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Filed on behalf of the Respondent
Witness: Peter Millington
1st Statement
Date: 23 June 2014

IN THE UPPER TRIBUNAL

JR/6299/2014

IMMIGRATION AND ASYLUM CHAMBER

IN THE MATTER OF AN APPLICATION FOR PERMISSION FOR JUDICIAL REVIEW

B E T W E E N:

THE QUEEN on the application of
Zaheer Hussain MOHAMMED

Applicant

-v-

SECRETARY OF STATE
FOR THE HOME DEPARTMENT

Respondent

WITNESS STATEMENT OF
PETER MILLINGTON

I, Peter Millington, of the Home Office will say as follows:

1. I am an Assistant Director and I have been employed by the Home Office since 2003, working in a variety of roles within the organisation in the UK. I am currently responsible for the network of Sponsor Compliance Officers in the Midlands and North of the UK and in this role I coordinate compliance visits to Sponsors. Prior to this role I was responsible for the unit that processed In-Country Tier 4 student applications, undertaking this role for 4 years.

2. I am duly authorised to make this witness statement on behalf of the Defendant in these proceedings. The purpose of my evidence is to provide the Court/Tribunal with an understanding of:

   i) the work of Educational Testing Service (ETS), a test provider operating under a licence granted by the Home Office; and
   ii) the process and procedure it has used to assist the Home Office with her actions in response to widespread deception used by applicants applying for leave to enter, or remain in, the United Kingdom.

3. This witness statement should be read in conjunction with the witness statement of Rebecca Collings, who deals with the relationship between the Defendant and ETS as well as the action taken by the Defendant in response to information provided by ETS. I do not intend to touch on those points in any detail.

4. The contents of this statement are derived from Home Office records and minutes, save as otherwise appears, and are true to the best of my knowledge and belief.

Background

5. In February 2014 BBC's Panorama broadcast a television programme which revealed widespread abuse within UK test centres, administering the Test of English and International Communication (TOEIC), which is used for other purposes including establishing sufficient ability in the English language to study at a education institution in the UK. The abuse included (i) the use of 'proxies' to undertake speaking and listening tests on behalf of the candidates and (ii) the provision of correct answers for those sitting written tests.

6. Consequently the Home Office requested that ETS investigate the validity of results across UK testing centres at which its tests were taken. Following comprehensive investigations ETS provided the Home Office with lists of

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candidates whose test results show 'substantial evidence of invalidity'. The Home Office was provided with the background to the process used by ETS to reach that conclusion.

7. In order to gain the clearest understanding of the detail of that process, at the beginning of June 2014 I attended ETS's offices in Ewing, New Jersey, USA as part of a delegation headed by the Director of In-country Migration Casework in the Home Office. The delegation also included a lawyer from the Treasury Solicitor's Department and an analyst from the Home Office Immigration Enforcement function.

8. During the course of our visit to ETS, representatives of ETS explained and demonstrated the background to the approach/process they used to identify invalid tests.

Educational Testing Services (ETS)

9. ETS, established in the USA in 1947, is the world's largest private nonprofit educational testing and assessment organisation. The company develops, administers and scores achievement in occupational and admissions tests globally. ETS administers approximately 50 million tests annually in 25,000 test centres in 192 countries.

10. ETS administers paper-based, computer-based and internet-based tests and has developed a scoring system which allows approximately 64,000 tests to be scored per day. It is also a world leader in respect of fraud prevention and detection.

11. ETS is contracted to perform testing services by the College Board, a private, nonprofit membership association of universities, colleges, school districts, and secondary schools within the USA. The most popular of the College Board's tests is the SAT, a college admissions test. The SAT is taken by more than 3 million students annually. ETS also develops and administers the College Board's Preliminary SAT/National Merit Scholarship Qualifying

Test (PSAT/NMSQT) and the Advanced Placement program, which is widely used in US high schools for advanced course credit.

12. ETS also administers the Test of English as a Foreign Language (TOEFL), the most widely respected English-language test in the world, recognised by more than 9,000 colleges, universities and agencies in more than 130 countries, including the UK, the US, Australia and Canada.

The Test of English for International Communication (TOEIC)

13. During my visit, a number of senior and expert representatives of ETS explained to my colleagues and me the detail of the operating model for administering the TOEIC. In summary what they told me was that the TOEIC tests listening, reading, speaking and writing. The listening and reading components of the test are paper based and machine scored. The speaking and writing elements are computer delivered and human scored.

14. It was explained to me that the test is used by a broad range of customers around the world and that 14,000 organisations use the test, including 7 of the 10 largest companies in the world. The test is administered in around 150 countries and there are 7 million tests taken annually.

15. The main use of TOEIC is to establish the suitability of an individual to operate in the workplace. It is often administered as part of a recruitment process, an educational programme or taken by individuals to help them secure a job or enhance their career. As discussed in Rebecca Collings' witness statement, between April 2011 and March 2014 the TOEIC was also an approved English language test for the purposes of applications for leave to enter, or remain in, the United Kingdom.

A Decentralised Process

16. In relation to TOEIC, ETS operates a decentralised process in which they have an ETS Preferred Network of local third party distributors around the world ("the EPN") which provide a localised service for clients. In this model the EPN is responsible for the administrative tasks such as test registration

and administration, customer service and recruitment and certification of test centres to administer the test on behalf of ETS. It was one of these EPN offices in the UK that operated the tests that were the subject of the Panorama programme.

17. Under this model ETS, centrally in the USA, has responsibility for designing and developing the tests and developing new products. Whilst the EPN offices administer tests, the responsibility for marking the results and analysing the overall statistics and management information rests with ETS. Having produced a test score, ETS will pass the results back to the relevant EPN office for them to report back to the test taker.

The Marking Process

18. In order to avoid the impact of human subjectivity (e.g. a marker having regard to previous performance) ETS wanted to construct processes which eliminated factors such as knowledge of the test taker or how they had performed on other parts of the test as a driver of subjectivity. To achieve this goal they have developed an approach to human marking based on 'blind scoring'. This ensures as far as possible that the marker does not know the identity of the test taker or how they have performed on the remainder of the test or previous tests.

19. In practice this means that after a test is administered in the UK, a test taker's spoken and written responses to each of the individual questions are divided into individual electronic files and transmitted to ETS and stored securely on servers in its data centre. These servers are accessible only by authorised personnel and the files are typically stored for 999 days. ETS has advised that file manipulation, corruption or misapplication has not been an issue once files are received in the USA. These individual files are then randomly and anonymously assigned to markers. That means multiple markers will be involved in the marking of each test. This process is done through an Online Scoring Network (OSN), which is also hosted on ETS's servers located in its data centre, and markers access the OSN remotely from locations across the USA.

20. ETS have advised that they have a robust process for recruiting and training markers and that each marker is required to follow strict scoring guides. ETS also has processes in place to allow experienced supervisors ("scoring leaders") oversight of the performance and quality of work of the remote markers. In addition, each day remote markers are required to take a calibration test (where their marking is checked against a scoring leader) before they can mark responses. Discrepancies in marking between initial markers will lead to intervention by a scoring leader.

21. As each test taker's test will be marked by multiple markers, ETS has a separate Scoring Key Management system which merges each of the individual scores into an overall score for a test taker.

Tackling Abuse

22. ETS has sought to identify and address abusive behaviour where it exists amongst test takers. Where they believe they have identified suspect behaviour on the part of the test taker they will cancel the test score. Examples of the sorts of behaviour that would lead to a score being cancelled would include:

    i) where there has been a repeat test however the voice of the test taker is different from the previous test;
    ii) the voice of the test taker changes from one question to the next (this would suggest another person has been substituted during the test);
    iii) the use of imposters to sit tests in place of the test taker;
    iv) the recordings revealing a voice other than the test taker giving them assistance; or
    v) an answer is unusually similar to another test taker's answer.

23. Markers and supervisors are encouraged (through training and day to day management messages) to be vigilant in respect of these potentially abusive behaviours. However the deliberately fractured nature of the marking process means that, to a large degree, abuse of this sort would only be uncovered if

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one marker was able to recognise patterns across items that they were marking despite the identity of individual test takers not being available to them.

24. The one area where a more structured approach is possible to detect abuse, is where repeat tests are taken by an individual and there is a large score difference between the scores achieved by that individual (the threshold was + or – 30 points). In these cases analysts from ETS's Office of Testing Integrity (OTI) would listen to and review the two voice samples to establish whether the tests were taken by the same person. The practices used by these analysts were developed around 7 years ago with the input of a former-FBI officer who acted on a consultancy basis to build their skills in analysing speech recordings.

25. Where abuse was not connected to repeat tests, the identification of individual or organised abuse would rely on them happening sufficiently frequently with the same markers to cause them to flag the issue to their supervisors. ETS were aware of the limitations of these approaches and therefore had, prior to the revelations in the Panorama programme, embarked on a programme to test and develop biometric voice recognition as a more comprehensive and structured way of identifying abuse.

Biometric Voice Recognition

26. During my visit to ETS I attended a presentation from ETS's technical expert who has been responsible for developing and testing the voice biometric technology that ETS are now using in analysing the TOEIC test data. The technology was initially developed for ETS's TOEFL programme and the intention had been to further establish the technology within the TOEFL system before applying it to the TOEIC system. However, following the revelations in the Panorama programme, ETS decided to deploy it as an analytical tool to retrospectively identify levels of abuse across EPN test centres in the UK.

27. It was explained to me that the use of this technology is well developed in other sectors. For example voice biometric technology is already used in the financial sector as a security measure (for example as part of telephone banking arrangements). ETS were therefore keen to explore its potential application to the English testing context. The basic technology extracts biometric features from an individual's speech to generate a voiceprint (the voice equivalent of a fingerprint). This voiceprint can then be run against samples to establish whether the sample is likely a recording of the same person who had generated the voice print or a different person.

28. ETS started with a number of key questions before they could be confident that the technology was applicable to their field. These included:

    i) whether they would need multiple models of the technology for particular regions (due to the variety of native first languages spoken by their clients);
    ii) whether the type of speech samples generated during a test were sufficiently long and of a high enough quality to allow for biometric analysis and comparisons;
    iii) could they develop the statistical guidelines, process and analysis of results to set themselves the thresholds for determining similarities or differences that did not result in large numbers of false negatives or positives?

29. In 2011 ETS conducted a proof of concept pilot focused on identifying a vendor who could provide the biometric technology required. They secured the software from a vendor who had already successfully operated this technology in other sectors. The procurement of the technology remains subject to a confidentiality agreement and it was not possible for me to ascertain any further details. Nonetheless, ETS assured me that the underlying technology was well established and tested.

30. In the process of testing the technology, ETS developed a statistical model whereby voice prints were compared against all other samples in the "batch"

being analysed and each comparison produced a numeric value that represents the amount of match between a sample and a voice print. In short, there is an increasing probability that samples match (i.e. the samples are from the same person) as the value increases. Conversely, there is a decreasing probability that the samples match as the value decreases.

31. Through 2012/13 ETS tested this technology with representative data which deliberately included 285 pairs of repeat test takers where it was already known they were recordings of the same person. Data from each of these test takers were also compared to every other test taker, resulting in over 70,000 pairings of non-matching comparisons. ETS wanted to know whether the technology could identify occasions where, within one test centre, there was evidence of multiple tests being taken by the same person (or people who had already been identified as imposters). The results of the pilot were that matching samples produced values that were higher than values from the non-matching samples the majority of the time, with a less than 2% error rate. ETS also tested whether the technology was effective in cases where repeat tests were being taken by two different people (although that form of abuse is not relevant to the current litigation).

32. The technology is used to "flag" a comparison where the result is suspicious (i.e. where the samples match despite being taken from 2 different test takers or where the samples do not match despite being from the same test taker). ETS accepted that voice biometric technology is currently imperfect and so their challenge was in establishing the appropriate probability thresholds for a comparison to be flagged as suspicious. They wished to strike the desired balance between providing confidence in the accuracy of the comparison and avoiding "false positives" (i.e. samples incorrectly flagged as a match) but also limiting the number of "false negatives" (i.e. samples that are in fact matches but are not flagged due to the thresholds being set too high).

33. ETS considered that too many false positives would fatally undermine the integrity of the voice biometric system and decided to set conservative

thresholds (i.e. there is high probability of irregularity). As a result, the probability of false positives decreased.

34. Because of the successful trial of the technology in TOEFL cases, ETS felt this would be an effective measure to deploy retrospectively to provide an analysis of previous UK TOEIC test results in light of the Panorama programme and the request from the Home Office for information.

Application of the Voice Biometrics Technology in the Current Cases

35. ETS's Office of Testing Integrity (OTI) was responsible for applying its voice recognition technology retrospectively to tests undertaken at UK testing centres. OTI has a staff of 60 and it oversees both paper- and online-based security operations with responsibility for maintaining the integrity of their testing around the world. It is important to note that OTI had not had day to day responsibility for the integrity of the TOEIC tests administered on ETS's behalf in the UK. However, given the seriousness of the issues raised by the Panorama programme and the urgency of the Home Office request, ETS immediately deployed much of the OTI's resources and experience to the issue.

36. Given that ETS had not originally planned to roll out its voice biometric technology on TOEIC at that point, or to use it as a retrospective fraud identification tool, a number of logistical measures had to be taken. The obvious source of voice samples for comparison were the electronic files containing individual spoken responses provided at the time of the test in the UK (see §19) The OTI were provided with electronic files and for each test taken identified the 6 audio files which were most appropriate for comparison. These would usually be:

i) the largest/longest audio files;
ii) those providing the clearest responses; or
iii) those where all test takers were required to read a set text and therefore comparison would be more straight forward.

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37. The electronic files generated at the testing stage required a two step audio conversion process (from .ogg to .wav to .spx) in order to be processed through the voice biometric software. The OTI was responsible for the conversion process to ensure consistency.

38. The Home Office identified UK testing centres that were considered to be "at risk" of incidents such as those shown on the Panorama programme. ETS prioritised those centres for analysis. ETS considered that the best way to test for "imposters" was to look at test centres individually as it was more likely that an imposter would sit multiple tests at one test centre. Tests from a test centre were "batched" into groups of 300-400 test takers. These batches could spread across one day of testing or multiple testing days, depending on the size of the centre. These audio files were then run through the voice biometrics engine. Each batch would take approximately 2 hours to process. The engine would compare each test to all other tests in that batch and flag all suspicious results (those that were a "match") in line with the probability thresholds discussed above. The output would be a list of flagged cases ranked in order of the most likely match through to least likely.

Further Human Verification of "Flagged" Matches

39. The OTI explained that they were determined to ensure that the Home Office was provided with information which was as accurate as possible. They acknowledged that the technology they used was imperfect and that samples could be incorrectly flagged as matches (i.e. false positives). This could occur due to noises in the background of a recording (e.g. an air conditioning system) or the detection of another voice in the background which matches another test taker (although ETS notes that test takers should not be sitting so close to one another that they can overhear each other's responses).

40. In order to avoid the occurrence of false positives, the OTI subjected each flagged match to a further human verification process. The scale of that task, and the need to provide results to the Home Office quickly, required OTI to

draft in additional staff from elsewhere within ETS. Those staff received mandatory training in voice recognition analysis, and were initially mentored by experienced OTI analysts. All of the new staff's work was peer reviewed by an experienced analyst until a level of confidence was reached that they were capable of carrying out the work on their own. It is important to note that a number of new staff were either re-deployed or chose not continue because they did not have the necessary aptitude for the task.

41. The OTI proceeded with the analysis on the basis that each flagged comparison would be verified by two analysts working entirely separately. Each analyst would listen to samples associated with two cases where the voice biometric engine concluded there was a match. Having listened to the samples they would confirm whether, in their opinion, it was the same or a different person speaking in those samples. They would enter their opinion on each match on a spreadsheet (if they considered the samples to be a match then they would enter "SAME" on the spreadsheet). Only where both analysts independently concluded that samples were of the same person would that case be treated as a match. OTI ensured that at least one analyst verifying each flagged match was an experienced OTI analyst.

42. My colleagues and I spent time with a senior and experienced analyst being taken through the human verification process. He played us a number of audio files that had been flagged as a match by the voice biometric technology. Over the course of the demonstration we heard samples which we concluded were the same person speaking although the samples were supposed to be from two different test takers. It was very clear to me, from the examples I heard, that those samples were of the same person speaking. I was able to compare tone, accent and the distinctive and instinctive expressions used to fill hesitations in speech.

43. During the course of the demonstration we also heard voice samples that were not verified matches. In these cases it was straight forward to recognise differences between the test takers. My colleagues and I were confident that two independent analysts would be able to effectively identify matches or

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false positives. We were advised that In numerous cases multiple "matches" listed on the spreadsheets would be linked to the same individual (i.e. the same person's voice is heard on multiple tests).

44. During the demonstration, the senior analyst advised that the OTI were constantly updating their guidance and sharing information to ensure that analysts could hone their skills. For example, they shared the distinctive use of particular idioms, verbal tics and/or answers being structured in exactly the same way between test takers. We were also advised that, in order to maintain accuracy, analysts were encouraged to take regular breaks and every effort was taken to avoid an analyst dealing with the same testing centre or the same questions repetitively.

45. ETS's statistics bear out the underlying reliability of the voice biometrics technology. Of over 33,000 possible matches identified by the system 80% were confirmed after human verification. As already discussed, many of those "non-verified matches" would have been because of the presence of noise in the background of recordings. The analysts adopt an approach whereby any doubt about the validity of a match will result in it being rejected. I am confident this mitigates significantly against the risk of a false positive.

46. ETS have identified thousands of cases where speech samples display marked similarities, leading OTI to believe an imposter was involved, and in such cases scores will be cancelled. Within the tests analysed the OTI has identified many instances where the speech sample indicates the same individual has taken tests in place of numerous candidates. Where a match has been identified their approach is to invalidate the test result. As set out in the witness statement of Rebecca Collings, ETS has informed the Home Office that there was evidence of invalidity in those cases.

47. Where a match has not been identified and verified, an individual's test result may still be invalidated on the basis of test administration irregularity including the fact that their test was taken at a UK testing centre where numerous other results have been invalidated on the basis of a "match". In

those cases the individual would usually be invited to take a free re-test. These cases are clearly distinguished by ETS in its spreadsheets provided to the Home Office from tests where there is substantial evidence of invalidity.

48. Having run the test data through their voice biometric engine, and verified all potential matches by way of independent analysis by 2 OTI staff, ETS can state that where matches have been identified the individuals taking those tests (which have been submitted on behalf of different test takers) are highly likely to be the same person.

Conclusion

49 Having attended a presentation by various ETS staff, discussed the verification process and witnessed the process first hand (including examples of both matches and non-matches), I believe that where ETS have identified positive voice matches among two candidates with different names it is because one person has sat the speaking and writing exam for both candidates. In my view this is clear evidence that both candidates have fraudulently obtained their TOEIC certificate and employed deception in their application for leave to remain.

STATEMENT OF TRUTH

I believe that the facts stated in this Witness Statement are true.

Signed: [signature]

Date: 23/06/14

IN THE UPPER TRIBUNAL JR/6299/2014

IMMIGRATION AND ASYLUM CHAMBER

IN THE MATTER OF AN APPLICATION FOR PERMISSION FOR JUDICIAL REVIEW

B E T W E E N:

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-v-

SECRETARY OF STATE
FOR THE HOME DEPARTMENT

Respondent

WITNESS STATEMENT OF

REBECCA COLLINGS

I, Rebecca Collings, of the Home Office will say as follows:

1. I am employed by the Home Office as a Grade 6 Civil Servant working within the United Kingdom Visas and Immigration Directorate. I have been employed by the Home Office for 14 years. I have a key role in supporting the delivery of decisions to grant or refuse leave to enter or stay in the United Kingdom (UK). Part of this role is to oversee delivery of Secure English Language Testing (SELT) on behalf of the Home Office. I took responsibility for this area last autumn (2013).

2. I am duly authorised to make this witness statement on behalf of the Respondent in these proceedings. The purpose of my evidence is to provide the Tribunal with an understanding of:

   i) the purpose of Secure English Language Testing (SELT) and how it is operated;
   ii) the role of Educational Testing Services (ETS) therein; and
   iii) the approach to the cases already considered which were reliant on a SELT certificate obtained from ETS.

3. This witness statement should be read in conjunction with the witness statement of Peter Millington, who deals with the work of ETS and the process and procedure ETS has used to assist the Home Office. I do not intend to touch on those points in any detail.

4. Where the content of this statement is within my own knowledge it is true. In all other instances it is true to the best of my knowledge and belief.

