 years residence which was completed on 19 July 2015. However, the respondent had refuses application made on 20 July 2015 on the basis that he relied on fraudulently obtained TOEIC certificate and had gone on to certify the decision of section 94 of the 2002 act so that there was no in country right of appeal.

107. The written grounds go on to cite the decisions of the Court of Appeal in *Ahsan* and *Khan* [2018] EWCA Civ 1684 and a more recent decision of the Upper Tribunal (presidential panel) in *Patel (historic injustice: NIAA Part 5A)* [2020] UKUT 351. By reference to those decisions it is submitted that on the findings of the FtTJ that he did not commit fraud, the Secretary of State is obliged to put the appellant into the position he would have been had the allegation in the early decisions based upon it not been made. This will result in a grant of leave to remain or at least reasonable opportunity to make or vary an application for leave to remain that was wrongly refused.

108. It is further submitted that this had a material bearing in the assessment of proportionality and Article 8 and thus the public interest did not require the appellant's removal from the United Kingdom. The appellant was in the present position because the respondent had made the unfounded allegation of fraud against him in response to his 2015 application and maintained that allegation in the decision that triggered the appeal before the FtTJ.

109. Consequently, it is submitted that the judge followed the guidance given by the Court of Appeal and thus made no error of law allowing the appeal in Article 8 grounds.

110. I have therefore considered those written submissions alongside the previous oral submissions made by Mr Maqsood.

111. Having considered the submissions of the parties I am satisfied that the FtTJ did not materially in law in the way advanced by the Secretary of State.

112. Dealing with the first issue, it is submitted on behalf of the respondent that the judge found that the appellant became appeal rights exhausted in June 2015 after his appeal was dismissed and permission to appeal to the Upper Tribunal was refused. However, the judge went on to find that the respondent's lawful leave did not end on 23 June 2015 because he made a further application for indefinite leave on 20 July 2015 (see paragraph [33]). Thus, it is submitted that the judge misdirected himself in law in reaching finding that the respondent's lawful leave continued.

113. In this respect it is accepted on behalf of the appellant that the FtTJ was wrong when he stated that his period of lawful residence did not end but continued. It is accepted that the appellant became an over stayer on 23 June 2015.

114. I should also state at this stage it is also accepted that by allowing the appeal under the immigration rules the judge was also in error.

115. However, I accept the submissions made on behalf of the appellant that neither of those errors were material to the outcome of the appeal and the decision that was ultimately reached by the FtTJ.

116. Whilst the appellant became an over stayer on 23 June 2015 and was short of approximately 25 days of completing 10 years, he completed that on 19 July 2015 as the chronology sets out. The application made on 20 July 2015 was refused on the basis that the application was made 31 days out of time. However, the unchallenged findings of the FtTJ reached a different view and that the application was made within 28 days of the section 3C leave ending on 23 June 2015 and thus the respondent was wrong in the decision letter.

117. The grounds advanced on behalf of the respondent do not challenge that issue but submit that in light of the decision of *R (Masum Ahmed) v SSHD* [2019] EWCA Civ 1070 paragraph 276B (v) does not cure a break in the continuity of lawful leave and that the period of overstaying that falls within paragraph 39E cannot be counted towards establishing a period of 10 years continuous lawful residence.

118. The Secretary of State has not provided any submissions in relation to the decision in *Hoque* nor engaged with the reasoning of the Court of Appeal based on the earlier decisions in *R (Masum Ahmed) v SSHD* [2019] EWCA Civ 1070 in the light of the decision in *Hoque*.

119. In the decision of *R (Juned Ahmed) v SSHD* [2019] UKUT 10, Sweeney J considered the situation where the current application for ILR was made within 14 days of the ending of previous leave. The appellant argued that it made his application for leave to remain within 28 days of his leave expiring and that the time spent waiting for the decision should be added to the period of continuous lawful residence. It was held the provisions of paragraph 276 B (v) were freestanding and that it was obvious that it was additional to subparagraph (i) (a) and any period of overstaying would result in a failure to satisfy the requirements of rule.

120. In the decision of *R (Masum Ahmed) v SSHD* [2019] EWCA Civ 1070, which was an application to refuse permission to appeal, considered the situation when 10 years continuous lawful residence was claimed when past applications have been made, and granted, with the benefit of paragraph 39E. The appellant argued that the gaps in his period of residence, when he had applied for extensions for leave to remain out of time should be disregarded by reason of paragraph 276B (v) and that as a result he could demonstrate 10 years of continuous lawful residence. The court considered whether the operation of paragraph 276B (v) operated to cure short gaps between periods of leave to remain. It was determined that the requirements under paragraph 276B of the immigration rules were freestanding and the intention behind the drafting of 276B(v) could not be that it was to provide an exception to 276B (i) (a).

121. Both decisions relied on the same reasoning but without the analysis of the context of the Immigration Rules in question.

122. However in *Hoque v Secretary of State for the Home Department and Another* [2020] EWCA Civ 1357 the Court of Appeal went on to consider whether past or present overstaying meant that a person who had otherwise remained continuously in the UK with leave for 10 years could not qualify for ILR under the long residence rule in paragraph 276B of the Immigration Rules and did so by a full analysis of the relevant rules.