Background

5. SELT is an important element of the consideration of applications for immigration to the UK. Our policies require the hundreds of thousands of people wishing to come to the UK, or to stay here for a longer period than that previously granted, to demonstrate an adequate level of ability to speak English. Demonstrating language ability is a requirement for applications for those seeking entry clearance and leave to remain to work in the UK under Tier 1, Tier 2 (General, Ministers of Religion and Sportspersons) and Tier 4 of the Points Based System (PBS), as well as applications by partners and parents of persons settled in the UK and applications for settlement and for British nationality.

6. Applicants can demonstrate their English language ability in a number of ways:

- by being a national of a majority English-speaking country; or
- holding a degree that was taught in English and is equivalent to a UK bachelor's degree or above; or
- in the case of potential students, having their sponsoring educational institution judge their English language ability, (only if their sponsor is a Higher Education Institution (HEI) and their course of study is at degree level or above); or
- having passed an English language test approved by UKVI at the appropriate level.

7. The language testing policy started to be introduced in 2008, in recognition that the ability to speak adequate English was a key indicator of success for people coming to work here. Between 2008 and 2010 it was added to the requirements of all of the aforementioned routes. Initially, for those applicants who were neither a national of a majority English-speaking country nor held a qualification equivalent to a degree that was taught in English, arrangements existed whereby they could take a test with one of 19 providers identified by the Home Office which offered English language testing, equivalent to a recognised European Standard (an acceptable UK equivalence) but with whom there was no contractual or other commercial framework. This list included Educational Testing Services (ETS).

8. In 2010 a tender exercise was commenced to approve a small group of Home Office suppliers of SELT, which would work under licence to the department. Only tests taken with one of these providers would be accepted

as evidence of English language ability (where the applicant was neither a national of a majority English-speaking country nor held a qualification equivalent to a degree that was taught in English). The Home Office approved six providers to work under licence.

9. ETS BV was one of the six organisations given approval as a SELT provider. The licences commenced on 6 April 2011 and gave them permission to provide services to third parties (i.e. those applying for UK immigration), for our specified purposes. From 6 April 2011, any person wishing to apply under the aforementioned routes and who was neither a national of a majority English-speaking country nor held a qualification equivalent to a degree that was taught in English was required to take an English language test with one of the approved providers before making their application. Test providers were expected to ensure the security and integrity of their processes.

10. Tests could be taken in most countries around the world. Each provider operated its own type of testing (e.g. ETS were approved to deliver both Test of English for International Communication (TOEIC) and Test of English as a Foreign Language (TOEFL) tests for UK immigration purposes) but each test must map onto the Common European Framework for Reference (CEFR). This is a European language testing standard, by which the various different testing methods of the providers can all be rated. It should be noted that the suppliers, including ETS, delivered English language testing not solely for the purposes of UK immigration – the same tests might also be accepted by other countries (e.g. Australia) for immigration purposes, or might be required by employers.

11. Tests were available to be taken at different levels dependant on the immigration application type and ability of the test-taker. This is set out in the Table 1 below.

Table 1. Level of English language required (where SELT test required)

Immigration Category	Level of English required (CEFR standard)	Components required
Tier 1 (General)	C1 or above	Speaking, Listening, Reading, Writing
Tier 1 (Entrepreneur)	B1 or above	Speaking, Listening, Reading, Writing
Tier 1 (Graduate Entrepreneur)	B1 or above	Speaking, Listening, Reading, Writing

Tier 1 (Exceptional Talent)	B1 or above	Speaking, Listening, Reading, Writing
Tier 2 (Minister of Religion)	B2 or above	Speaking, Listening, Reading, Writing
Tier 2 (General)	B1 or above	Speaking, Listening, Reading, Writing
Tier 2 (General)	A1 or above	Speaking, Listening, Reading, Writing
Tier 2 (Sportsperson)	A1 or above	Speaking, Listening, Reading, Writing
Tier 4 (General)	B1 or above for courses below degree level B2 or above for courses at degree level or above	Speaking, Listening, Reading, Writing
Spouse/Partner	A1 or above	Speaking and Listening
Settlement	B1 or above	Speaking and Listening

12. Test takers were provided with notification of their results by the test provider, either by way of a score report, as in the case of ETS tests, or a certificate, which they then included as part of their visa application to be considered by the Home Office.

13. It was ETS's responsibility to ensure the integrity of their test procedure and to report any issues or concerns to the Home Office. SELT providers are responsible for accrediting their test centres and ensuring the Home Office criteria and their own standards are met.

14. Over the period of the licence we had, on the basis of intelligence or other information, undertaken investigative actions with SELT providers where concerns emerged, including, in May 2013, issues at ETS where we asked them to investigate suspicious levels of certificates with "top scores" being provided with applications for leave to remain in Tier 1. ETS verified these results as genuine.

15. Since the licences commenced in 2011, the Home Office also worked with providers to introduce further anti-fraud measures, particularly online

verification systems. This means that Home Office caseworkers can verify with the provider that the details presented in the certificate match their records (e.g. same photo, same scores), which mitigates the risk of fraud and significant further strengthening features were to be introduced via a tender exercise to deliver renewed provision from April 2014.

16. Although ETS was not expected to have fully implemented these when the BBC Panorama programme aired in February 2014 (as the re-tender exercise had not yet been completed), ETS had bid and provided evidence in relation to its security and other operating capabilities which demonstrated that it already met or would be capable of meeting all our requirements.

Abuse at Test Centres and Home Office Response

17. I became aware of the potential issues with testing at ETS when I was provided a copy of a letter from the BBC dated 6 January 2014, outlining its findings following undercover reporting and its intention to air an episode of its "Panorama" investigative programme. It said "*in our research into two approved English language exam centres we discovered instances of:*

    - *Registered candidates standing aside from the secure computer terminals, allowing other people ("fake sitters") with superior English language skills to take the oral and written parts of the exam on their behalf. The fake sitters were organised by the very staff who were supposed to ensure the proper conduct of the exam.*
    - *Verification checks, intended to act as proof that registered candidates sat the exams themselves, being falsified by staff at those centres in order to facilitate this fraud.*
    - *Exam 'invigilators' at one centre dictating the correct answers to the registered candidates in the multiple choice part of the exam.*
    - *At the other centre multiple choice exam answer papers were filled out and submitted without the registered entrant even being present.*

    It is evident that the intention of all of these activities is to help exam candidates gain an English qualification by fraudulent means. And that this fraud is being perpetrated with the ultimate aim of enabling the recipients of those qualifications to attempt to deceive UK immigration authorities in their visa applications"

18. Subsequent correspondence with the BBC provided information that Eden College and Universal Training Centre were the test centres involved in the programme, at which 11 of the "top score" results previously sent to ETS had been taken.

19. The Home Office initiated a "Gold command" structure. This is a standard response to any item arising which is critical in nature and outside the bounds

of our normal business as usual. The parameters included commencing a full investigation as well as planning and implementing operational responses and communications for individuals who might be affected. Even before seeing the programme, from what the BBC had shared, there appeared to be a serious breach of the licence. The Home Office suspended the licence with ETS to allow our investigation to commence and for remediation to be proposed and considered.

20. Testing outside the UK (and for any purposes other than UK immigration) was allowed to continue. Given the information provided in the letter from the BBC (and we were not given prior sight of the footage they had recorded) before Panorama aired, we publicly announced the suspension of ETS testing in-UK and also that we were pausing consideration of applications using an ETS test certificate. This decision was taken because at this point we did not know the full scale or precise scope of the issue, but we believed there could be a significant threat to immigration control.

21. Applicants who had applied using an ETS test and those continuing to apply using tests taken before ETS suspended them on 6 February, were offered the chance to withdraw their application or take a test with another provider if they wished to avoid any delay to the processing of their application. The offer to take a new test was made because, at the time, the Home Office were only aware of two test centres being subject to abuse and we believed the majority of applicants would have a genuinely obtained test score and be able to prove this to us by using an alternative test.

22. We asked ETS to provide us with details of UK based candidates taking tests with them, initially for the eight months prior to February 2014, in order to establish the volume of customers affected. We subsequently requested details for all tests taken since the licence commenced in April 2011.

23. In addition we immediately instigated action to investigate the other providers to ensure that nothing of the same nature was occurring elsewhere in the overall system of SELT.

24. The episode of "Panorama" was aired on the evening of 10 February. We had had no opportunity to see the programme before it was aired. It was immediately clear that there was a serious breach of the licence and abuse of the immigration system had taken place. Most notably in relation to ETS test centres, individuals were able to pay to pass the English language test. Proxy test-takers were seen taking the speaking element of the test and answers were seen read out from the front of a class supposedly taking a multiple-choice element of the test.

25. From February into March our investigations, which included criminal investigations, progressed and we were in very regular contact with ETS to gather data, trend analysis and other evidence to enable the Home Office to make informed decisions on handling those affected who had either already had leave and previously taken a test with ETS or had an application for

leave pending with the Home Office and had taken a test with ETS. We also began scenario-planning for removing ETS as a provider. Testing continued to be suspended throughout, as did our consideration of cases in almost all instances.

26. In late March 2014, ETS informed us that it had been able to identify impersonation and proxy testing using voice recognition software. Early analysis demonstrated evidence of cheating, but ETS confirmed that it would take time to complete analysis for all tests taken since the licence began in April 2011. Details of the processes adopted by ETS are set out in the witness statement of Peter Millington.

27. ETS sent the Home Office the results of the analysis of the first batch of test centres on Monday 24 and Friday 28 March. Following the provisions of this data the Home Office had a teleconference with ETS on 1 April. The discussion focussed on the first batch of test analysis.

28. ETS described that any tests categorised as cancelled (which later became known as invalid) had the same voice for multiple test takers. On questioning they advised that they were certain there was evidence of proxy test-taking or impersonation in those cases.

29. ETS explained, at the time, that those categorised as questionable (as opposed to cancelled / invalid) were inconclusive in terms of being certain of impersonation/proxy test-taking. Following further communication with ETS they confirmed the definition of "questionable" and this is set out in Peter Millington's witness statement; it is where an individual's test result was still cancelled on the basis of test administration irregularity including the fact that their test was taken at a UK testing centre where numerous other results have been invalidated on the basis of a "match". ETS had analysed over 10,000 test scores at that point, of which the majority were cancelled as invalid, the remainder were cancelled as questionable.

30. ETS advised they were working to complete the same analysis for other test takers. Clearly these numbers were huge and the level of cheating was incredibly high. Further analysis continued to be sent by ETS to the Home Office and we agreed a schedule and priority of order for ETS to continue to do so. Information provided by ETS on individual cases was required for us to make decisions on an individual basis and in relation to the particular merits of their case.

31. However, the information we already had about the cancelled scores was sufficient to make decisions on the handling of those already highlighted as having taken a test with ETS. I believe we were right to have waited until week commencing 24 March, the point at which the Home Office received the results of the tests that had been analysed, to start to take action on individual cases because we now had evidence to take action we could be confident in.

Deception and section 10 Decisions

32. We recognised that where ETS had cancelled a test score because of impersonation and proxy test-taking that test score had been obtained by deception. We further recognised that persons in that position who then used that test score had sought to obtain leave by deception.

33. It is clear in Section 10 of the Immigration and Asylum Act 1999 (as amended) that a person using deception when seeking leave to remain may be removed from the UK.

34. A significant data matching process was commenced to take the results from ETS and match them (or not) to actual individuals with leave already granted or with applications pending. From this, we were able to segment the results into a series of categories (including, for example, pending application with an invalid result, pending application with a questionable result) and make detailed plans for handling the cohorts, recognising though that each case needed careful individual consideration to ensure the right outcome be reached.

35. In the case of pending applications with an invalid result and using the evidence ETS had provided, we took the decision that the cases could proceed to consideration and we would seek to remove persons from the UK for the reasons given above. This is standard procedure for those who have sought to obtain leave by deception albeit this would need to be delivered in large volumes by colleagues in Immigration Enforcement directorate responsible for removing persons from the UK.

36. Where the details of the certificate on the Home Office file matched those provided in the data from ETS as an invalid result, we undertook a consideration of all relevant factors (including for example possible Human Rights grounds) which might mean that removal was not appropriate. Where no such circumstances existed, we took a decision to remove the applicant on the grounds of deception under section 10(1)(b) of the Immigration and Asylum Act 1999.

37. Upon service of this decision, the leave that these individuals had became invalidated under Section 10(8) of the Immigration and Asylum Act 1999.

38. Chapter 48 of our Enforcement Guidance states removal should not proceed whilst there are outstanding unresolved representations. Paragraph 322(1A) of the immigration rules gives us clear grounds to refuse an application for leave to remain where "false representations have been made or false documents or information have been submitted". Where the details of the certificate on the file matched those provided in the data from ETS as an invalid result, we refused the application under Paragraph 322(1A).

STATEMENT OF TRUTH

I believe that the facts stated in this Witness Statement are true. I am duly authorised by the Respondent to sign this Witness Statement form.

Signed  Date 23 June 2014

Full name Rebecca Collings

Position Held Grade 6 Civil Servant

J P French λssociates

In the Matter of

ETS TOEIC Fraud

Report on Testing of Samples Undertaken by ETS

Dated 5th February 2015

Author: Dr Philip Harrison

Prepared on the Instructions of

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by

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I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer.

Dated 5th February 2015

Signed .....

1 PERSONNEL

I am a forensic consultant specialising in the analysis of speech, audio and recordings. A summary curriculum vitae is appended to this report (Appendix A).

2 MATERIAL RECEIVED

I was provided with the following items by Salima Budhani of Bindmans:

Table 1 Material received from Salima Budhani of Bindmans

Item	Date received	Delivery method	Item/ Format	Content
1	06/01/2015	Email	Statement	Witness statement of Peter Millington dated 23/06/14 in the matter of Zaheer Hussain Mohammed v Secretary of State for the Home Department
2	06/01/2015	Email	Statement	Witness statement of Rebecca Collings dated 23/06/14 in the matter of Zaheer Hussain Mohammed v Secretary of State for the Home Department
3	09/01/2015	Post	CD-R	Video of BBC Panorama program 'Immigration Undercover: The Student Visa Scandal'

3 INSTRUCTIONS

3.1 Instructions

J P French Associates received instructions from Ms Budhani in a letter dated 6th January 2015. These are summarised below.

1. Describe the analysis process that would be undertaken by my laboratory if instructed to analyse a potentially fraudulent TOEIC test, including equipment and software used and the time required to undertake the examinations.
2. Consider the approach taken by ETS in general but in particular:
    a. Comment on the validity and reliability of automatic software tools used in identifying recordings of the same speaker;
    b. In relation to the human verification process, comment on whether this is a reliable process;
    c. In relation to the human verification process, comment on what length of sample would be necessary and consider potential issues regarding accent and dialect;
    d. Consider the time taken to conduct the examinations;
    e. Comment on the likely number of false positives produced by the process.

3.2 Standard expert declaration of impartiality

I understand that my duty is to the court rather than to those instructing me. I have complied with this duty and will continue to do so. I am aware of the requirements of Part 35 of the Civil Procedure Rules, Practice Direction 35 and the Protocol for Instruction of Experts to give Evidence in Civil Claims.

4 SPEAKER COMPARISON METHOD EMPLOYED BY J P FRENCH ASSOCIATES

The most common type of examinations undertaken by J P French Associates is forensic speaker comparison analysis, usually for criminal proceedings. The outcome of the analysis is an opinion concerning the potential identity or not of an unknown speaker in a recording. A normal case involves comparing the known voice and speech patterns of a suspect, usually from a police interview recording, with the voice of an offender in a criminal recording; for example in a hoax 999 call, a fraudulent telephone call to a bank or a covert recording relating to the supply of drugs.

If we were instructed to examine materials from an individual potentially fraudulent TOEIC tests in which it was suspected that a proxy sitter had been used, we would follow the same

method we currently use for *forensic* speaker comparisons. The method is known as the auditory-acoustic phonetic method and is described in the sections below. (More comprehensive descriptions of the method are provided in French and Stevens 2013 and Jessen 2008.) The general method is also followed by all other forensic speech analysts working within the UK, as well as a significant proportion in Western Europe, including government and police laboratories in countries such as Germany and the Netherlands. In a recent survey of practicing forensic speech scientists it was found to be the most commonly used method internationally (Gold and French 2011).

The method is componential in that it involves analysing different aspects of the voice and speech patterns found in a recording. The profiles of the features that are found are then compared across the recordings. The analysis process usually takes between 10 and 15 hours for a comparison of two samples.

4.1 Question Addressed

The availability of samples and information concerning the potential fraud would govern the questions that could be addressed. These might be:

1. Compare recordings of answers from two or more tests from purportedly different candidates to assess whether they have been taken by the same proxy sitter;
2. Compare recordings of answers from one test with a known sample of speech from the named candidate to assess if they are the same speaker;
3. Compare recordings of answers from a test (or tests) with a known sample of speech from the suspected proxy sitter to assess if they are the same speaker.

Each question would provide slightly different information but would ultimately assist in addressing the issue of whether fraud had been committed.

4.2 Preparatory Work

Before the analysis commences the samples need to be prepared. This involves ensuring that the recordings are in a suitable format for replay and analysis within a computer. This may involve re-recording (digitising) material from analogue cassette or converting audio data

files from a proprietary or compressed format to a standard format. This is done using a standard PC with a high quality audio interface and high quality replay equipment. Following this, the samples are manually edited so that they only contain speech from the voice of interest in the recording. For interview recordings, this involves removing speech from the interviewing officers and legal representatives. This is again carried out using a standard PC and audio editing software, specifically *Sony Sound Forge*.

I have not had access to any audio files resulting from TOEIC tests, but it is likely that they would require some editing in order to remove any long pauses or silences between the speech of the test taker and to remove any potentially intrusive background sounds and speech. The editing is undertaken so that the analyst can focus on the speech of the voice being analysed and not be distracted by other voices or sounds, and so that analysis software is only producing measurements based on the voice of the speaker being examined.

4.3 Analysis

The analysis of the recordings involves two types of examination which are carried out in parallel: auditory-phonetic and acoustic-phonetic. Auditory-phonetic analysis involves listening analytically to individual voice and speech parameters and assigning them to categories laid out in frameworks established by the speech sciences. The second, acoustic-phonetic analysis, uses computer software to produce visual representations of the speech signal and make various measurements; both automatically and manually. Each type of analysis is described below.

4.4 Auditory-Phonetic Analysis

The components of the auditory-phonetic analysis are described below. They are all undertaken whilst listening to the material via high quality headphones in sound editing or sound analysis software (in the case of our laboratory, *Sony Sound Forge* and/or *Praat*).

4.4.1 Segmental analysis

Segmental analysis involves determining how individual vowel and consonant sounds (or speech 'segments') are pronounced. For example, whether or not someone produces the 'h'

sound at the start of words such as 'hello' or 'help', whether they replace 't' sounds with a glottal stop as in words such as 'better', whether a long or short vowel is used in words such as 'bath' and 'path'. The way that the sounds are produced is recorded using a specialised system of notation developed by the International Phonetic Association for capturing the fine-grained nuances of speech.

A profile of the speaker's pronunciation patterns is compiled for each sample. This assists in determining an individual's regional accent, as well as assessing any first language influences if they are not a native speaker of English. Most importantly, the profile also allows potentially distinctive realisations to be highlighted which may not be standard for that speaker's variety of English; for example, lisped pronunciations of 's' or 'w'-like realisations of 'r'.

4.4.2 Voice quality

Voice quality is the overall tone or timbre of someone's voice. The analysis undertaken during a comparison involves uses a modified version of the Vocal Profile Analysis Scheme developed at the University of Edinburgh, which can be broken down into three main strands:

1. phonation types - features originating from the larynx e.g., breathiness, creakiness, harsh- or rough-ness;
2. overall muscular tension - i.e., whether someone has very lax or very tight control of their larynx and articulators;
3. features relating to the vocal tract - i.e., features originating above the larynx, such as tongue body/blade/tip position, jaw position, degree of nasal resonance and larynx height.

This allows the voice to be assessed under 12 main categories with 38 different sub-categories.

4.4.3 Pitch, intonation, rhythm and tempo

Several other aspects of a person's speech which occur at a more general level are also considered. These include speaking pitch, i.e. how low or high pitched their voice is in

general and also their intonation patterns, i.e. how their pitch changes within utterances - the melody of speech. The speed or tempo of speech is noted and sometimes measured along with rhythmic features. A speaker's level of fluency will also be noted, with particular focus on distinctive disfluency features if present.

4.4.4 Lexical/grammatical choices and conversation management

If elements of the spoken content are considered to be potentially distinguishing, then patterns of language and grammar use may also be analysed. This might also involve their use of hesitation markers, e.g. 'ums' and 'ers', as well as specific phrases, interruption strategies, telephone call opening or closing patterns.

4.5 Acoustic-Phonetic Analysis

Acoustic-phonetic analysis entails the use of specialised speech analysis software to produce visual representations of the speech signal and allows the analyst to make objective measurements. The different types of analysis are discussed below. The software used at J P French Associates is called *Praat* and it is commonly used within the forensic field. It is also widely used by phoneticians and speech scientist more generally.

4.5.1 Spectrographic Analysis

One of the main tools within speech analysis software produces what is known as a spectrogram. This is a graphical representation of the different frequencies of sound energy over time. Different types of speech sounds show different configurations and patterns of energy. Such displays are often viewed during the segmental auditory analysis as they can provide corroboration of what is heard.

Measurements in both time and frequency can be taken from spectrograms. This could include measuring the duration of specific speech sounds or the frequency at which certain features occur, for example the concentration of energy is an 's' sound.

4.5.2 Formant Analysis

Formants are resonances or concentrations of energy at different frequencies that occur when vowel sounds are produced. Different vowel sounds have different characteristic frequency patterns but individuals also display variation of their patterns of usage because formant frequencies result from the configuration of the articulators (the tongue, the lips etc.) but also the shape and size of a person's vocal tract. The frequencies that formants occur at are measured in a manual or semi-automatic way for multiple instances of the same vowel sound occurring in different words. These values are logged by the computer program. They can then be compared across the samples and patterns of overlap or deviation can be seen.

4.5.3 Fundamental Frequency Analysis

Speech analysis software automatically measures the fundamental frequency or pitch of the voice across the entire speech sample and produces various statistical measures, such as the mean, standard deviation and the distribution of the measurements. This provides an objective measure of the speech that can be easily compared across the samples and against population data.

4.5.4 Articulation Rate

Articulation rate is an objective measure of the speed that a person speaks. To calculate this, the number of syllables spoken in a short utterance is counted and the duration of the utterance is measured. This is done across several utterances and an average syllables per second rate is calculated. The articulation rate can be compared across samples and also against population data.

4.6 Conclusion

In reaching the final conclusion, the findings of the analyses are considered in two ways. Firstly, an assessment is made of the similarity of the voices across the samples. Consideration must be given to any factors which may influence the speech within them, such as emotional state, intoxication, technical characteristics of the recordings. Secondly, the distinctiveness of the voice in the criminal sample is considered in order to assess the number

of potential speakers who may also exhibit the voice and speech patterns found. These two factors are weighed and the final conclusion is given as a statement of support for either the view that the speakers are the same or that they are different. For example:

On the basis of these assessments, my opinion is that the evidence provides strong support for the view that the questioned speaker is Mr Smith.

Forensic speech analysts generally do not provide categorical statements of identity or non-identity such as 'Mr Smith made the call'. This is because there are no speech features either individually or in combination that can uniquely identify individuals. This is a fundamental limitation of the science and the method. Also, forensic analysts do not produce statements of likelihood along the lines of 'it is highly likely that Mr Smith made the call'. Statements such as this stray into the province of the triers of fact and fall foul of the prosecutor's fallacy (French and Harrison 2007[1]).

4.7 Educational & Training Requirements for Analysts

There are no specific regulations or statutory requirements governing the qualifications and training for forensic speech analysts. However, within the field it is generally accepted that at least a master's level university education in phonetics/linguistics is required, if not a doctorate. Such qualifications should involve substantial components of phonetics, socio-phonetics and speech acoustics.

Specific forensic training should ideally take place over a period of at least one to two years and cover a large number of different forensic cases. This would involve shadowing the work of an established expert as well as conducting work independently that is checked and subject to detailed scrutiny by a mentor.

[1] The framework for expressing conclusions presented in French and Harrison (2007) has since been superseded by the support statement framework discussed above.

4.8 Combined Use with Automatic Systems

At present, we do not routinely use an automatic speaker recognition (or 'ASR') system in casework. This is because it has not yet been possible to satisfactorily test system performance in a sufficient range of realistic case conditions due to the lack of representative speech databases. The variation in the types of criminal recordings encountered in the UK is much greater than in many other countries in which ASRs are more frequently used. In these countries recordings of intercepted telephone calls are admissible as evidence and are frequently encountered. However, we have used an ASR system (*Batvox*) in a recent Criminal Court of Appeal case in which its results provided further evidence of incorrect identifications and supported the findings of earlier auditory-acoustic phonetic analyses. In this case we were able to test the performance of the automatic system using samples equivalent to the disputed ones in which the defendants were agreed to be present.

In cases where such software is used, it is generally considered as an additional tool rather than being used as the sole test. The results from the system are considered in conjunction with the results of the other auditory and acoustic phonetic tests. This approach is advocated by Becker *et al* (2012):

> 'Using automatic forensic voice comparison systems without any further investigation of the recording material results in a considerable proportion of errors. This proportion can be reduced if forensic phonetic experts are involved to judge the material as well as [the ASR].' (page 5)

Indeed it seems that ETS have, to some extent, followed this approach in adding a human verification element to their process (albeit not one involving forensic phonetic experts).

4.9 Other Factors

4.9.1 Appeal Court Rulings

Forensic speaker comparison analysis undertaken for the criminal courts in the UK is subject to two specific Appeal Court Ruling Rulings. The first of these is R -v- Anthony O'Doherty ([2002] NICA 20). This relates specifically to the jurisdiction of Northern Ireland and states:

> "in the present state of scientific knowledge no prosecution should be brought in Northern Ireland in which one of the planks is voice identification given by an expert which is solely confined to auditory analysis. There should also be expert evidence of acoustic analysis ... which includes formant analysis."

This ruling essentially makes acoustic analysis, and specifically formant analysis, a compulsory aspect of any voice comparison exercise undertaken for the courts in Northern Ireland. Whilst it is not binding on the courts in England, Wales and Scotland, analysts in these jurisdictions do carry out acoustic analysis, including formant analysis.

A second ruling R -v- Flynn & Another ([2008] EWCA Crim 970) also concerns voice comparison evidence given by experts as well as evidence given by lay listeners, in this case police officers. The relevant paragraphs from the postscript of the ruling are:

> 63. The increasing use sought to be made of lay listener evidence from police officers must, in our opinion, be treated with great caution and great care. In our view where the prosecution seek to rely on such evidence it is desirable that an expert should be instructed to give an independent opinion on the validity of such evidence. In addition, as outlined above, great care should be taken by police officers to record the procedures taken by them which form the basis for their evidence. Whether the evidence is sufficiently probative to be admitted will depend very much on the facts of each case.
>
> 64. It goes without saying that in all cases in which the prosecution rely on voice recognition evidence, whether lay listener, or expert, or both, the judge must give a very careful direction to the jury warning it of the danger of mistakes in such cases.

This ruling highlights the court's view on the potential issues associated with speaker comparison evidence given by lay listeners.

5 PERFORMANCE OF AUTOMATIC SPEAKER COMPARISON SYSTEMS

5.1 Principles of Automatic Systems

Automatic speaker recognition systems work on the principle that individual voices may be distinguished from one another by virtue of the different anatomical dimensions and proportions of different speakers' vocal tracts, and that individuals also exhibit different speaking behaviours. These factors give rise to acoustic differences; namely, differences in the structure of the frequency characterises of speech found across individuals. To capture these differences, automatic systems take the recorded voices of individuals, perform complex mathematical operations on them, and reduce them to statistical representations or models.

In conducting an analysis, a system compares the models generated from two different recordings or samples and produces a score which is a measure of the similarity/difference between the two[2]. In order to determine whether the score is indicative of the two samples having come from the same or different speakers, one of the models is also compared with a set of statistical models from a reference population of other speakers held within the system. The characteristics of the reference population, including gender, language and recording conditions, should ideally be the same as those of one of the speaker models in the initial comparison. This is a generic description of automatic systems and the steps followed by specific systems may be different. A comprehensive overview of automatic speaker recognition is provided by Kinnunen and Li (2010).

The statistical models generated by automatic systems are sometimes referred to as 'voice-prints', as in paragraph 27 of Mr Millington's report. This terminology is problematic and potentially misleading. Speaker models are not the equivalent of finger-prints. Fingerprints are a stable physiological attribute of an individual. Speech is the product of a dynamic bio-mechanical process, which is affected by many factors leading to variation in the speech of individuals. In view of this, speaker models aim to capture a general representation of an individual's speech and they are not considered as uniquely identifying.

[2] This is the current state of the art approach employed by systems that use a speaker models known as 'i-vectors'. In previous generations of ASR technology the speech features extracted from one sample were compared with a speaker model obtained from a second sample.

5.2 *Determining the Performance of Automatic Systems*

One of the benefits of automatic speaker comparison systems is that it is relatively easy to assess their performance, i.e. how good they are at correctly determining if two samples of speech are from the same person. This is because the comparison process is automatic and the comparisons are done very quickly. To assess a system's performance, a large database of recordings is required in which the true identity of the speakers is known. Two different types of comparison are carried out by the system. One set of tests involves pairs of samples where the same speaker is in each sample, known as same speaker tests, and a second set is where different speakers are in each pair of samples, known as different speaker tests.

In its simplest form the output of an automatic system is a simple binary 'yes' or 'no' answer to the question of whether the two speech samples being compared are of the same speaker.

For the same speaker tests, if the system gives a 'yes' result, then it is correct and this is known as a 'true positive' or 'true acceptance'. If the system gives a 'no' result, then it has made an error known as a 'false negative' or 'false rejection'.

In the case of the different speaker tests, if the answer given is 'no', then this is the correct result referred to as a 'true negative' or 'true rejection'. If the result is a 'yes' then the system has made an error known as a 'false positive' or 'false acceptance'.

The different types of correct results and errors can also be expressed in table form as shown below.

Table 2 Correct responses and errors results obtained when testing the performance of an automatic speaker comparison system

System Result	Same Speaker Pair	Different Speaker Pair
Yes	True Positive – Correct Result	False Positive – Error
No	False Negative – Error	True Negative – Correct Result

If a large number of same speaker and different speaker pairs are tested by the system then it is possible to calculate errors rates for the system which reflect its performance. For example,

if 100 same speaker pairs are tested and the correct result of 'yes' is obtained for 95 of the 100 pairs, then it has a 'true positive' rate of 95%. For 5 of the pairs the incorrect result of 'no' was given meaning that the 'false negative' error rate was 5%.

The results produced by automatic systems are numeric scores which reflect the degree of similarity between two samples – larger numbers reflect greater similarity and smaller numbers reflect a greater dissimilarity between samples. For a yes/no decision to be made a score threshold must be established so that all scores above the threshold are considered as a 'yes' and all those below it are a 'no'. This is discussed in paragraph 32 of Mr Millington's witness statement. Changing the threshold alters the errors rates of the system since results from some pairs will change from a 'yes' to a 'no' or vice-versa. There is a trade-off in the error rates. As the threshold increases the false negative error rate increases whilst the false positive error rate decreases. Conversely, if the threshold is decreased then the false negative error rate decreases and the false positive error rate increases. Therefore the choice of threshold is crucial in determining the errors rates and performance of the system. The changes in error rate resulting from different thresholds can be represented as shown in the plot below.

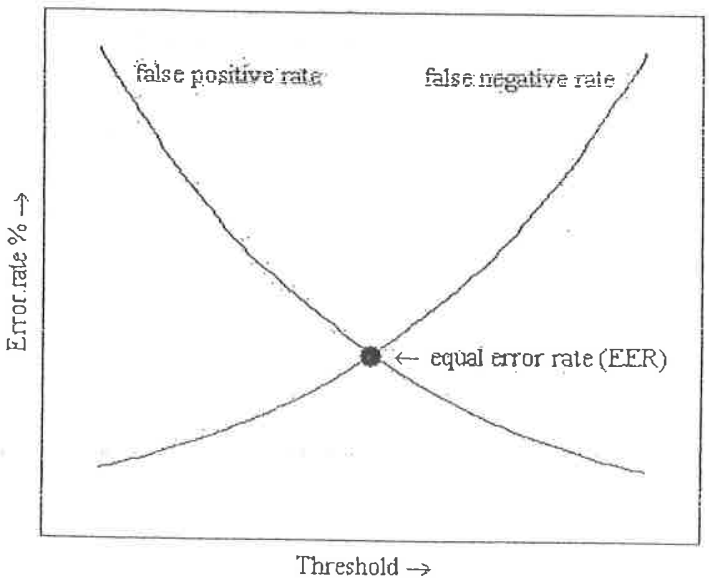

Figure 5.1 Plot showing how false positive rate and false negative rate changes for different thresholds.

Another way in which the performance of a system is often expressed is known as the 'equal error rate' (EER). On the plot above there is a threshold value at which the false positive and false negative error rate curves cross over and both have the same value. This is the equal error rate since both errors are equal. Whilst this is a commonly used measure of system performance since it is a single number, the actual errors rates of a system will be different if the threshold used in the operation is not the one that gives the equal error rate.

The descriptions above show that systems can make two types of errors, a false positive or a false negative. For a quoted error rate to be meaningful, the type of error that it refers to must be stated. There are other graphical methods and numeric measures that can be used to show the performance of a system. However, the ones discussed above are the most straight-forward and demonstrate the concept of system performance for the present purpose.

5.3 Factors Affecting Performance

There are many factors that affect the performance of automatic systems. Those that are most relevant to the current case are discussed below.

5.3.1 Duration of samples

The duration of a sample reflects how much speech material is contained within it. The longer a speech sample, the more speech is available to the automatic system to generate a speaker model. In general terms, the longer the samples that are compared, the better the performance of the system. Table 3 below shows the minimum and recommended sample durations for a commercially available automatic speaker comparison system, Batvox 4, which is widely used by forensic analysts. The durations given refer to the net amount of speech that the system extracts from a sample. Systems will pre-process each sample to automatically remove non-speech sections such as silences or pauses. Separate sets of values are given for both the known reference recording and the unknown criminal sample. These values have been determined by the manufacturer and are based on their own testing of the system. However, these values do not imply that a specific level of performance can be achieved since the other factors discussed below also influence performance.

Table 3 Absolute minimum and recommended net speech length for speech samples used in Batvox 4

	Net speech length	
	Known Sample	Test Sample
Absolute minimum	30 seconds	7 seconds
Recommended	60 seconds or greater	15 seconds or greater

5.3.2 Quality of samples

The quality of samples also has a marked influence on system performance. Quality can refer to many different aspects of a recording. One of the key aspects is the amount of noise in a recording. Noisier recordings will lead to a reduced performance relative to quieter ones. Different types of noise will also affect the performance to differing degrees. For example music has been shown to decrease performance more than road noise within a car (Künzel and Alexander 2014). Representing noise in a meaningful quantitative way is somewhat problematic since the different kinds of noise have varying time and frequency structures, which influence performance in different ways that cannot be simply expressed as a single figure. However, one commonly used measure is known as signal to noise ratio (SNR), which reflects how loud the signal of interest is, in this case the speech, relative to the noise. The minimum and recommended SNR values for both known and criminal recordings to be used in Batvox 4 are given in Table 4 below.

Table 4 Absolute minimum and recommended SNR for speech samples used in Batvox 4

	Signal to noise ratio (SNR)
Absolute minimum	10 dB
Recommended	15 dB or greater

Quality can also relate to the recording format used. If a lossy compression format such as MP3 is used to make a recording, this can also influence the performance. Recordings of a limited bandwidth, such as those made over the telephone also tend to reduce the performance of ASR systems.

5.3.3 Reference population mismatch

A reference population of speakers is used in automatic systems to assess whether the degree of similarity between two samples is indicative of them having come from the same speaker or not. For the reference population to do this job correctly it must match various characteristics of the materials being testing, including recording quality and language. If there is a mismatch with these characteristics then the system is likely to make more errors.

5.4 Assessing the Performance and Suitability of Automatic Systems

Since there are no automatic systems that perform perfectly, there are no systems that are completely reliable. In other words, all systems will make errors. To assess the degree of reliability of a system its performance must be measured by conducting large numbers of comparisons of pairs of same speaker and different speaker recordings where the ground truth answer is known. The issue of whether a system is reliable enough depends on the context in which it is being operated and how the results from the system are used in reaching decisions. The potential consequences of false positive and false negative errors are different in telephone banking authentication, intelligence gathering exercises and in criminal court proceedings. It is not possible, therefore, to provide a single threshold figure for either the quality or the duration of a sample at which the results of an automatic system change from being unreliable to reliable.

A very important consideration is that quoted performance and error rates only relate to the specific recordings involved in the testing and their characteristics such as duration and quality. If a different set of recordings are used, even with the same characteristics, the performance will be slightly different. Therefore quoted error rates can only be used to infer the performance of the system and are not absolute concrete, unchangeable values.

5.5 Typical performance of ASR systems

The discussion above in Section 5.3 introduces three factors that can influence the performance of ASRs: duration, quality and reference population mismatch. Other important factors are the underlying method employed by the system and mismatch in recording conditions between the samples being compared, such as a microphone interview recording

with a telephone recording. Given the number of influencing factors and the interaction between them, a wide range of performances are reported in the research literature. In very general terms, the *best* performance for state of the art systems, expressed as equal error rate, is typically between 1% and 3% (Hautamaki *et al* 2010). However, commonly reported equal error rates can range from between 2% to 10% (Kinnunen and Li 2010 and Gonzalez-Rodriquez 2014). In non-ideal conditions, equal error rates can be as high as 20 or 30% (Hautamaki *et al* 2010).

6 RELIABILITY OF PROCESS USED BY ETS

In principle, given the number of TOEIC tests undertaken in the UK and the amount of material to be analysed, the general approach adopted by ETS is reasonable. To subject thousands of samples to the type of detailed analysis described in Section 4 would be entirely impractical.

However, the level of detail provided in the witness statements of Mr Peter Millington and Ms Rebecca Collings is not sufficient for me to be able to properly scrutinise ETS's approach. The circumstances of the present case are different from that usually encountered in that witness statements describing an analysis process are normally authored by the person conducting the analysis, not a third party. Such statements tend to contain a greater level of detail. Also, the recordings that have been examined are normally made available for analysis by experts representing the other party involved in the matter.

6.1 Specific Issues with Automatic Analysis

6.1.1 Lack of Information Concerning Initial Testing

Paragraphs 28 to 34 of Mr Millington's statement[3] describe a "proof of concept" exercise undertaken by ETS to assess whether automatic speaker comparison technology would be suitable for their purposes in detecting fraud. The tests involved comparing a large number of same speaker pairs (285) and different speaker pairs (over 70,000). There is certain information not presented about this testing which makes it difficult to assess. This includes:

[3] All further references to paragraph numbers concern the report of Mr Millington.

1. Other than the fact that the testing involved 'representative data' no information is provided about the quality or duration of the samples, or the type of spoken material, i.e. spontaneous or read.
2. Paragraph 28 lists three key questions that ETS felt should be addressed before the technology should be used. They relate to the sensitivity of the results of the system to i) first languages spoken, ii) duration and quality of samples and iii) suitable thresholds. There is no further mention of whether these issues were addressed sufficiently by the testing other than with the very general statement that the trial was successful. No mention is made of any threshold or limits that were chosen for example on sample duration or quality.
3. An error rate of less than 2% is quoted in paragraph 31. However, the type of error rate i.e. false positive, false negative or EER, is not given.
4. Paragraphs 32 to 33 discuss the trade-off between false positive and false negative errors and selecting an appropriate threshold. However, the resulting error rates from the selected threshold are not provided.

6.1.2 Comparability of Initial Testing with Testing for Current Purposes

No reference is made to how comparable the samples used for the proof of concept testing are to the samples used for the TOEIC testing. Differences in technical attributes of the samples such as duration and quality may have resulted in differing performance of the software. ETS acknowledged that the variety of first languages spoken by their clients (paragraph 28 i)) may have influenced the performance of the system but there is no mention as to whether this was found to be the case and whether the first languages encountered in the proof of concept testing was the same as those in the TOEIC testing.

There is no explicit statement that the configuration of the automatic system used in the proof of concept testing was the same as that used for the TOEIC testing. It is possible that the system received updates from the manufacturer that may have resulted in changes to its performance. Also, there may have been user-configurable parameters that were different which could affect performance, such as the selection of reference populations.

6.1.3 Description of Analysis Method

In general, only limited information is provided about how the automatic system was used. No detail is given about the system itself since 'the procurement of the technology remains subject to a confidentiality agreement' (paragraph 29). It is highly unusual for fundamental information such as this not to be provided in a forensic report. If the manufacturer and model of the system were given, it would potentially allow the underlying analysis approach of the tool to be known and further information concerning its general performance could be obtained by consulting other studies.