123. By a majority, the Court held that where an individual became an overstayer and remained as such, neither (a) the reference in present paragraph 276B to the current period of overstaying being disregarded where paragraph 39E applies, nor (b) the reference in the previous version of paragraph 276B to "any period of overstaying for a period of 28 days or less" being disregarded enabled an individual to satisfy 276B(i)(a), by counting any part of the period of overstaying so as to show 10 years continuous lawful residence . In each case, the overstaying is, in Underhill LJ's phrase, open-ended. Properly construed, paragraph 276B does not enable a person who had leave but who becomes an overstayer and remains as such, to contend that such open-ended overstaying counts towards the 10- year requirement.

124. Thus the court held that an over stayer applying for indefinite leave to remain ("ILR") relying upon paragraph 276B of the immigration rules cannot rely upon his time in the UK while the application ILR is pending in order to make up the required period of 10 years continuous lawful residence (as set out in conclusion of the UT in *R(Juned Ahmed) V SSHD*).

125. The factual circumstances of the appellant do not fall within those of the appellants in the decision of *Hoque* or *Ahmed*. On the factual circumstances here, the appellant became an overstayer when he became "appeal rights exhausted" on the 18 June 2015 (or as the FtTJ found) on 23 June 2015. The respondent has not challenged the finding of the FtTJ as regards the date of the 23 June 2015 as the relevant date either in the grounds or in the written submissions (see paragraphs 5-7 of the written submissions). He had not attained 10 years lawful residence at that date. He made an application on the 20th of July 2015 which was 28 days after he became appeal rights

exhausted by which time, he had been in the UK for 10 years, having arrived on the 19 July 2005. Therefore, as the appellant had accumulated 10 years lawful and continuous residence and the requirement of the disregard applied, as found by the FtTJ, the period of overstaying during that period applied.

126. It is also the case that the refusal of his application made on 20 July 2015 was due to the assertion made that his application was 31 days out of time. In the light of the unchallenged finding made by the FtTJ, that was an error, and the application was made within 28 days and thus the disregard applied.

127. It is therefore not been demonstrated that the FtTJ was an error as asserted in the grounds by reference to the decision in *Ahmed.*

128. Furthermore, the appellant's application was refused on the basis that he had obtained leave by deception in an application made in 2014, relying on a fraudulently obtained TOEIC certificate. The finding of the FtTJ, which I have concluded was not in error, was that the respondent had not discharged the burden on her to demonstrate that the appellant had used deception in that application. Having made that finding, the judge was entitled to consider the relevant case law concerning the effect upon an appellant who is in that particular factual situation.

129. In my view the judge was correct in his citation of the decision in *Ahsan* at paragraph [31] of his decision.

130. 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 be remedied by either kind of proceeding.)"

131. Paragraph 37(iii) of *Khan* 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".

132. 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.

133. A more recent decision cited in Mr Malik's written submissions is that of *Patel (historic injustice: NIAA Part 5A)* [2020] UKUT 351 and the headnote which reads as follows:

> "… (2) Cases that may be described as involving "historical injustice" are… where the Secretary of State forms a view about an individual's activities or behaviour, which leads to an adverse immigration decision; but where her view turns out to be mistaken (e.g. Ahsan v SSHD [2017] EWCA Civ 2009). Each of these failings may have an effect on an individual's Article 8 ECHR case….".

134. The panel at [46], quoted paragraphs [120] – [121] of Ahsan, and at [47], said:

> "Although not immediately apparent, one way in which this kind of erroneous treatment of an individual can have a bearing on Article 8 proportionality is in an ensuing human rights appeal, as was envisaged by Underhill LJ. In such an appeal, the individual would be able to argue that, if the respondent did not form the mistaken view of their conduct, he or she would have been given leave to remain, and that this should be given way to the balancing exercise, comparably with how the Court of Appeal, in *AA (Afghanistan)* et cetera, spoke of the respondent taking account of past mistakes in deciding whether to exercise discretion in the individual's favour."

135. 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].

136. The factual circumstances of this appellant are not comparable to the appellant's in *Khan* or *Ahsan*. Nor are his circumstances analogous to the appellants in the case of *Hoque and others* (as cited). The decisions in *Khan* and *Ahsan* 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 and that this had been the reason for refusing his application for leave to remain on long residence grounds.

137. However, I would accept the submission made in the written submissions by Mr Malik and supported by his reliance on paragraph 120 of Ahsan, and the case law I have referred to above, 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. That was the decision reached by the FtTJ. Whilst he erroneously allowed the appeal under the immigration rules, in the light of the above, his decision to allow the appeal under Article 8 of the ECHR was a decision reasonably open to the judge to make in the light of the factual findings he made on this particular appellants appeal.

138. For those reasons I am not satisfied that the decision of the FtTJ demonstrates any error on a point of law that was material to the outcome and therefore the decision to allow the appeal on Article 8 grounds 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.

Signed *Upper Tribunal Judge Reeds*

Dated 28 January 2021

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.