Paragraphs 36 to 38 provide some detail of the analysis process followed. It states that six audio files were selected for comparison from each test, based on the largest/longest audio files, those providing the clearest responses or those involving the reading of a set text. No mention is made of specific durations of the files selected and whether the audio from the six files was combined to form a longer recording. Since the term 'or' is used within the list it is possible that short, poor quality samples of reading may have been selected.

No mention is made as to whether this selection process was done manually or automatically and whether any editing of the samples was done prior to the analysis to remove non-speech events such as coughs, or loud instances of background speech.

There is no indication whether the consistency of the speaker across the six files was assessed by the automatic system. If it is assumed that the same test taker answered all parts of a test then this testing across the six samples would have provided an indication as to how reliable the system was at identifying the specific voices in individual tests.

As mentioned above, it is not apparent whether each of the six audio files from each test was considered separately or combined into a single file. It is therefore not clear whether the flagging of a test as a 'match' was based on the result from a single audio file or not. If the results were based on the single files then the overall performance of the system might be expected to be less than if the six files had been combined. This is because the individual files would be shorter and there would be the potential for individual files to be noisy or have significant amounts of background speech.

No explicit mention is made about the scoring method used by the system and whether a reference population was employed in the calculation of the final comparison score. If a reference population was used, it is not stated how well this was matched to the test materials and whether it was varied for individual tests.

6.2 General Issues with Human Verification

6.2.1 Factors Affecting Performance

Like automatic systems, humans also make errors when attempting to identify speakers. There are many factors that can affect the performance of humans when conducting these tasks. There is a significant body of academic research literature which investigates these factors and their influence on performance, for example Bull and Clifford (1984), Foulkes and Barron (2000), Kerstholt *et al* (2004), Shirt (1984) and Yarmey (2004). The studies that have been conducted address a wide variety of factors and employ different experimental designs.

In summary, some of the factors that have been shown to affect performance include:

1. Duration of speech material – shorter samples result in worse performance;
2. Quality of speech material – worse quality results in worse performance;
3. Individual ability of the listener – amongst lay-listeners some people are better than others and phonetically trained people perform better than lay people;
4. Familiarity with the voice of the speaker – greater familiarity can lead to better performance but not always;
5. Distinctiveness of the voice – more distinctive voices are normally easier to identify and result in better performance.

6.2.2 Typical Performance of Human Verification

Many of the studies concerning the ability of humans to identify voices are focused on the performance of lay-listeners and are designed to provide insight into lay-witness identification i.e. the situation where a lay-witness claims to have recognised the voice of a criminal. The test conditions in these studies are not representative of the task undertaken by

the ETS analysts so they are only able to provide insight into factors that can affect performance rather than provide comparable performance results.

However, there is one particular body of research which aligns more closely with the human verification task undertaken by ETS. This is the Human Assisted Speaker Recognition (HASR) task which was part of the American National Institute of Standards and Technology (NIST) Speaker Recognition Evaluation (SRE) project undertaken in 2010. Since 1996 NIST has conducted a series of evaluations of automatic recognition systems in which they provided companies and academic institutions around the world with large quantities of speech material to allow them to test the performance of their automatic systems and compare it with others. In 2010 NIST incorporated the HASR task to test the performance of humans.

For the HASR task two sets of recordings were made available to the human analysts. The first, HASR1, consisted of 15 pairs of speakers, 6 were same speaker pairs and the other 9 were different speaker pairs that were judged to be difficult to distinguish. The second set HASR2 had 150 test pairs, 51 same speaker pairs and 99 different speaker pairs, and was somewhat less difficult than HASR1. The pairs of recordings involved one telephone and one microphone recording and both were approximately 3 minutes or greater in length. The human listeners could be a single person or a team of listeners, and they were free to use just human expertise or combine it with an automatic system.

Averaged over the 8 human systems that took part in the HASR2 test, the false positive rate was 42%. The best false positive error rate for any system was 3% (system 20), whilst the worst was 75% (system 11). Unfortunately the details of each human system are not made available, so it is not possible to know the specific method that was used by any of the systems. Further details, including the complete set of results, can be found in Greenberg *et al* (2010)[4] and Schwartz *et al* (2011).

[4] The complete set of results is provided in the presentation slides rather than the proceedings article. The slides are available to download from: http://www.nist.gov/itl/iad/mig/upload/hasr_od10_webpage.pdf

6.2.3 Defining Thresholds

Similarly to automatic systems, it is not possible to define a set threshold for duration or quality of material at which a method changes from being unreliable to being reliable. Similarly it is not possible to prescribe a specific amount of training that someone must undergo or a set amount of knowledge that they must have before being able to reliably conduct a comparison. However, research has shown that lay-listeners are more prone to errors than trained and experienced phoneticians (Schiller and Köster 1998).

6.3 Specific Issues with Human Verification Method Employed by ETS

6.3.1 Explicit Acknowledgement of Human Errors

The reason for using human analysts as a second stage of analysis was to "avoid the occurrence of false positives" (paragraph 40) in the results from the automatic comparison process. There is further acknowledgement that "ETS accepted that voice biometric technology is currently imperfect" (paragraph 32). However, there is no explicit acknowledgement that the human verification process will almost certainly have resulted in false positive errors.

ETS have clearly taken steps to attempt to reduce the likelihood of the human analysts making false positive errors. These include the use of two analysts working independently, the training of new analysts and the requirement for analysts to reject any matches where they had any "doubt about the validity of a match".

6.3.2 No Testing of Analysts Performance

There is no mention that human analysts were subject to any specific testing of their performance. In relation to the training of new analysts, their work was "peer reviewed by an experience analyst until a level of confidence was reached that they were capable of carrying out the work on their own". However, there is no indication of what this level was in objective terms (see further discussion in Section 7.3.3 below).

Performance testing would have been possible as the OTI had a database of TOEFL recordings that they had used when assessing the suitability of the automatic system. Whilst it

would be very time consuming to run the same number of tests as that undertaken by the automatic system a smaller number of samples would still provide an indication of performance. Without knowing the performance of the human analysts it is not possible to make an objective assessment of the overall reliability of the process used to ETS to identify potentially fraudulent tests.

6.3.3 Relationship Between Confidence & Accuracy

As mentioned above, one of the methods used to reduce the likelihood of false positive errors was for analysts to reject any matches where they had any "doubt about the validity of a match". This implies that they only verified matches where they had a very high degree of confidence in the accuracy of their opinion. However, many studies have found that there is no correlation - or at best a weak correlation - between level of confidence and accuracy of recognition. Studies by Yarmey *et al* (2001), Yarmey (2004), Broeders and Rietveld (1995), Hollien *et al* (1983), and Sørensen (2012) found very limited, if any, correlations between correct judgements and confidence. Although Rose and Duncan (1995) showed a significant positive correlation between confidence and accuracy, this was only for familiar speakers and in individual cases listeners were incorrect despite being 'very certain'.

In court cases involving ear-witness identifications, Bull and Clifford (1999) recommend that witness confidence ratings should not be used by courts as an indication of correctness as there are only limited and variable correlations between confidence and accuracy.

The implication of these research findings for ETS's testing is that although the analysts only verified matches where they had no doubt about their validity – i.e. where they were certain about their judgements – this should not be taken as a reliable indicator of the accuracy of those judgements. This approach does not remove the risk of false positive results.

6.3.4 Details of Analysis Method

Paragraph 24 makes references to a procedure that OTI analysts would use to compare "two voice samples to establish whether the tests were taken by the same person". It states that these were developed 7 years ago with input from a former FBI officer. It must be assumed that these are the procedures that were followed in the current matter. However, no

information is given about the actual process. Also, no specific details are given about the background, skills and knowledge of the former FBI officer. Without this information it is very difficult to attempt to make an assessment of the method.

In relation to the specific task undertaken, there is no indication of how much time was spent by each analyst on the samples from each test. There are no indications of how many times each sample was listened to. There is no information about the level of detail that was included in any analysis notes that might have been made. Again, this information would provide insight into the analysis process followed and the level of detail in the analysis.

6.3.5 Degree of Experience & Knowledge of "Experienced Analysts"

A distinction is made between experienced analysts within OTI and other members of ETS's staff who were brought in to assist. Little specific information is given in relation to the experience, abilities and knowledge that the experienced analysts have. It is not clear what training they have received, how often they perform this kind of analysis and their familiarity with different varieties of foreign accented English that they might encounter. Whilst they may have greater experience and skills than a lay-listener, it would appear that they cannot be considered the equivalent of phonetically trained forensic experts.

6.3.6 Training of New Analysts

Paragraph 40 states that the additional ETS staff "received mandatory training in voice recognition analysis, and were initially mentored by experienced OTI analysts". However, no information is given about the content of this mandatory training, how long it lasted, what the mentoring involved or how long it lasted. Given the timeframe involved, the training can only have been very limited relative to that undertaken by forensic phoneticians.

In order to determine which staff to redeploy or to allow others to decide not to continue with the checking of samples, information on their performance must have been available. Again, no information is provided about the threshold above which staff were considered suitable for the task.

6.3.7 Familiarity with language varieties

In paragraph 42 Mr Millington states that as part of the demonstration of samples he received he "was able to compare tone, accent, the distinctive and indistinctive expressions used to fill hesitation in speech". It is not clear whether these are specific features that the OTI analysts also used as part of their comparison process. In order to be able to assess the usefulness and distinctiveness of features one must know what the norms are for a particular variety of a language. For example, a non-native speaker of English might use a particular pronunciation of a vowel sound that, when compared with standard English, appears to be very distinctive. However, the use of that non-standard pronunciation might be very common in other speakers with the same first language because their English pronunciations are influenced by their first language. Without a detailed knowledge of these pronunciation patterns, speech features might be classed as distinctive and form a significant part of an identification decision when in fact they are features shared by a large number of speakers. These patterns of influence and the specific features affected will vary across different first languages.

A small number of studies have addressed whether the speaker recognition ability of lay-listeners is influenced by foreign accented speech. The general finding is that a foreign accent makes the identification task harder. The difference in performance of listeners between non-foreign accented speech and accented speech varies across the studies and is also influenced by the duration of the samples (Doty 1998 and Goldstein *et al* 1981).

6.3.8 Independence of Results from Two Analysts

The decision to use two analysts working independently is a sensible approach as it prevents some types of bias which can be introduced when one analysts checks the results produced by another. However, the occurrence of errors produced by one analyst cannot be assumed to be independent of the second analyst. This is because their ability to accurately detect the same or different voices is in part governed by the degree of similarity or dis-similarity and the distinctiveness of the voices examined. If two samples from two different people sound very dis-similar then there is a high likelihood that both analysts will mark them as being two different people, i.e. their false identification rate will be low. If there are samples from two different people who sound similar and non-distinctive then the likelihood of a false identification error being committed is greater. This is demonstrated in various studies which

have found that identification rates vary across speakers (for example Foulkes and Barron 2000, Mullennix *et al* 2011, Orchard and Yarmey 1995, Papcun *et al* 1989 and Sørensen 2012).

6.4 Further Issues

6.4.1 Examples Played to Mr Millington & Colleagues

In paragraphs 42 and 43 of Mr Millington's statement he explains that during his visit to ETS he was played samples which "we concluded were the same person speaking" as well as "non-verified" matches (i.e. false positives that the automatic system showed to be matches but which the human analysts rejected as a match). No information is given on how many samples they listened to or how representative they were of the material listened to by the analysts in terms of degree of similarity between speakers, duration or recording quality. Whilst this was no doubt a useful exercise to demonstrate the task undertaken by ETS, the exposure to a limited number of samples of unknown representativeness may have misrepresented the difficulty of the comparison task.

6.4.2 Basis for Mr Millington's Opinion

In Mr Millington's statement he sets out the information that he has been provided with in order to reach his view that where "ETS have identified positive voice matches among two candidates" "this is clear evidence that both candidates have fraudulently obtained their TOEIC certificate" (paragraph 49). However, it is not apparent whether Mr Millington has sufficient expertise, scientific knowledge or experience to properly assess and interpret the information that he has been provided with in order to reach his opinion. No information is given about his qualifications or any expertise that he may possess.

6.4.3 Interpretation of ETS's Results

In paragraph 48 the process undertaken by ETS has given results that are summarised as showing "that where matches have been identified the individuals taking those tests are highly likely to be the same person" [my emphasis]. This is not a categorical statement and as such it implies that there is a small probability that errors, i.e. false identifications, have

occurred. Since a large number of tests have been analysed it is therefore not unreasonable to suggest that within the set of verified matches provided by ETS that there will be some false identifications, albeit an unknown number of them. This issue is addressed further in the following section.

6.5 *Number of False Positive Results*

As discussed at various points in this report there is a limited amount of information and detail provided about the process used by ETS. This means it is not possible on the basis of the information provided to accurately assess its reliability and estimate how many false positive results may exist within the 25,000 verified matches. In order to do this it would be necessary to know the performance of the human analysts as well as that of the automatic system.

However, it is possible to demonstrate in a hypothetical manner how the number of false positive verified matches is influenced by the performance of both the automatic system and the human analysts. For the sake of this exercise it is assumed that the automatic system produced 33,000 same speaker matches. Table 5 shows the number of false positive test results from the total 33,000 same speaker matches for different false positive error rates.

Table 5 Number of false positive results produced by the automatic system for different hypothetical false positive error rates from a total of 33,000 same speaker matches.

	Automatic System False Positive Error Rate				
	1%	2%	5%	10%	20%
Number of false positive results	330	660	1650	3300	6600

If it is assumed that the false positive errors made by the pairs of human analysts are independent of the false positive errors made by the automatic system, then the same exercise can be performed to determine the total number of false positive errors made by the combined automatic and human verification process. The results from Table 5 are reproduced at the top of Table 6. The bottom section of Table 6 shows the number of false positive results after the human verification at different false positive error rates.

Table 6 Number of false positive results produced by the combined automatic and human verification process for different hypothetical false positive error rates.

		Automatic System False Positive Error Rate					
		1%	2%	5%	10%	20%	
	Number of false positive results after automatic analysis	330	660	1650	3300	6600	
Human Verifiers' False Positive Error Rate	1%	3	7	17	33	66	Number of false positive results after human analysis
	2%	7	13	33	66	132	
	5%	17	33	83	165	330	
	10%	33	66	165	330	660	
	20%	66	132	330	660	1320	
	30%	99	198	495	990	1980	

Table 6 shows that if both the automatic system and the human verifiers have a false positive error rate of 1 percent then only 3 out of the 33,000 tests would be false positives. If they both had an error rate of 5 percent then that number would increase to 83. If the error rate of the automatic system was 10 percent and the human verification process was 20 percent then there would be 660 false positive results. If the automatic system false positive error rate is 20 percent and that of the human analysts is 30 percent then the number of false positive results would be 1,980.

7 SUMMARY & CONCLUSIONS

Section 4 of this report has set out how individual speaker comparison tests are carried out by J P French Associates, and forensic phoneticians more widely, using the auditory-acoustic phonetic approach. The method involves a componential analysis of a range of speech features including individual speech segments, voice quality, pitch, intonation, rhythm, tempo and spectral aspects of the speech signal. The features are assessed and compared using a range of both auditory-phonetic and acoustic-phonetic analysis techniques. The time taken to analyse and compare a reference sample with one unknown sample is normally between 10 and 15 hours. Skills in using these analysis techniques and knowledge of the patterns of occurrence and variation of speech features are obtained via a postgraduate-level university education in linguistics and phonetics and experience with forensic case materials.

Due to the time required to undertake auditory-acoustic phonetic comparisons, it would not have been practical for ETS to have adopted the method to examine the very large number of TOEIC tests undertaken in the UK in order to determine which ones may have been the subject of fraud. They used a method in which an automatic speaker comparison system compared many pairs of tests and identified those in which the same speaker occurred in more than one test. As described in Section 5 of this report, automatic systems do not perform perfectly and false positive errors can occur i.e. recordings from two tests can be identified by the system as being from the same speaker when in fact they are different speakers. In order to reduce the likely number of false positive results, ETS required each of the 33,000 pairs of tests that had been identified as a match to be verified by two human analysts.

At the level of principle, the overall method adopted by ETS is a reasonable approach, given the magnitude of the task. However, there is a lack of technical information and detail within the statements of Mr. Millington and Ms. Collings concerning the specific implementation. This means that it is not possible to adequately scrutinise the method or assess its overall reliability. Also, there is no explicit acknowledgment that the human verification method – and therefore the overall exercise - is almost certain to have resulted in false positive results.

Relevant factors which would influence the reliability of the method and for which there is insufficient information provided includes:

1. Technical characteristics of the TOEIC test recordings including duration and background noise levels
2. The performance of the automatic system when operated with recordings representative of the TOEIC samples
3. The comparability of the TOEIC tests materials with the TOEFL materials used in the trial of the automatic system
4. The specific operation and configuration of the automatic system including whether samples from individual tests were combined, the use of appropriate reference populations and chosen thresholds
5. The performance of the human analysts
6. The experience, training and knowledge of the 'experienced' OTI analysts
7. The training given to the members of ETS staff drafted in to assist
8. Details of the analysis method used by the human analysts

9. The time spent by human analysts on comparisons
10. The familiarity of the human analysts with the range of foreign accented English and specific knowledge of common features within those varieties.

Without this information it not possible to provide a detailed objective assessment of the overall reliability of ETS's method and the likely number of false positive results, i.e. how many tests considered as verified matches were not the result of a fraud.

Table 6 illustrates the influence of the performance of the automatic system and human analysts on the number of false positive results. In the example, the number of false positives range from 3 to 1,980 when the automatic system false positive error varies from 1 percent to 20 percent and from 1 percent to 30 percent for the human analysts.

Since there are an unknown number of false positive results there are also an unknown number of test takers who have been incorrectly identified as having fraudulently taken the TOEIC test. At present, for any specific case, there is no independent way to assess whether the individual in question committed fraud or whether their result is a false positive. The only information available is the verified match result from ETS. Since the performance of ETS's process is unknown it is not possible to assess the degree of confidence that can be placed in the results provided by ETS. If the audio material from individual tests were made available then it would be possible to use the auditory-acoustic phonetic approach to independently examine and compare the audio material. It would also be possible to use auditory-acoustic phonetic testing to assist in assessing the overall reliability of ETS's method by conducting spot checks on a selection of tests. However, such checking would only be valid if the material examined was sufficiently representative of that which was tested.

In conclusion:

1. Given the large number of tests examined and the limitations of both automatic and human speaker comparison methods it is almost certain that the set of verified match results from ETS will contain false positive errors;
2. Insufficient information has been provided to allow an assessment of the likely reliability of the method employed by ETS and the potential number of false positive results;

3. Making recordings available from tests in which concern has been raised about the accuracy of the result would allow them to be subject to independent scrutiny via auditory-acoustic phonetic speaker comparison analysis.

8 QUALITY CONTROL/CHECKING

As part of the quality control procedure at J P French Associates, the content of this report was discussed with and agreed by my colleague Dr Richard Rhodes[5].

Dr Philip Harrison BEng MA PhD MIOA

5th February 2015

[5] Forensic consultant with experience of over two hundred and fifty cases, BA (First Class Hons) in Applied English Language Studies, MSc in Forensic Speech Science and PhD in Linguistics - Forensic Speech Science.

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Appendix A – Dr Philip Harrison: Summary Curriculum Vitae

Philip Harrison is a forensic consultant specialising in the analysis of speech, audio and recordings. He has seventeen years' experience of forensic work at J P French Associates, having worked on over 1000 cases in the areas of authentication, enhancement, transcription and speaker comparison, as well as many miscellaneous cases.

He holds a first class honours degree (BEng) in Acoustical Engineering from the Institute of Sound and Vibration Research, University of Southampton, an MA with Distinction in Phonetics and Phonology and a PhD in Linguistics from the Department of Language and Linguistic Science at the University of York.

He is an elected Member of the Institute of Acoustics (MIOA), of the International Association for Forensic Phonetics and Acoustics, and of the British Association of Academic Phoneticians. He is a committee member of the Speech and Hearing Group within the Institute of Acoustics.

He was appointed a specialty assessor in the area of Audio Analysis for the Council for the Registration of Forensic Practitioners (CRFP) before its closure and was responsible for producing the assessor documentation for the Speech and Audio Analysis specialty. He is currently part of a group writing the appendix for Speech and Audio analysis for the UK Forensic Regulator's Codes of Practice and Conduct.

He holds the position of Teaching Fellow in the Department of Language and Linguistic Science at the University of York and is involved in lecturing on a post-graduate course on forensic speech science. He has been employed as a tutor on forensic speech analysis at the International Summer School in Forensic Linguistic Analysis.

He is actively involved in research in the areas of forensic speech and audio analysis, and regularly delivers lectures and presentations to academic conferences and universities in the UK and abroad. He was also centrally involved in the formulation of a new framework for expressing conclusions in forensic speaker comparison cases which has now been universally adopted by experts within the United Kingdom.

He has appeared as an expert witness in the Court of Appeal (Criminal Division), Crown Courts in England, including the Central Criminal Court (the Old Bailey), the Sindh High Court, Karachi (court removed to England to hear expert evidence) and the High Court in Accra, Ghana. In criminal cases he undertakes work for both prosecution and defence.

Relevant publications, high profile cases and further information can be found in a more detailed CV at: http://www.jpfrench.com/staff/philip-harrison/

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Report on Forensic Speaker Comparison Tests Undertaken by ETS

Dated: 20th April 2016

Prepared on the Instructions of:

Government Legal Department

On behalf of:

Secretary of State for the Home Department

Author: **Professor Peter French**

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Witness Statement

I, Professor Peter French, say as follows:

1 THE EXPERT

I am instructed as an expert witness on speaker identification by the Government Legal Department on behalf of the Secretary of State for the Home Department (SSHD).

I am Chairman of JP French Associates Forensic Speech and Acoustics Laboratory, Professor of Forensic Speech Science in the Department of Language and Linguistic Science at the University of York, Visiting Professor of Forensic Speech Science in the Department of Modern Languages and Linguistics at the University of Huddersfield, Chairman of the Home Office Forensic Science Regulator's Group on Forensic Speech and Audio, President of the International Association for Forensic Phonetics and Acoustics and Editor (phonetics and acoustics) of *The International Journal of Speech, Language and the Law*. I have published widely in my fields of expertise and have over thirty years of experience in analysing recordings of speech for cases being heard in jurisdictions across the world. A summary CV can be found here: http://www.jpfrench.com/wp-content/uploads/Prof-Peter-French-CV.pdf

2 MATERIAL RECEIVED AND INSTRUCTIONS

In a letter of instruction from the Government Legal Department received by email on 16th February 2016 I was provided with background information concerning the cases of Mr Majumber and Mr Qadir. The letter contained the following attachments:

a. Skeleton argument of counsel for Mr Majumber;

b. Skeleton argument of counsel for Mr Qadir;

c. Skeleton argument of counsel for the Secretary of State for the Home Department;

d. Witness statement of Peter Millington (filed 23rd June 2014);

e. Witness statement of Rebecca Collings (dated 23rd June 2014);

f. Two witness statements of Richard Green with attachments (both dated 3rd February 2016);

g. Report of Dr Philip Harrison, forensic consultant on speech and audio (dated 5th February 2015).

On 3rd March 2016 my instructing solicitor emailed me a link to the thirty-minute Panorama documentary in relation to student visa fraud.

My letter of instruction pointed out that Dr Harrison's report stated that he had been instructed by Bindmans Solicitors on behalf of the National Union of Students to evaluate the speaker comparison methods used by ETS in identifying fraudulently gained results in spoken English tests. However, he had found that he could not fully do so owing to a lack of technical detail in Mr Millington's statement. The SSHD had therefore posed further questions to ETS in an attempt to secure the missing information. I was informed that when the responses to those questions became available they would be provided to me.

On 7th April 2016 I received from my instructing solicitor an email to which was attached a letter dated 15th February 2016 from the Government Legal Department to Jones Day, solicitors for ETS, setting out the SSHD's further questions. Also attached to the email was a letter of response from Jones Day dated 9th March 2016 setting out ETS's answers.

From a consideration of the material provided, I was asked to:

1. Give an opinion on whether, on the balance of probabilities, ETS's methodology was likely to result in any false positives i.e. speaker comparison test results indicating that different speakers are same person. If I considered false positives were likely, I was asked to estimate how many.

2. Give an opinion on whether, on the balance of probabilities, it was possible for a test centre to re-use a recording of one test-taker's voice, without their knowledge, for subsequent test-takers.

In respect of the latter instruction, I was given the same request in another Tribunal appeal case and informed the Government Legal Department that the matter was one of computer and system security and therefore lay outside my area of expertise (report of 24th March 2016 in case of MA vs SSHD, Appeal number 1A/39899/2014). As my expertise lies centrally with speaker comparison testing and the efficacy of alternative approaches to that task, I confine my attention here to the first of the instructions.

2.1 Expert declaration of impartiality

I understand that my duty is to the court rather than to those instructing me. I have complied with this duty and will continue to do so. I am aware of the requirements of Part 35 of the Civil Procedure Rules, Practice Direction 35 and the Protocol for Instruction of Experts to give Evidence in Civil Claims.

2.2 Isolation of experts

Dr Harrison and I are colleagues working within the same firm and University department. However, we did not confer over the work represented in his report for Bindmans solicitors; nor did we confer over the work I report here.

3 OPINION. WHAT IS THE LIKELIHOOD OF FALSE POSITIVES HAVING OCCURRED AND IN WHAT NUMBERS?

3.1 Errors in ASR Performance: General Background

I begin from the premise that all automatic speaker recognition (ASR) systems make errors. I have yet to see a report of an ASR achieving perfect performance (Hautamaki et *al* 2010). Some errors derive from providing the system with degraded input – voice recordings that are contaminated with noise, of poor quality owing to digital compression or brief. Dr Harrison's report contains a summary of the effects of these and other 'performance inhibitors' in Section 5.5. They are acknowledged in Peter Millington's witness statement (para 40) and in ETS's response to SSHD's questions (answer 18). However, even with the highest quality recordings, errors remain inevitable. A main reason for this concerns the 'dimension' of the voice that ASRs measure. They operate by taking

a voice recording, performing complex mathematical transformations on it and reducing it to a statistical model based on mel frequency cepstrum coefficients (MFCCs). Another voice recording is similarly processed and modelled. The system then compares the models[1] and produces a measure of similarity/difference (distance) between the two. The relationships between the highly abstract units, MFCCs, and the features of a person's voice to which they correspond are far from fully understood (French *et al*, 2015). However, it is generally accepted that they are most closely related to vocal tract resonances - i.e. the resonances that arise from the geometry of the 'tube' beginning at the larynx and ending at the lips. Studies of vocal tract anatomy repeatedly report little variation across individuals within gender, age and racial groups (Xue and Hao, 2006; Xue *et al*, 2011). What is more, the relatively small amount of biological variation that does exist is further reduced by linguistic socialisation. In other words, speakers of a language or accent may converge in adopting, unconsciously and involuntarily, positions and orientations of vocal tract component parts. Given that ASR systems work on the analysis of vocal tract resonances, this leads to a performance limitation that is unlikely be surmounted simply by further technical development of ASR software. (For a more detailed account of speaker convergence in relation to ASRs see French and Stevens, 2013).

This lack of variation across individuals accounts for the fact that ASRs are more likely to make errors of the false positive type (identification of different speakers as the same person) than false negatives (identification of same speakers as different people) (Gold, French and Harrison, 2013)[2].

3.2 *False Positives in the ETS ASR Results*

In view of the above, I take the view that the ASR used by ETS is extremely likely to have produced some false positives among the 58,464 matches identified by the software in respect of TOEIC test recordings (ETS's response to SSHD's question 24). This is despite

[1] The comparison of models with models is the mode of operation for recent ASR systems. Earlier ones compared features extracted from questioned recordings with models created from reference (known) recordings.

[2] Another problem arises from the lack of stability within the speech of any individual. This intra-speaker variability gives rise to a different type of error – the false negative. This, however, appears to be a subordinate problem with MFCC-based ASR analysis (Gold, French and Harrison, 2013) and is not, I understand, an issue in the present case.

the threshold for producing matches having been set conservatively (witness statement of Peter Millington, para 31). The number of false positives produced by the ASR, however, cannot be estimated with any great degree of precision. Although we are informed that the 'proof of concept' TOEFL pilot tests used the same ASR as the actual TOEIC tests and that there had been no modifications to the system or its settings between the two test sets (ETS's answer to SSHD's question 10), the error rate of 2% quoted for the pilot tests is not broken down into false positives versus false negatives. However, even if one assumes the 'worst case' scenario, that all the errors were false positives, then the 'safety net' system of having trained listeners assess all the matches thrown up by the ASR would, in my opinion, have made a very large reduction to the overall number of false positives. I explain my reasons for taking this view in Section 3.3 below.

3.2.1 Use of reference populations

As stated in Section 3.1, an ASR reduces two recorded speech samples to statistical models and compares the model of one with the model of the other. It calculates the 'distance' (similarity/difference) between the two models and on the basis of the distance score it will give a likelihood of the two recordings being of the same voice. The manufacturers of some ASRs refer to using the system in this way as operating it in 'identifier mode'. Many ASRs can be operated in another rather more sophisticated mode too. This involves the use of a reference population, i.e. a population of speakers, optimally from the same/similar linguistic community to the samples being tested and matched in terms of technical recording conditions – over a telephone line, directly to microphone, etc. The reference recordings are uploaded to the ASR. The system models the reference recordings and compares the test recording models not only with one another but with each reference recording too. This allows for an assessment not just of the correspondence between the test samples, but also of how typical or atypical the voices are in respect of the relevant background population. Operated in this mode, the output of the system is a likelihood ratio – i.e. a mathematical expression of the likelihood of finding the degree of correspondence between the test recordings if they were of the same speaker over the likelihood of finding that same degree of correspondence if the recordings were of different people with similar accents. This mode of operation is referred to by some manufacturers as 'forensic' mode, and in those jurisdictions where ASR evidence is used criminal courts, this is how the system is normally operated for that purpose.

Dr Harrison in Section 6.1.3 of his report raises the possibility that for the TOEIC tests system performance could have been diminished by the use of a badly matched reference population and points out that no information is available on this point. In answer 12 to SSHD's questions, this matter is clarified: 'No reference population was ever used in relation to TOEIC recordings'. This would indicate that the ASR was used in the simpler of the two modes described above and that false positives had not resulted from reference population mismatch.

3.2.2 Merging of recordings

Under point 4 of the missing information listed in his Conclusion, Dr Harrison asks whether samples from individual tests were combined. This question is answered in response to question 2 from SSHD: 'each audio file was processed and considered separately'. However, from the answer to question 7, it is clear that consistency across the separate recordings from individual tests was also evaluated - both automatically (by the ASR) and by the trained listeners in both the TOEFL exercise and the actual TOEIC tests.

3.2.3 Duration of recordings and sound quality

It seems clear from ETS's responses to SSHD's questions that they hold no data on sound quality of the TOEFL or TOEIC recordings. The answer to question 4 suggests that ETS does not properly understand what is meant by signal-to-noise ratio (SNR), which is a quite standard way of assessing recording quality. Irrespective of that, however, the view suggested by ETS is that the adequacy of the recordings for ASR processing in this respect is assessed by the ASR itself and the user has no access to the settings or modes of calculation (answer 4).

With regard to recording duration, it would appear that, while there is an answer to the minimum duration of speech needed for the TOEFL and TOEIC testing ('15 continuous seconds of recognizable speech', answer 1), there are no data on the average speech file durations associated with each set of tests. From the phrasing of answers (e.g. 'average time is not relevant to the operation of this technology', answer 1), one might reasonably surmise that duration data has not been recorded or retained.

The applicability of the 2% error rate established for the ASR in the TOEFL pilot tests to the TOEIC tests is dependent upon there being some parity between the two sets of recordings in terms of sound quality and durations. If the TOEFL recordings, say, generally fell just within the pre-established thresholds of suitability for processing, and the TOEIC set substantially exceeded those thresholds, then one would expect the ASR to have established better speaker models for the latter and the error rate would be likely to be lower than the 2% established for the TOEFL pilot tests. If the reverse were to apply, the consequence would ne that the error rate would be likely to exceed 2%. Ultimately, however, even if ETS had recorded and retained SNR and duration data and were able to produce it, there would be no way of estimating with any precision how any disparities between the two sets of recordings would translate into percentage increases or decreases in error rate for the particular ASR used. So, for instance, if one were to know that the TOEIC recordings had on average an SNR that was 2 dB poorer and an average duration 6 seconds less than the TOEFL set, one could not say from that information that the increase in false positives would be X or Y%.

Possible percentage increases or decreases of false positives at the ASR processing stage should in any case be considered in the light of the proportion of matches produced by the ASR that were subsequently rejected during the assessments undertaken by the trained listeners – see Section 3.3.7 below.

3.2.4 Editing

In response to SSHD's question 6, ETS state that 'no editing was done prior to analysis in either the TOEFL pilot or in respect of the TOEIC tests'. Editing is quite normal in respect of speech samples being prepared for processing by an ASR. Had editing been undertaken to remove any extraneous, non-speech material (coughs, throat clearing, background sounds, etc), one would have expected an increase in system performance.

3.3 Use of trained listeners

3.3.1 Range of features available

My reason for taking the view that review of the ASR matches by trained listeners would result in a large reduction to the overall number of false positives concerns, firstly, the fact

that the listeners would have available to them a much wider range of speech parameters than those used by the ASR. In addition to being able to perceive differences and similarities in vocal tract resonances, they would also be able to perceive disparities or correspondences in respect of *phonatory* features. These are aspects of voice quality (timbre) that emanate from within the larynx itself. Examples would include whether a voice was breathy, harsh or 'creaky'. Such information is effectively excluded from an MFCC analysis of the type performed by an ASR; it is lost or 'discarded' by the software in the processing of the signal.

Further information that would be available to the listeners but excluded from the ASR analysis includes:

1. Lexical and grammatical choices
2. Grammatical errors
3. Discourse markers ('like', 'you know', 'innit', etc)
4. General level of fluency
5. Speed of delivery
6. The nature of filled pauses ('um's and 'er's)
7. General voice pitch
8. Intonation (patterns of pitch movement – speech 'melody')
9. Speech rhythm
10. Accent (regional UK, ethnic, etc)
11. Peculiarities of pronunciation of consonant and vowel sounds
12. Speech impediments
13. Mispronunciations of words

These are essentially the components dealt with in Section 4.4.4 of Dr Harrison's report under the heading of 'Auditory phonetic analysis'[3] and are analysed in a systematic way by forensic speech scientists/phoneticians undertaking speaker comparisons. Phoneticians undergo ear-training in identifying features of speech within the component areas and have available formalised systems of classification and specialised vocabularies for describing

[3] Although potentially all are considered in a forensic phonetic analysis, not all are phonetic. 1, 2 and 3 relate to different levels of language organisation, namely lexico-syntax, morphology and discourse, rather than phonetics.

the features. One would expect phoneticians to have a heightened awareness of the features. However, that is not to say only phoneticians can perceive them. Non-phoneticians are regularly heard to comment on, for example, accents, grammatical errors, distinctive voices or speech impediments. Further, it would appear from ETS's answer to SSHD's question 17 that the approach of their trained listeners to the task was analytical rather than merely undifferentiated holistic listening and that the components and features the listeners attended to in comparing the voices matched by the ASR stood in at least a rough correspondence to those outlined above and by Dr Harrison:

'The approach outlined by ETS provided verifiers with several levels of potential analysis starting with observing speech patterns auditorily (such as sibilant "s" pronunciations, word articulation, vowel and consonant formations, pacing and delivery style, hesitations when pronouncing words, mispronunciation of words, volume of speech, tone of voice and any other distinguishing characteristics like male/female, age, region and accent and ethnicity) ...'

Also, it would appear from the same answer that some, albeit rather basic, acoustic examinations of speech were attempted by the listeners.

3.3.2 Training of listeners

It remains unclear exactly how much training the listeners underwent: 'multi-day training' is stated for the OTI staff in ETS's answer to SSHD's question 15; 2 – 3 days is stated as being the period for which training was 'typically available' for the extra ETS staff with this being followed up by a mentoring period with an OTI member which 'varied' in duration (answer 16). Also, it would appear from answer 15 that the person responsible for training the OTI staff, although a member of various specialist associations, may themselves have had no university education or training in phonetics/speech science. Whilst this is far from ideal, the areas in which they provided the training are nevertheless commensurate with those covered in university forensic speech science courses and the descriptions of those areas indicate knowledge of significant issues in speaker comparison testing (e.g., 'intraspeaker variability vs. interspeaker variability' – answer 15).

In summary, it would appear from the information given that the trained listeners at ETS would be in a significantly less advantageous position than forensic phoneticians/speech

scientists (minimum of master's degree in the subject area and 1 – 2 years working under supervision), but in a distinctly better position than untrained lay-listeners attempting the same task.

3.3.3 Quantity of speech

As well as being able to base their decisions on a much wider array of features than those used in an ASR analysis, the trained listeners also had more speech available to them than was processed by the ASR, in that they 'were not limited to the six [sound files] selected for biometric review' (answer 7).

3.3.4 Pairing and foreign accent familiarity

The listening was undertaken by two people working independently and in each pair there was at least one experienced OTI examiner. Dr Harrison notes that a 'general finding' to emerge from research studies of lay-listeners 'is that a foreign accent makes the identification task harder' (Section 6.3.7). However, it would appear that the OTI examiners, whilst not having undergone formal education in sociophonetics, which would include study of ethnic accents, were in a more favourable position than most lay-listeners, in that they had gained familiarity with foreign accented English through their involvement in the TOEFL program from 'reviewing speaking responses from candidates around the world' (answer 15).

3.3.5 Time expended on comparisons

It is noted from answer 18 that ETS has no data available on the average time expended by listeners on a comparison. However, the requirement was that each recording should be reviewed a 'minimum of three times with no interruptions' and that listeners could go beyond this and listen 'multiple times' as needed (answer 18). While, I would consider it virtually inconceivable that even the most extensive listening would occupy the '10 and 15 hours' cited by Dr Harrison as the time normally taken by a forensic speech scientist to compare two recordings, it should be borne in mind that a substantial part of that time – perhaps upwards of one third is expended on note-taking, compilation of records and report writing, rather than on the analysis itself. Further, in many cases the general direction of the outcome – 'positive' or 'negative' – becomes apparent all of the detail has been

recorded and the acoustic measurements taken and analysed. In respect of the listeners at ETS, it appears that reports were not written and there is no indication of any requirement for extensive note-taking or compilation of analytic records; rather, the listener arriving at a positive decision entered the word 'same' on a spreadsheet (witness statement of Peter Millington, para 41). Viewed against this information, the disparity between the likely time expended by ETS listeners and that by forensic speech scientists is somewhat reduced.

3.3.6 Absence of testing of new staff

Dr Harrison notes (Section 6.3.2) that no testing of new staff deployed on the listening appears is mentioned and their work was simply 'peer reviewed by an experienced analyst until a level of confidence was reached that they were capable of carrying out the work on their own'. Whilst this is not the way one would ideally wish the induction period to terminate, it should be understood that in this respect the extra ETS staff drafted in are in exactly the same position as neophyte forensic speech scientists who enter the profession through an in-house system of mentoring without formal testing upon its completion. Consideration of the significance to be attached to the lack of testing should take into account the fact that the ETS listeners are the rule rather than the exception in respect of those undertaking speaker comparisons[4].

3.3.7 Match rejections by trained listeners

Answers to SSHD's questions 24 and 25 provide the number of matches identified by the ASR and the number subsequently rejected when reviewed by the trained listener pairs. The system identified 58,464 matches of which just 33,735 were confirmed by the listener pairs[5]. In other words only 57.7% of the matches were accepted. One presumes the very high rejection rate (42.3%) is in part attributable to the stringent conditions laid down for match confirmation, i.e. for acceptance of a match *both* listeners *working independently* had to confirm it, and the test for individual acceptance was that '*any doubt* about the

[4] The situation in the UK is to be changed under proposals from the Forensic Science Regulator.
[5] These figures are at variance with those provided in Peter Millington's witness statement, where it appears that the ASR identified 33,000 matches, of which 80% were confirmed by the listeners. I have assumed that the information coming from ETS directly in response to SSHD's questions should be given precedence of Mr Millington's account.

validity of a match will result in it being rejected' (witness statement of Peter Millington, para 45; emphasis added).[6]

While Dr Harrison notes unfavourable performance rates for human listeners, some of whom worked together with ASRs (Section 6.2.2), he points out that the details of each human system [person or team of people involved] are not made available in the studies he refers to and so it is not possible to know the specific method that was used by any of [them]'. Further, and unlike in the present case, the tests he cites involved the comparison of telephone transmitted speech with directly recorded microphone speech and there are indications that the recordings were noisy (Greenberg *et al,* 2010) and Schwartz *el al,* 2011). I do not regard the findings on error rates arising from these studies to be transferrable to the ETS testing.

4 CONCLUSIONS

1. **The conditions used for trained listener pair confirmation, in conjunction with the (albeit unspecified) conservative thresholds set for ASR match identification (witness statement of Peter Millington, para 31), would, in my view, have resulted in substantially more false rejections than false positives.**
2. **Even though there is still material missing from the body of information called for by Dr Harrison, I am not convinced that the provision of such information could be used to establish a closely specified percentage of false positives.**
3. **If the 2% error rate established for the TOEFL pilot recordings were to apply to the TOEIC recordings, then I would estimate the rate of false positives to be very substantially less than 1% after the process of assessment by trained listeners had been applied. This is in because:**

   (a) there were stringent criteria for verification by the trained listeners;

   (b) the trained listeners had potentially more speech available from the tests than that processed by the ASR;

[6] Whilst, as Dr Harrison points out, there is no necessary correlation between listener certainty and accuracy of identifications, the studies from which that observation arises are based on tests carried out with lay listeners, not trained listeners as were used by ETS.

(c) the trained listeners had available a much wider range of speech features on which to base their decisions than just vocal tract resonances as reflected in an MFCC analysis performed by the ASR.

4. **Even if the TOEIC recordings were on average somewhat shorter and poorer in quality than the TOEFL pilot test recordings, on the basis of the information that has been provided, I would still estimate the number of false positives emanating from the overall process of ASR analysis followed by assessment by two trained listeners to be very small.**

5 QUALITY CONTROL/CHECKING

As part of the quality control procedure at J P French Associates, the content of this report was discussed and agreed with my colleague Dr Christin Kirchhübel[7].

Prof Peter French PhD, FIOA

20th April 2016

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[7] Forensic consultant in forensic speech science with involvement in over three hundred forensic cases: BA Hons (First Class) in English Language and Linguistics, MSc (with Distinction) in Forensic Speech Science, PhD in Electronics - Forensic Speech Science.

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MA (anonymity direction granted by the Tribunal) v SSHD

Appeal number IA/39899/2014

Report of Christopher Stanbury in The HM Courts and Tribunals Service

Dated: 31st January 2016

Specialist field: Computing, Database programming, Web Design and Search Engine Marketing

On behalf of the Respondent: MA

On the instructions of: Oaks Solicitors (for Respondent)

Subject: Report on the circumstances around the processing of computer files related to MA

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1 *Introduction:*

1.1 The writer

1.1.1 I am Christopher David Stanbury. My specialist field is Computing, in particular Database programming, Web Site development and search engine marketing. I have been involved in the computer business since 1979 and have experience in many areas. My initial experience and training related to database creation and programming. My company has now produced around 200 Web sites. Most of our client's sites have been hosted on our own Web servers and maintained by us. I am familiar with Web site creation including database driven sites, meta tags, keywords and the art of search engine optimisation. I have also been an analyst/programmer since 1979 working mostly with databases. I have many years experience supplying and installing hardware and software including networked systems.

1.2 My experience as an Expert Witness

1.2.1 I have undertaken work on many cases related to IT, in particular the Internet.

1.2.2 The first case I was involved with was a major case involving the suitability of a programming language to the job it was being used for. I was asked to assist the court on behalf of the Defendant in May 1993. The case was heard at The High Court in London. I wrote a report, took part in discussions with barristers and solicitors as well as experts for the Claimant, I attended court on several days to assist the barristers and presented my evidence over two days.

1.2.3 Since then I have worked on cases involving the valuation of stolen hard disk drives, plagiarism related to Web pages, the likelihood that a former employee had copied his employer's program when setting up his own business, giving an opinion on whether the charge imposed for a Web site was reasonable and whether a Web site had been completed satisfactorily. I have appeared in court to give evidence as an expert on two occasions so far.

1.3 Summary background of the case

1.3.1 The case revolves around an English language test that MA undertook at Cauldon College on 20-03-2013 in order to assist with his application to stay in the UK.

1.4 The parties involved

1.4.1 Those involved in the case are as follows:

1.4.2 Appellant - SSHD (The Secretary of State for the Home Department) aka Home Office

1.4.3 Respondent - MA

2 The issues to be addressed and a statement of instructions:

2.1 My instructions are contained in a letter from Oaks Solicitors, dated 13 November 2015 and a "Request to the experts..." dated 18th December 2015

2.1.1 As mentioned the speaking test was recorded on the day. Are you able to give us an explanation as to how the information (from the test) is captured at each stage eg from the recording of the test to being recorded onto a CD. How likely is the recording and/or the CD to be corrupted through a computerised process?

2.1.2 When the recording is taken from the original computer, it is then transmitted through different computers. Can the voice transmitted remain the same or can it be interfered with.

2.1.3 When the recording was made directly onto the computer, what would have been the file type used and what mechanism would have been used to time stamp the file to ensure its creation date was indubitable.

2.1.4 When listening to the CD, there is a silent background. MA informs us that 20 other candidates sat the test with him. Would the recordings not be contaminated by background noise? If there is a silent background, how could the background noise be erased?

2.1.5 MA sat the speaking test on 20 March 2013. The CD was provided to us by the Home Office via ETS in June 2015. If you look at the properties of the CD, it has a date modified as 1 March 2014. Can you please confirm what this means? Additionally the CD does not contain a date, time or place of the test taken. Why would this be?

2.1.6 MA informs us that after he sat the test, they came out of their cubicles and had their photographs taken. These photographs were then transposed onto their certificates. Can you please comment on how easy it would be to transpose the photograph onto the certificate.

Are you able to state and if so with what certainty:

2.1.7 Whether it is possible for a College (EPN) or ETS to interfere with the integrity or alter the speaking test computer delivered recordings of a candidate who sat the test and if so how, when and under what circumstances?

2.1.8 The likelihood of a proxy test taker overriding the speaking test recordings of a candidate delivered on a computerised system without the candidates' knowledge? In other words can a proxy test taker take the test for a particular candidate at a different computer from that allocated to a candidate?

2.1.9 Whether it is possible for the original test recording made at the source site (the computer which the candidate worked on) and then transferred to ETS USA to be interfered with, altered, corrupted or manipulated on route or in the USA before or after the test being marked?

2.1.10 Whether it is possible for one proxy test taker to take the speaking test at the test centre at the same time for all of the candidates sitting the same test with or without their knowledge?

2.2 The purpose of the report

2.2.1 To comment on the processes used on the test results recorded at Cauldon College

3 *My investigation of the facts*

3.1 Documents inspected:

3.1.1 Instructions (to expert witness)

3.1.2 Outcome of Appeal by MA - decisions and reasons

3.1.3 Upper Tribunal Determination - 2015/09/11

3.1.4 Witness statement - MA

3.1.5 Witness statement - [redacted] (Police officer) AK

3.1.6 Witness statement - Rebecca Collings

3.1.7 Witness statement - Peter Millington (incomplete)

3.1.8 Witness statement - [redacted] MH

3.1.9 Immigration Acts - Notice of decision to appeal (by Home Office)

3.1.10 Upper Tribunal - directions to parties

3.1.11 Application to SSHD for information (Rule 16(1)(b)

3.1.12 Rule 24 response - detailing data use outside EU

3.1.13 Letter from Home Office with graphs etc (3/9/2015)

3.1.14 Letter to Appeals & Litigation directorate asking for information (9/2/2015)

3.1.15 Letter to Jones Day asking for information (27/10/2015)

3.1.16 Letter from Jones Day to Oaks (24/11/2015)

3.1.17 Interview notes

3.1.18 Refusal letter

3.1.19 Spreadsheets and score sheets relating to MA's tests

3.1.20 File properties screenshots for six sample voice recording files

3.1.21 Speaking & Writing User Guide

3.1.22 Listening & Reading Examinee Handbook

3.1.23 Speaking & Writing Examinee Handbook

3.1.24 Emails between Chris Stanbury and Oaks Solicitors

3.2 Interview and examination

3.2.1 I attended a meeting in London on 13th January 2016 with MA and his legal team

3.2.2 I viewed the Panorama documentary on-line

3.3 Research

3.3.1 I read the documents supplied. Where necessary I used the Internet for research on certain topics such as, for example, file date/time properties.

4 Limitations

4.1 A request for information was made to Jones Day (Solicitor acting on behalf of ETS) in a letter (dated 27th October 2015 - Ref VB/AHM/2388.02).

a.) Can ETS provide details of the systems that were used on the day to record MA during his speaking test on the 20th March 2013?

b.) To be clear can you please confirm the process from the moment candidates have sat the speaking test, how and when the recordings are taken and by whom?

c.) Can ETS verify when the voice recording was transferred to ETS in America and whether the original voice recording was interfered with or subsequently re-recorded and if so by whom, how, when, where and why? Please provide details of how the original voice recordings were transferred to and also how it

was kept in America. Was it transferred directly, or through another organisation, to America by test centre to ETS and to be clear please explain how it was then stored in America?

d.) Once the original voice recording of the test was taken and transferred to America can you confirm when, why and how this was then sent to Jones Day?

e.) The Home Office have given us a CD of MA's speaking test which is said to contain the voice of a proxy test taker (e.g. John Smith) which is not that of MA.

f.) You have provided the Home Office with information that the proxy voice occurred in MA's test and at least one other test. You state at point E that the same voice occurring in MA's test also occurred on at least another test. Please confirm on what date and where this occurred

g.) Have you checked whether this proxy voice (e.g. of John Smith) appears on the same day of the test taken by MA for other of the 78 candidates besides MA and if so for how many other candidates and whether this proxy voice appeared at the same or other time when MA's sat his test? To be clear we like to know if this proxy voice of John Smith appears for any of the other of the 78 or 60 candidates on the same day or on any other days at the Cauldon College test centre? ; if so please let us have all results of this test and other tests conducted. If you have not conducted this comparison please let us know why not?

h.) Does the proxy voice (e.g. John Smith) on the CD appear on any other day of the examination for other candidates at this or different test centres holding the speaking exam and if so could we have details to this? To be clear can ETS confirm whether the same proxy voice (John Smith) has been matched to other colleges apart from Cauldon College where MA sat the speaking test whether on the same or different dates?

i.) Can we have the question paper for the speaking test which MA took?

j.) Additionally can ETS confirm who marks the tests, and who produces the certificates?

k.) Please provide us with the original date/disc from where the copy (given to us by the Home Office) was produced from; when, where and by whom was the CD made and was it made from the original recording or from other source? If it is from some other source please identify this source and explain why and how it came into existence.

l.) To be clear can you provide us with details of whether the recording on the CD was the first recording of the original voice recording of MA and how this (second) recording made on the CD was taken by your staff and under what conditions were they taken? Can we have a statement from the persons who firstly, identified the first original voice recording at the test centre, who secondly took subsequent recordings from the original voice recordings at each stage and how he took it, thirdly the process he followed and how there has been verification subsequent recordings relate to the original voice recordings of MA's test? To be clear can we also have verification of how many second recordings were made of the first recordings in respect of other 78/60 candidates who took the test on the same date as MA and provide us with those results?

m.) You state that in the same letter that 60 individuals were confirmed matches to other voice recordings. Please explain how many other proxy voice test takers sat the speaking tests (besides John Smith)?

n.) Can you provide us with any record kept of the second recording if there is one and if there is not please explain why there is no such record?

o.) Can we have access to the original recording of the speaking examination which MA took (as you allege was taken by a proxy voice)?

p.) In relation to the 18 candidates whose results you suggest were not treated as invalid can you explain why this was the case?

q.) In relation to point F in your letter what type of case would be deemed "questionable".

r.) We refer to your letter dated 13 May 2015 to Mike Wells, Chief Operating Officer at UK Visas. You state at point B of your letter that 78 people took the test. We request the diary entry for that date for confirmation as to how many people actually took the test; we would also like confirmation whether there was a CCTV in operation at the test centre at the time of the examination; if you have the CCTV please let us have a copy of this. If there was no CCTV are you able to explain why not?

s.) Please provide us with the names and addresses of the invigilators for the speaking test for that day. If you do not have this are you able to state where this information can be obtained from?

t.) Please confirm the name of the Chief Executive and/or the Technical Director for ETS. Can you take instructions whether they would be prepared to come to give evidence at the UT voluntarily? We would want them to attend to give evidence on certain aspects of the case.

u.) Please provide the terms of the contract that existed between ETS and Cauldon College, in particular relating to the operational matters; we do not want terms of the contract which are commercially sensitive but we would like the terms of the contract regarding the way students were enrolled for the tests, the way the tests were administered, how recordings were made of the speaking tests, how the voice recordings were then transferred, how photographs were taken of candidates.

4.1.1 I have been made aware that there was no response to these requests. Answers would have been very useful in determining what happened to the data recorded at Cauldon College. In the absence of answers, I am forced to offer speculative scenarios based on the limited information I have to hand.

5 *My Opinion*

5.1 A brief overview of what is likely to have happened

5.1.1 MA claims to have sat the TOEIC test (Speaking and Writing) on 20th March 2013 at Cauldon College. The judge at the first appeal found him "entirely credible" - MA's level of English is very good and I understand he also has a Degree from Nigeria that was taught in English

5.1.2 MA's voice was recorded onto a computer (probably)

5.1.3 The file produced at MA's computer may or may not have been saved at the time and, if it was, it has since been overwritten with a different file.

5.1.4 It is agreed that the sample files now produced are not recordings of MA's voice

5.1.5 Recordings were used to mark the test (they may or may not have been MA's)

5.1.6 The files now stored have been subject to processing in the USA for marking and to check for fraud

5.2 As mentioned the speaking test was recorded on the day. Are you able to give us an explanation as to how the information (from the test) is captured at each stage eg from the recording of the test to being recorded onto a CD. How likely is the recording and/or the CD to be corrupted through a computerised process?

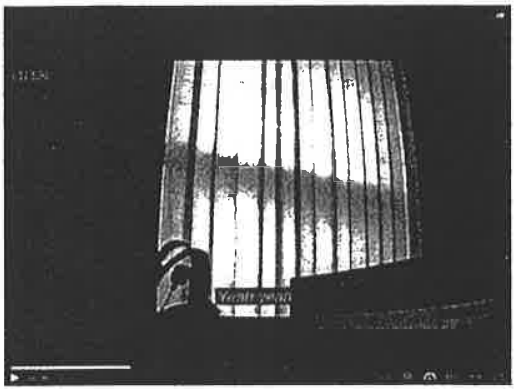
5.2.1 Unfortunately I have not been supplied with any information about the process used and therefore I can only offer an opinion of what the process might have been.

5.2.2 I understand from speaking with MA that around 20 candidates were present on the day that he took the test at Cauldon College although his estimate is at odds with the figure quoted in other documents which I believe ranges from 30 to 78 (Point B in a letter from Jones Day dated 13th May 2015)

5.2.3 MA told me that several candidates were sat at a long table or desk with approximately 3-4 feet between each candidate. Each candidate was seated in

front of a computer provided by the college. He states that here was no sound absorbent barrier between each candidate and therefore it was a fairly noisy environment.

5.2.4 I understand that the candidates wore headphones with an attached microphone. I believe the microphone was located approximately 1-3 inches from the candidate's mouth. An example of the headphones can be briefly seen in the Panorama programme at 06:56 - this shows the microphone silhouetted against a window although not in position for use.



5.2.5 MA has told me that the candidates would hear a question through the headphones and would speak the answer to the question. MA says that all the candidates answered simultaneously or almost simultaneously. This suggests that they were all hearing the question(s) at the same time. It is not clear whether every candidate was given the same question or whether they heard a variety of questions.

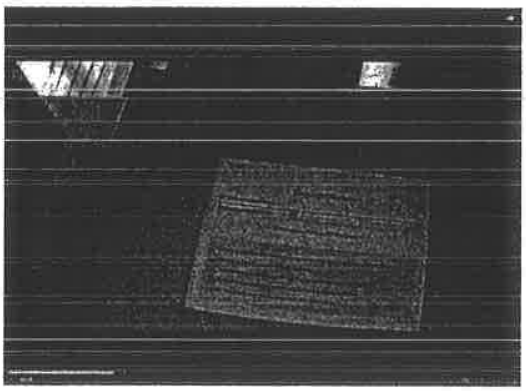
5.2.6 It does appear from Mr Millington's statement (para 36 iii) that at least some of the questions in each test session were asked of all the candidates. The sample recordings used for the biometric tests were "those where all test takers were required to read a set text and therefore comparisons would be more straight forward." At least two of the sample recordings appear to contain "spontaneous answers", ie they do not seem to be responses being read from a prepared text. This means that not all the files that were used for the biometric tests were candidates reading from prepared texts. As there is no

dispute between the parties that the recordings submitted by ETS are not of MA, there seems little point in exploring this further.

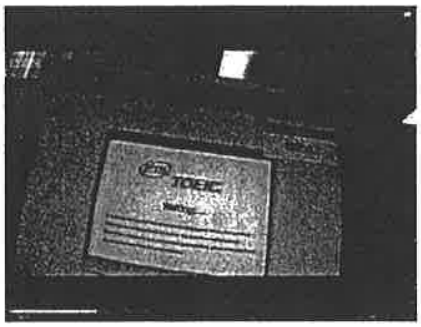
5.2.7 According to the "TOEIC User Guide - Speaking and Writing" (page 6) there are "...four speaking and four writing tests..." It is not clear to me whether all the candidates at each session receive the same test.

5.2.8 In order to distinguish each candidate's results and to be able to access them at a later date, each candidate needed to have a unique code. This is shown on the TOEIC Speaking and Writing Official Score Report as a "Registration number". In MA's case, his registration number is shown as [redacted]. The score report also shows the test date as 2013/03/2((ie the 20th March 2013)

5.2.9 The Panorama documentary briefly shows a screen with some bespoke software. The first screen shown is an input screen with space for the candidate's "Unique ID number" In the documentary, the exam invigilator indicates that he will enter this number. The choices offered are "National ID", "Passport ID" , "Driver's License ID" or "Other ID".



5.2.10 Once the Unique ID number is entered, the software appears to go into a "waiting" phase.



5.2.11 It is crucial that for all the tests undertaken by the candidate, there is a robust chain of custody to ensure that the results can always be reliably linked back to the candidate.

5.2.12 In the "Decisions and Reasons" document dated 23 mar 2015 (para 18) it is stated that Officer RK [redacted] used "the ETS Lookup Tool". I have not been supplied with any information about this but I think it is highly likely to be software which allows an authorised user to interrogate the ETS database in order to find the results relating to a specific candidate. In order to do so, the user would need to have the "Registration Number" or another unique identifier for the candidate in order to obtain the results for the correct candidate.

5.2.13 The "Speaking & Writing Examinee Handbook" states that "Testing premises are subject to video recording." However, I have seen no evidence suggesting this was the case at Cauldon College.

5.2.14 If I were designing a testing system that was difficult to cheat, I would record both audio and video for the speaking tests. This would be easy to achieve with the correct software and an inexpensive Web-Cam. It would enable anyone to later check to see that the person taking the test is the candidate who has registered.

5.2.15 It appears that the "Registration number" is not entered into the software at the point at which the speaking test is undertaken. I assume that this must be entered later and would need to be entered carefully to make sure that the

correct "Registration number" was used for each candidate. If the wrong number were used, it is possible that two candidates might have their results swapped. I have not been supplied with any information about the process of allocating the "Registration number" to each recording.

5.2.16 The Speaking and Writing Test Official Score Report contains the "Registration Number" in the top section of the page. However, the Listening and Speaking Test Official Score Report contains a different number ([redacted]) described as "Identification Number". It is unclear from the information I have, how a candidate's results from different tests can all be linked back to the individual candidate.

5.2.17 I can see, from Andrew Carter's witness statement, that the files he was supplied with all had file names starting with [redacted] and ending with .ogg, eg [redacted]_VE626634_201845415.ogg

5.2.18 It would seem sensible to name the files with the registration number as appears to be the case here. I am unclear what the other codes within the file names relate to. They do not appear to relate to the date the test was taken.

5.2.19 The Panorama documentary states that "Once [the test is] finished, invigilators submit the papers [and presumably the recordings for the Speaking Test] electronically to the exam board". This indicates to me that all the files relating to the day's testing will be transmitted via the Internet to the people who will undertake the marking process. This is in line with the statement in the "TOEIC Examinee Handbook Speaking & Writing" - "The TOEIC Speaking and Writing tests will be administered on fixed dates at secure, Internet-based test centers."

5.2.20 This matches the description in the "TOEIC User Guide - Speaking and Writing" which states on page 9, "The Speaking test responses are digitally recorded and sent to ETS's Online Scoring Network where they are scored by certified ETS raters."

5.2.21 The six sample recordings supplied were all under one minute in length. It is unclear whether the software used at the test centre divides the test into the individual recordings or whether this is done at a later stage prior to marking. By having single response recordings, ETS are able to allocate the recordings for each question to different, randomly chosen markers.

5.2.22 It appears from Andrew Carter's statement that the files were transferred to ETS in the USA for marking. He says, "Once the speaking tests were conducted in the UK the associated voice recordings were transferred to ETS in America who listened to and graded them."

5.2.23 Mr Millington's statement confirms this. He says in relation to the marking process, "...after a test is administered in the UK, a test taker's spoken and written responses to each of the individual questions are divided into individual electronic files and transmitted to ETS and stored securely on servers in its data centre. These servers are accessible only by authorised personnel and the files are typically stored for 999 days. ETS has advised that file manipulation, corruption or misapplication has not been an issue once the files are received in the USA. These individual files are then randomly and anonymously assigned to markers." "...markers access the OSN [Online Scoring Network], which is also hosted on ETS's servers located in its data centre, and markers access the OSN remotely from locations across the USA."

5.2.24 Mr Millington's reference to 999 days is at odds with the "TOEIC User Guide - Speaking and Writing" which states on page 26 that "Test scores are retained in the TOEIC database for only two years from the test date and scores more than two years old are not reported. Individuals who took the TOEIC test more than two years ago must retake the test if they want scores. While all information that could be used to identify an individual is removed from the database after two years, anonymous score data and other information that can be used for research or statistical purposes are retained."

5.2.25 The "Speaking & Writing Examinee Handbook" goes further, saying, "Individually identifiable TOEIC scores are retained in a database for two years. After two years, all information that could identify an individual is removed. If you took the TOEIC tests more than two years ago, you will have to take the tests again to have scores sent to you."

5.2.26 With regard to how likely it is that the recording could be corrupted, I can think of dozens of possible scenarios that could involve such corruption but with no information about the processes used, these are necessarily speculative. However, it appears that the "Registration Number", used as part of the file name, is not entered at the time the exam is taken (see note referring to the Panorama documentary). If I am correct, this means it must be entered at another time. In which case there would seem to be an opportunity for error. If the registration number used was for another candidate then the recording used for marking would not belong to the genuine candidate.

5.2.27 Because of the dangers of manually entering Registration numbers later, it is likely that this is somehow automated but this would require a list of the IDs used for the test and the MATCHING Registration number.

5.2.28 Alternatively, the "Registration number" could be allocated automatically to each file as it is recorded by the software used. This would pose certain issues with the other tests undertaken by the same candidate. At some point there would need to be a table matching the "Unique ID number" to the "Registration number".

5.2.29 I have not been given any information about exactly how the files are sent to ETS's Online Scoring Network . If the files are held locally before being sent, it is possible that someone with access to the computer could amend the file names or substitute different recordings and rename the files to appear to be the original recordings.

5.2.30 In such a case, it would also be possible to substitute a single proxy candidate's recordings for several files. This would lead to a situation where exactly the same recording was used to represent more than one candidate. It is unclear from any of the information that I've read whether a single recording has been used for more than one candidate although it is alleged that the same voice appears on the file returned as belonging to [redacted] and one other recording. (Point A in a letter from Jones Day dated 13th May 2015)

5.2.31 Following the broadcast of the documentary investigation by Panorama (in February 2014) there were tests carried out by the OTI [ETS's Office of Testing Integrity (in the USA)] on the files which had been stored in the USA These tests involved converting the files into a new file type and using the converted file via biometric voice software to attempt to determine whether the voice on the recording was the same as the voice in one or more other recordings OR the recording contained more than one voice.

5.2.32 Mr Millington's statement states at para 37 that "The electronic files generated at the testing stage required a two step audio conversion process (from .ogg to .wav to .spx) in order to be processed through the voice biometric software. The OTI was responsible for the conversion process to ensure consistency"

5.2.33 A .wav file is a Waveform Audio File Format which is a Microsoft and IBM audio file format standard for storing an audio bitstream on PCs whilst a .spx file is a compressed format using Speex compression and saved in the Ogg Vorbis container format. it is designed as an audio compression format specifically for speech. The Speex format also supports intensity stereo encoding, noise suppression, echo cancellation, variable bitrate (VBR) encoding, Voice Activity Detection (VAD), and Discontinuous Transmission (DTX). I do not believe there is anything suspicious about the conversion from one format to another in order to process the recordings.

5.3 When the recording is taken from the original computer, it is then transmitted through different computers. Can the voice transmitted remain the same or can it be interfered with.

5.3.1 See above

5.4 When the recording was made directly onto the computer, what would have been the file type used and what mechanism would have been used to time stamp the file to ensure its creation date was indubitable.

5.4.1 The file extension of the files I've been sent is ".ogg". Wikipedia states that "Ogg is a free, open container format maintained by the Xiph.Org Foundation. The creators of the Ogg format state that it is unrestricted by software patents and is designed to provide for efficient streaming and manipulation of high quality digital multimedia. Ogg is only a container format. The actual audio or video encoded by a codec is stored inside an Ogg container. Ogg containers may contain streams encoded with multiple codecs, for example, a video file with sound contains data encoded by both an audio codec and a video codec. Being a container format, Ogg can embed audio and video in various formats (such as Dirac, MNG, CELT, MPEG-4, MP3 and others) but Ogg was intended to be, and usually is, used with the following Xiph.org free codecs for audio recordings:

Speex: handles voice data at low bitrates (~8–32 kbit/s/channel)

Vorbis: handles general audio data at mid to high-level variable bitrates (~16–500 kbit/s per channel)

Opus: handles voice, music and generic audio at low and high variable bitrates (~6–510 kbit/s per channel)

FLAC handles archival and high fidelity audio data.

OggPCM: handles uncompressed PCM audio. It is broadly comparable to WAV."

5.4.2 Inspection of the file indicates to me that Vorbis was used for these files - I see no particular significance in this.

5.4.3 The operating system used on the computer would usually "time stamp" the file as it is produced. However, there are a number of dates relating to a file and these can be amended by software or the operating system in many ways. (see "Dates relating to files" section). It is also likely that the bespoke software would have marked the file in some way with the date and time. There is a facility to add "Metadata" into a .ogg file. This could contain information such as the date and time that the recording was made and event the candidate registration number, but this would be a function of the software used rather than an automatic facility. Unfortunately, there are no notes in the Metadata on the files I have been sent. This is not proof that there were never any notes as they could have been removed at a later stage. It seems likely though that the recording software did not insert any notes into the files.

5.5 When listening to the CD, there is a silent background. MA informs us that 20 other candidates sat the test with him. Would the recordings not be contaminated by background noise? If there is a silent background, how could the background noise be erased?

5.5.1 Because the microphones used were not located directly touching the candidates mouths, it is highly likely that there would be a degree of background noise recorded alongside the candidate's answer to the question. This would not be sufficiently high to prevent the candidate's answer being heard but would be audible. In MA's witness statement (para 16) he says "We all wore earphones but despite this, I could hear noise in the background, namely all the other candidates talking."

5.5.2 Mr Millington's statement states (para 39) "...ETS notes that test takers should not be sitting so close to one another that they can overhear each other's responses".

5.5.3 It is possible to "clean up" a recording to lessen background noise. This would typically be done by applying filters to remove certain frequencies. The sample

files I listened to did have a level of background noise although it was not significant. I could clearly hear muffled background noise to indicate that other voices were present at the time the recording was made. In the case of file [redacted]_VE607571_201846384.ogg it is possible to hear the other voices starting to speak immediately prior to the principle voice on the recording.

5.6 MA sat the speaking test on 20 March 2013. The CD was provided to us by the Home Office via ETS in June 2015. If you look at the properties of the CD, it has a date modified as 1 March 2014. Can you please confirm what this means? Additionally the CD does not contain a date, time or place of the test taken. Why would this be?

5.6.1 I have inspected screenshots of the file properties from the six sample files. All six files have the same "modified date" of 01 March 2014 06.27.00 and the "created" and "accessed" dates are within one second of each other. 25 August 2015 12.26.07 & 12.26.08 This is consistent with the files having been copied onto a new medium to be sent. In this case the files were sent on CD to the legal team for MA. In order to be able to gain useful information relating to the original recordings I would need to inspect the original (un-copied) files. These are likely to have been made to the PC used by MA before being copied across to the USA.

5.7 MA informs us that after he sat the test, they came out of their cubicles and had their photographs taken. These photographs were then transposed onto their certificates. Can you please comment on how easy it would be to transpose the photograph onto the certificate.

5.7.1 To transpose a photo onto a document would be very simple. A typical process would be to trim (or "crop") the photo to the size required. This would also be required in this case because MA told me that eight candidates were photographed at once (in a line). Each candidate would therefore need to be

separated from the group picture. Once that had been done, the photo could be "pasted" into the document being used for the certificate.

5.8 Are you able to state and if so with what certainty: Whether it is possible for a College (EPN) or ETS to interfere with the integrity or alter the speaking test computer delivered recordings of a candidate who sat the test and if so how, when and under what circumstances?

5.8.1 Unfortunately, I have not been told how the files are stored before being sent to the markers. If they are stored locally, or on a computer accessible by the test centre, then it is possible someone could amend the files and possibly substitute an alternative recording.

5.9 Are you able to state and if so with what certainty: The likelihood of a proxy test taker overriding the speaking test recordings of a candidate delivered on a computerised system without the candidates' knowledge? In other words can a proxy test taker take the test for a particular candidate at a different computer from that allocated to a candidate?

5.9.1 Technically this is possible however it would potentially require a fairly sophisticated system. A lot depends on how and when the recordings are transmitted to the test markers. If they are stored locally, it would be possible for a proxy taker to take the test at the same time (or another time) as the candidate. This recording can then be substituted for the candidate's file without his or her knowledge. If the files are sent to the markers immediately on completion, then there would need to be a "mirror" PC being used to answer the questions with the candidate's "Unique ID". This computer would be connected to the Internet and the genuine candidate's computer would not. I do not know whether the test questions are provided via the Internet or whether each PC has its own copy of the test. If the questions are delivered remotely via the Internet, then a more sophisticated arrangement would be required

where the candidate and the proxy taker were both fed the question but only the proxy's recording would be sent for marking. Whilst technically feasible, this would need a fairly high level of technical ability and determination.

5.10 Are you able to state and if so with what certainty: Whether it is possible for the original test recording made at the source site (the computer which the candidate worked on) and then transferred to ETS USA to be interfered with, altered, corrupted or manipulated on route or in the USA before or after the test being marked?

5.10.1 Discussed earlier

5.11 Are you able to state and if so with what certainty: Whether it is possible for one proxy test taker to take the speaking test at the test centre at the same time for all of the candidates sitting the same test with or without their knowledge?

5.11.1 The principles are similar to those where a proxy taker is undertaking the test for a single candidate (with or without their knowledge). Again, a lot depends on how the files are stored and sent to the test markers. If they are stored locally, it would be possible for a proxy taker to take the test at the same time (or another time) as the candidate. This recording can then be substituted for an individual candidate's file or several candidates' files without their knowledge.

5.12 **Dates relating to files**

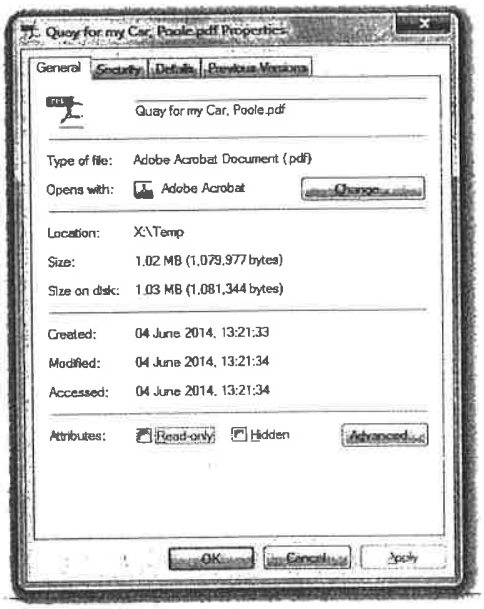
5.12.1 When MA took the test at Cauldon College his voice was (or ought to have been) recorded onto a computer file.

5.12.2 There are a variety of dates associated with computer files. In this case I am unable to say what the operating system would have been on the computers at Cauldon College although for cost reasons it was most likely to have been Microsoft Windows (Apple Computers are generally more expensive).

5.12.3 Using the date properties for a file to determine when it was last accessed by a human being is sometimes possible but with some severe limitations. In addition to the factors listed below, one must also consider that the clock on a computer is not always accurate. The clock can sometimes be wrong by several hours or even days and in the case where fraud is undertaken it is likely that the clock would be deliberately reset to mislead.

5.12.4 Where files are stored on or transferred to "the Cloud" (Internet based servers), it is possible that the Cloud Server will be in a different time zone and therefore a discrepancy can occur in the date information recorded.

5.12.5 Date information relating to a file can be viewed on a Windows system by right clicking the file in Windows Explorer and choosing "properties" - a window is displayed showing the following information:



5.12.6 The dates shown are "Created", "Modified" and "Updated"

5.12.7 The Creation date is the date (and time) that the file is created in the current folder. Copying a file to a new folder will revise this time. whilst moving it to a new folder will not. This property is relatively reliable.

5.12.8 "Modified" is the time the file was last modified. If the file is copied or moved elsewhere the modified date remains unaltered. It is also true that not all

applications update the "modified" property although most do. It is therefore possible that a file is updated but the modified date remains unaltered.

5.12.9 "Accessed" is the least reliable but potentially most useful date/time property. Unfortunately, many programs do not update this when a file is merely opened and read. Further, some programs do update the accessed date even though there may be no human intervention. The most common of these would be some antivirus software. The consequence of this is that even though the "Accessed" date has changed, the file may not have been looked at by a human being. In addition, it is difficult to know which user may have accessed a file. In high security environments it is possible to set up more advanced audit tracking that does allow more analysis of this date information but this cannot be done in arrears.

5.12.10 Information taken from Microsoft.com (http://support.microsoft.com/kb/299648)

If you copy a file from C:\fat16 to C:\fat16\sub, it keeps the same modified date and time but it changes the created date and time to the current date and time.

If you move a file from C:\fat16 to C:\fat16sub, it keeps the same modified date and time and keeps the same created date and time.

If you copy a file from C:\fat16 to D:\NTFS, it keeps the same modified date and time but changes the created date and time to the current date and time.

If you move a file from C:\fat16 to D:\NTFS, it keeps the same modified date and time and keeps the same created date and time.

If you copy a file from D:\NTFS to D:\NTFS\SUB, it keeps the same modified date and time but changes the created date and time to the current date and time.

If you move a file from D:\NTFS to D:\NTFS\SUB, it keeps the same modified date and time and keeps the same created date and time.

In all examples, the modified date and time of a file does not change unless a property of the file has changed. The created date and time of the file changes depending on whether the file was copied or moved.

5.12.11 It is possible in certain circumstances for the file's modified date to be earlier than the created date. This issue can occur if the file was copied to a Windows

95-based, Windows 98-based, or Windows NT-based computer. When you copy a file to a Windows 95-based, Windows 98-based, or Windows NT-based computer, the current date becomes the "Created" date of the file and the date that is currently on the file becomes the "Modified" date.

5.12.12 Just to complicate matters even more, there are several programs available that will modify the file dates/times to whatever date or time you choose. It is therefore possible for a knowledgeable user to view or even update a file and then use one of these programs to amend the file attribute dates back to their original values to make it look as if the file had not been accessed. It would be equally feasible to set an entirely new date in line with whatever date/time one wished to suggest the file was used/read/created.

5.12.13 Files that have been "deleted" are generally not entirely erased from a computer. In many cases they are simply moved to the "recycle bin". In such cases it is very easy to determine the date that the file was "deleted" albeit with the same caveats about accuracy of the date information as apply to live files. Files that have been copied from the original computer to another one will as can be seen above, have different dates from the original file. It may therefore be necessary to view both the original computer and the computer that the file was copied to in order to determine a better idea of the history of the file.

5.13 Summary of my conclusions

5.13.1 We know that the voice recording provided by ETS was not of MA. The Home Office claim it is not and MA agrees. The Home Office claim that this is because MA had a proxy take the test in his place. MA claims he took the test himself and he was believed by the Judge at the First Tier Tribunal. I have met MA and he has a command of the English language that is excellent and I had no difficulty understanding him.

5.13.2 It is my opinion that MA's test recording was either never made or, if it was made, it was lost or confused with another recording later in the process, either

deliberately or accidentally. In either case without the knowledge or involvement of MA.

6 *Statement of compliance*

6.0.1 I understand my duty as an expert witness is to the court. I have complied with that duty. This report includes all matters relevant to the issues on which my expert evidence is given. I have given details in this report of any matters which might affect the validity of this report. I have addressed this report to the court.

7 *Statement of truth*

7.0.1 "I confirm that insofar as the facts stated in my report are within my own knowledge I have made clear which they are and I believe them to be true, and that the opinions I have expressed represent my true and complete professional opinion."

8 *Qualifications and Experience:*

8.0.1 Member of the Society of Expert Witnesses

8.0.2 My direct knowledge and experience cover the design, build and use of computer databases plus the building of Web sites from scratch and using templates and databases. I have been involved in the computer business since 1979 and have experience in many areas. My company has now produced around 200 Web sites. Most of our client's sites have been hosted on our own Web servers and maintained by us. I am familiar with Web site creation including database driven sites, meta tags, keywords and the art of search engine optimisation. I have also been an analyst/programmer since 1979 working mostly with databases. I have many years experience supplying and installing hardware and software including networked systems.

9 *Definitions (alphabetical):*

9.1 **Attachment** - a file attached to and sent with an email. The file(s) may be of any type such as spreadsheet, image or data.

9.2 **Cloud based** - data or programs that are not located on the user's PC or even the server but are instead located on the Internet. The files are stored remotely on an Internet server (or servers).

9.3 **Codec** - A codec is a device or computer program capable of encoding or decoding a digital data stream or signal. Codec is a portmanteau of coder-decoder or, less commonly, compressor-decompressor. A codec encodes a data stream or signal for transmission, storage or encryption, or decodes it for playback or editing. Codecs are used in video conferencing, streaming media (including audio recordings) and video editing applications. A video camera's analog-to-digital converter (ADC) converts its analog signals into digital signals, which are then passed through a video compressor for digital transmission or storage. A receiving device then runs the signal through a video decompressor, then a digital-to-analog converter (DAC) for analog display.

9.4 **Database** - a collection of data which are stored in an organised way in order to facilitate the retrieval of some or all of the data. The term database does not apply exclusively to data stored on computers. A simple card index system would also constitute a database.

9.5 **Metadata** - is "data that provides information about other data". In the case of metadata relating to a file, it is merely a description (or notes) relating to the content of the file.

9.6 **OGG file** - Ogg is a free, open container format maintained by the Xiph.Org Foundation. The creators of the Ogg format state that it is unrestricted by software patents and is designed to provide for efficient streaming and manipulation of high quality digital multimedia.

9.7 **Server** - a computer used as a central resource. Data to be shared amongst several users will typically be stored on a server and "served" to users on demand.

9.8 **ZIP file** - ZIP is an archive file format that supports lossless data compression. A .ZIP file may contain one or more files or directories that may have been compressed. The .ZIP file format permits a number of compression algorithms. The intention is that "zipping" a file or multiple files will compress them into a smaller file size to reduce storage space on computer media or to speed transfer of files from one computer to another (particularly via the Internet).

Signature .....

Date January 26, 2016

Christopher Stanbury
Wilbury Barn
Swallowcliffe
Salisbury
Wilts
SP3 5QH

IN THE UPPER TRIBUNAL

IMMIGRATION AND ASYLUM CHAMBER

IA/39899/2014

BETWEEN:

THE QUEEN on the application of

[redacted]

Appellant

-v-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

THE APPELLANT'S QUESTIONS TO THE EXPERT
MR CHRISTOPHER STANBURY
EXPERT IN COMPUTING, DATABASE PROGRAMMING, WEB DESIGN AND SEARCH ENGINE MARKETING

Introduction

We are instructed in the above named appeal on behalf of the Secretary of State for the Home Department. We refer to your report in this matter and enclose questions prepared on behalf of the Appellant.

Please note that we are not experts in computing and database programming and have prepared the questions in good faith and in the interest of the Appellant. We apologise for any errors or uncertainties and mean no discourtesy in submitting the same and thank you in advance, for responding to our questions.

Questions

1. (a) With regard to 5.2.26 of your report, given that you do not know what processes are used for entering registration numbers, do you accept that you cannot quantify with any precision what error rate there may be in entering the numbers?

(b) Further or alternatively, do you accept that in general transcription errors are not so common that it is not more likely than not that any individual entry has been entered correctly?

2 (a) Alternatively, you posit at 5.8 that it would be possible that (i) someone with access to the computer could amend the files and possibly substitute an alternative recording; and at 5.9 that a proxy test taker could possibly override the speaking test of a candidate. Bearing in mind the apparent lack of advantage to anyone who amended the test of [redacted] without his knowledge, the increased risk to them of detection, and the difficulty of the task, do you accept that it is more likely than not that any individual entry has **not** been amended or overridden in such ways?

Costs

It is the usual practice that the party or parties instructing the expert must pay any fees charged by that expert for answering any questions put to the expert. This does not affect any decision of the court as to the party who is ultimately to bear the expert's costs. Consequently, any fee for a reply to these questions should be sent to the Respondent's solicitors, namely, **Oaks Solicitors, Rowlandson House 289 – 293 Ballards Lane, Finchley, London, N12 8NP**

Duties

We remind you of your overriding duty to the court and the fact that this duty overrides any obligation to the person from whom you have received instructions or by whom you are paid.

Rights

If you have any difficulties or issues with questions we remind you of your right to file a written request to the Tribunal for directions to assist in carrying out this function as an expert.

IN THE UPPER TRIBUNAL IA/39899/2014

IMMIGRATION AND ASYLUM CHAMBER

B E T W E E N :

MA (anonymity direction granted by the Tribunal)

Appellant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

THE APPELLANT'S QUESTIONS TO THE EXPERT

MR CHRISTOPHER STANBURY

EXPERT IN COMPUTING, DATABASE PROGRAMMING, WEB DESIGN AND SEARCH ENGINE MARKETING

Question

1. (a) With regard to 5.2.26 of your report, given that you do not know what processes are used for entering registration numbers, do you accept that you cannot quantify with any precision what error rate there may be in entering the numbers?

Answer

Yes

Question

1. (b) Further or alternatively, do you accept that in general transcription errors are not so common that it is not more likely than not that any individual entry has been entered correctly?

Answer

Transcription error rates will depend on the competence of the person entering the data and the complexity of the data. It is also possible to add what are known as "check digits" as a way to reduce errors. I am not aware whether check digits are used in the data sent to ETS.

If I understand your question to mean that there is a better than 50% chance that the data will be entered correctly then I agree. It is most unlikely that a data entry person would be retained if their error rate were greater than 50%.

Question

2 (a) Alternatively, you posit at 5.8 that it would be possible that (i) someone with access to the computer could amend the files and possibly substitute an alternative recording; and at 5.9 that a proxy test taker could possibly override the speaking test of a candidate. Bearing in mind the apparent lack of advantage to anyone who amended the test of [redacted] without his knowledge, the increased risk to them of detection, and the difficulty of the task, do you accept that it is more likely than not that any individual entry has not been amended or overridden in such ways?

Answer

Because I have not received the requested information about how the candidate's recordings were stored and transmitted to the USA, I am not in a position to speculate on the likelihood that anyone might have substituted an alternative recording. I have merely stated that it is possible that this may have happened. It might have been that all the files were overwritten rather than deciding on an individual candidate basis which files to amend or overwrite.

Statement of compliance

I understand my duty as an expert witness is to the court. I have complied with that duty. This report includes all matters relevant to the issues on which my expert evidence is given. I have given details in this report of any matters which might affect the validity of this report. I have addressed this report to the court.

Statement of truth

"I confirm that insofar as the facts stated in my report are within my own knowledge I have made clear which they are and I believe them to be true, and that the opinions I have expressed represent my true and complete professional opinion."

JR/2171/2015

IN THE UPPER TRIBUNAL IMMIGRATION & ASYLUM CHAMBER

BETWEEN:

THE QUEEN (ON THE APPLICATION OF MOHAMMAD MOHIBULLAH)

Applicant

-v-

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

REPORT of PROFESSOR PETER SOMMER

15 June 2016

I, Peter Michael Sommer, certify that this statement (which consists of 26 pages plus appendices all which have been signed by me today), has been prepared by me and is true to the best of my knowledge and belief. I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer. I make it known that if it is tendered in evidence I shall be liable to prosecution if I have wilfully stated anything in it which I know to be false or do not believe to be true. I acknowledge that, although I am instructed by the Applicant, my over-riding and continuing duty is to the Court. I am aware of the operation of the Civil Procedure Rules Part 35. I am over 21.

---

1. I am instructed by Messrs Bindmans LLP, solicitors to the Applicant, Mohammad Mohibullah, to provide expert evidence in the management of and security of computer and information systems. The term "information system" draws together both computer technical infrastructure and the ways in which human beings manage and control it.

Background, Instructions

2. Mohammad Mohibullah is bringing judicial review proceedings against the Secretary of State for the Home Department in respect of actions taken by her following the inclusion of Mr Mohibullah's name in a list of people who had been identified to have cheated in an English Language test.

3. My instructions appear in Appendix 1.

4. My instructions are that in April 2012 Mr Mohibullah took a test to establish, among other things, his skills in spoken English. The test is known as TOEIC.

5. The tests were run by an international company called ETS which uses a series of local test centres here in the United Kingdom. The particular test centre in this instance was run by a company called Synergy Business College (hereafter "Synergy"). During the test of aptitude in spoken English an audio recording is made which is then assessed by ETS against a number of agreed criteria. Following a series of investigations, including one by the BBC *Panorama* programme, the integrity of the activities of a number of test centres similar to Synergy came into question. In particular, evidence which is generally accepted indicated that in a number of instances proxy

candidates had been used in order to provide "passes" and their associated certificates to individuals who would otherwise not have been successful. There have since been admissions both from former staff members of Synergy and from candidates who allowed their activities to be proxied. As a result, enquiries were instituted against all past candidates of the TOEIC test. The principal means of investigation consisted of examining samples of the archived recordings made during the tests and comparing them with other archived samples to identify which voices appeared on several occasions, thus suggesting that the voice belonged to a proxy and not to the candidate.

6. It is common ground that the archived recordings held by ETS and which their records say are associated with the tests taken by Mr Mohibullah are of an individual who is not Mr Mohibullah. For his part Mr Mohibullah insists that he did take the ETS test and that no proxy or impersonation took place.

7. My task is to review the evidence and circumstances to test the proposition that the recordings held by ETS and labelled as being associated with Mr Mohibullah, are in fact incorrectly labelled. On this basis the various biometric voice comparison testing results become pointless. The hypotheses I am asked to consider are that the overall security regime of the circumstances in which the ETS test was run – and these circumstances include the operations at Synergy – were such that misleading inputting of data into ETS main systems was able to take place. "Misleading" in this context could be the result of either deliberate or clumsy action, or a combination of both.

Qualifications

8. I am currently Professor of Digital Forensics at Birmingham City University. This post takes up 10% of my time. I combine academia, public policy work and expert witness instructions. My undergraduate degree was in Jurisprudence at Oxford. I have been acting as an expert witness since 1993, acting for both defence and prosecution in criminal matters, as well as acting in civil and international litigation. Between 1994 and 2011, I held various visiting posts at the London School of Economics teaching CyberSecurity within a social science and management context; for the last four years I was a Visiting Professor. I have held posts, lectured and examined at a number of other universities in the fields of digital forensics and cybersecurity. Most of my commercial consultancy has been concerned with the risk analysis of complex information systems, largely for underwriters and loss adjusters in the London (Lloyds) insurance market. During its existence, I was the joint lead assessor for the digital forensics specialism at the government backed Council for the Registration of Forensic Practitioners. Since then and until April 2016, I sat on the digital forensics panel for the Forensic Science Regulator. My full curriculum vitae can be seen at http://www.pmsommer.com/PMSCV042015_leg.pdf and this includes references to my publications and activities in the public policy field. It appears at Appendix 2.

Material Considered

9. I have been supplied with a large bundle of documents and list them in Appendix 3. There is also a CD containing copies of audio files. Of particular importance are a number of procedural guides used during the testing of candidates, the reports of investigations and the statements of individuals who took the tests in question. I have also

viewed a BBC Panorama programme originally broadcast on 10 February 2014.

10. It is important to understand that none of the computers used by Synergy appear to be available for inspection. I have not seen in operation the overall ETS system either as it is today or as it was in 2012. I regard some of the information supplied by ETS as potentially incomplete, though I stress that this may be because it has hitherto not been requested. I also draw attention to the fact that former personnel associated with Synergy have not provided any relevant explicit information.

11. As a result some of my conclusions must be regarded as informed conjecture based on information currently available. If as a consequence of this report further information becomes available I will make appropriate adjustments.

Understanding the risks in the ETS testing regime

12. In order to test the proposition that Mr Mohibullah's audio files were mislabelled we need to build up a picture of the technical and administrative infrastructure behind the testing. Once we have this we can attempt to identify weaknesses. The relevant documents appear to be (the figure in brackets is the tab number in the bundle – and I will be using this reference method throughout in this report):

    - Synergy Audit (16)
    - Speaking And Writing Admin Day Guide (18)
    - Speaking And Writing Test Day Guide (19)
    - TOEIC Speaking And Writing – Test Centre Administration Manual (20)
    - Test Centre Photo Registration Guide (21)
    - Test Administration Procedures (22)

- TOEIC Speaking And Writing Examinee Handbook (23)
- PTPix TCA user documentation – ETS global (24)
- Witness statement of Hae Jin Kim (35)
- BBC Panorama *UK Student Visa English Testing Scandal* broadcast 10 February 2014 (viewed separately online at http://www.dailymotion.com/video/x1bx5uj_panorama-uk-student-visa-english-testing-scandal_news)

13. With the exception of the Synergy Audit, which was carried out on 16 January 2013, none of the documents bear a date and it is not clear to me whether they accurately refer to circumstances as they existed in April 2012 when Mr Mohibullah took his test. But for the purposes of this report I am assuming that they do.

14. We can get a general overview from the Affidavit of Peter Millington (1):

> ETS operates a decentralised process in which they have an ETS preferred network of local third party distributors around the world ("the EPN") which provide a localised service for clients. In this model the EPN is responsible for the administrative tasks such as test registration and administration, customer service and recruitment and certification of test centres to administer the test on behalf of ETS.
>
> Under this model ETS, centrally in the USA, has responsibility for designing and developing the tests and developing new products. Whilst the EPN offices administer tests, the responsibility for marking the results and analysing the overall statistics and management information rests with ETS. Having produced a tests score, ETS will pass the results back to the relevant EPN office for them to report back to the test taker.
>
> In practice this means that after a test is administered in the UK, a test takers spoken and written responses to each of the individual questions are divided into individual electronic files and transmitted to ETS and stored securely on servers in its data centre. These servers are accessible only by authorised personnel and the files are typically stored for 999 days. ETS has advised that file manipulation, corruption or misapplication has not been an issue once files are received in the USA.

15. Three of the manuals put flesh on the practical arrangements: *Speaking And Writing Admin Day Guide* (18), *Speaking And Writing Test Day Guide* (19) and *TOEIC Speaking And Writing – Test Centre Administration Manual* (20). The following is my conjecture based on reading these manuals and using my general experience of computer systems.

16. Further information is available from the statement of Hae Jim Kim (35) starting at paragraph 13.

17. At a local ETS test centre there is a room with a number of computers. One of them is designated for an administrator and acts as a local server; the others are for the examinees. All the computers are linked via a local area network. The computers typically run the Windows operating system; at the relevant time this may have been Windows XP or Windows 7. In order to set the computers up, specialist software must be downloaded from ETS centrally via the Internet. The administrator downloads "CBT Manager" and the other computers download "CBT Client". Once that has taken place and some checks run, the computers used by the examinees no longer need to have direct Internet connectivity. The CBT Manager acts as a server for the computers used by the examinees and has the connection over the Internet to ETS centrally. In effect the CBT Manager mediates the connections between the client computers and ETS. The CBT Manager has login credentials which have been provided by ETS. Having run a few connectivity tests, the next step is to ensure that all the computers to be used by the examinees are appearing on the local network. (See page 21 of the *Test Centre Administration Manual*). A further series of tests are run to make sure that everything is communicating properly. Some of the tests require verification/acknowledgement from the ETS systems in the United States.

18. Other aspects of running the test centre include the placement of the individual client computers in relation to each other and some other physical matters such as one would normally expect in an examination environment.

19. Hae Jim Kim (35) tells us at paragraphs 13 and 15 of his statement:

> The TOEIC speaking and writing tests were originally delivered in the UK using a web based system (ID number beginning with 1000) which was

> changed towards the end of 2011/ early 2012 to a mobile delivery system (ID number beginning with 0044). In the web based system, ETS provided ETS Global with a list of Authorisation (registration) Numbers for a specific administration. ETS would provide the list of Authorisation (registration) Numbers to the test centre in advance of the test date. Before the test day, a test centre administrator ("TCA") at a test centre had to fill out the test taker information (e.g. name, date of birth) for each Authorisation Number. On the test day, the TCA distributed a pre-populated form which contained the Authorisation Number and the candidate details (e.g. last name, first name, birth date) to each test taker to confirm that the pre-populated information was accurate. After the administration was finished, the test centre sent the registration file to ETS Global and ETS Global then sent it to ETS via a secure file transfer method. In the mobile delivery system, the registration number is created during the computer log-in process on the test day. The registration number is generated as soon as the test taker enters the required personal information and ETS Global has access to that information. In both systems the registration number is unique to the candidate and any associated voice samples provided during that test administration. If a candidate retakes the test, the candidate will receive a new candidate number for each re-test....
>
> After the speaking and writing test is administered in the UK, the test taker's spoken and written responses are transmitted to ETS. On the web based system, the system detects when a test taker has completed test and transmits the test taker's responses to ETS via the web. On the mobile system, once the test taker has completed the test, the test taker has the opportunity to review his/her responses but with no ability to make amendments. If the test taker discovers that there are technical difficulties which mean that his/her responses are inaudible, the test taker can choose not to submit to the test response and this has the effect of cancelling that test taker's test. If the test taker wishes to proceed, all of the test taker's responses are submitted. At the end of the session the TCA uploads all responses which had been submitted by the test takers by activating the "response upload" function. The TCA has no ability to make any amendments to these responses once they have been submitted by the test taker. ETS Global has the ability to monitor the success of the upload and to assist the TCA if there were upload problems but does not have the ability to make any amendments to the responses. All uploaded speaking and writing responses sent electronically to ETS for marking.

20. The manuals make reference to the use of an iPhone to take photographs of the candidates. See paragraph 8 in the *Test Day Guide* and pages 36 and following of the *Test Centre Administration Manual*. The latter document refers also to photo registration via a personal computer which is run by the centre administrator but should not be the same personal computer as is running the CBT Manager application. It is not clear to me whether this procedure was in place in April 2012.

21. At this point the test centre is ready to receive candidates.

22. In addition to whoever is acting as the administrator of the CBT Manager computer, the documentation makes reference to individuals who act as "proctors" who have the role of on-the-ground invigilators. Proctors have their own passwords to the system distinct from that used by the person who is acting as the administrator of the CBT Manager.

23. The supplied documentation is not particularly clear about how registration of candidates takes place. Turning to the *Test Day Guide* at paragraph 10, it appears that candidates can be registered shortly before the test is due to commence. Candidates are required to fill in certain information which includes name and address, date of birth and the documents they are using so that they can be properly identified by the authorities – typically this will be a passport or driving licence.. It appears from the statement of Hae Jim Kim that there were two different systems under which ETS registration data was entered. In the earlier system ETS provided registration numbers in advance; in the later system, the number was created when the candidate was sitting in front of his/her terminal. The spreadsheet appended to the witness statement of Adam Sewell (33) includes a list of ETS ID numbers, all of which begin with '0044'. Therefore, it would appear that the later, mobile system was in place in April 2012 when Mr Mohibullah sat his test. It also appears that the registration number refers to the particular test, and the candidates who take several tests, including re-tests for the same module, are assigned different numbers on each occasion.

24. However, my understanding is confused by reading information in the *PTPIx TCA User* documentation (24). This seems to provide for a "candidate management" sub-application and, if I read correctly between the lines, this procedure was stimulated by the requirements of UKBA. Under this arrangement, the information about the candidates was on the system long before any test was

run. Information in the footer of this document seems to suggest that it dates from October 2013, so that it may not have applied at the time of Mr Mohibullah's test.

25. Once the test is due to start, candidates must be registered by a properly authorised Test Centre Administrator (TCA) who must be an employee of the test centre and who must be appropriately certified for the role. Proctors are not allowed to carry out this function, though they can escort a candidate to their workstation and start up a session.

26. Once the candidate has signed in, it appears that it is the Proctor who carries out a local verification on the candidate's computer terminal and then inputs a "submit" command which requires the use of a Proctor password.

27. The test is then downloaded and run. Here too, there is a lack of immediate clarity as to what is actually happening. One possibility is that the test materials have previously been downloaded to the CBT Manager which then releases the information to each client on demand. Another option is that the material is downloaded direct from ETS in the United States with the CBT Manager computer simply mediating the transmission through the local area network. It would be helpful to have clarity from ETS on this point. Similarly it is not immediately clear what happens to the responses. Are these responses sent to the local CBT Manager computer and stored there for later transmission to ETS, or are the responses immediately sent to ETS with the CBT Manager simply acting as a conduit? The explanations in the *Test Centre Administration Manual* (20) at pp 22-25 suggest that data was initially held locally and then sent on later in batches. Or was there more than one system – one "web-based" and one "mobile", as referred to by Hae Jim Kim?

28. I imply no criticism of ETS for not providing this information as under normal circumstances there is no need for anyone to know. However, where malfeasance is suspected, plainly there are more opportunities for rogue behaviour if candidates' responses to tests are stored on a machine local to a test centre. There are also implications for this sort of evidence of activity at any given test centre which is likely to be held or has been held by ETS centrally. Plainly ETS may have more information of value to an investigation if the individual examinees activities are recorded during the tests, as opposed to being batch uploaded at a later date.

29. The manuals also provide instructions about what to do in some forms of emergency. These could include the failure of one or more computers, the failure of an Internet link and the need in particular circumstances of a candidate to move from one terminal to another.

30. What is striking about all of these procedures is the extent to which trust is placed by ETS on the reliability and probity of staff in the test centre. The assumption seems to have been that appropriate checks had taken place at the point at which the test centre and its staff were recruited. I will pursue this matter a little later.

31. Hae Jim Kim tells us a little of the identification of irregularities (paragraph 19 of his statement):

> ETS has sought to identify and address irregularities where they occur. Where it believes it has detected irregularities it will not release score reports. Examples of the sorts of the irregularities that would lead to a score report to being withheld in relation to a Speaking and Writing test would include:
>
> - where there has been a repeat test and the voice of the test taker is different from the previous test;
> - where are the voice of the test taker changes from one question to the next (this would suggest another person has been substituted during the test);)
> - where it appears imposters were sitting the tests in place of the test taker;

- where the recordings revealing a voice other than the test taker giving them assistance; or
- where an answer is unusually similar to another test taker's answer

32. But he also provides an important caveat (paragraph 20):

> Markers and supervisors are encouraged (through training and day-to-day management messages) to be vigilant to detect these irregularities. However, the deliberately fractured nature of the marking process means that, to a large degree, irregularities of this sort would only be uncovered if one marker was able to recognise patterns across items that he/she was marking. The irregularity would need to occur with sufficient frequency within the responses being reviewed by a single marker to cause that marker to flag the issue to his/her supervisor

33. The position therefore, subject to any further information which ETS is able to provide, is that the security precautions are concentrated on malfeasance by candidates rather than ETS test centres.

Opportunities for proxy impersonation and other means of system deception / corruption

34. We can turn first to the various reports and admissions of frauds known or alleged to have taken place at Synergy and other ETS test centres.

35. **Simple impersonation** Under this arrangement the candidate arrives at the test site, presents his credentials including ID documents, is admitted to the examination room and enters sign-on information on to the terminal. At some point, a photograph is taken. Once the sign-on has been completed, the candidate leaves the terminal and examination room and is replaced by the proxy who then proceeds to respond to the tests. At the conclusion of the test, the candidate returns, picks up his identity documents and leaves. Later the candidate receives the test results.

36. This is the method described as being witnessed during the unannounced ETS audit which took place on 16 January 2013, details of which appear in the statement of Ahmad Bdour (25) and which led to the termination of the Synergy's contract in the letter of 8 February 2013 (17).

37. This was also the experience of [redacted] (31) on 15 January 2013, [redacted] (29) and [redacted] (30), though the latter two do not provide dates when the impersonations took place.

38. It should be noted that within the bundle there are interview summaries with individuals who say that they took tests at Synergy and that neither they nor anyone else then present was using proxies. See [redacted] (25) and [redacted] (28). There is also a witness statement of a police officer, [redacted] (42) which refers to police interviews with nine others who denied dishonesty.

39. **Dictated answers** This method is referred to in the statement of Rebecca Collings (2) and which in turn quotes from a letter from the BBC dated 6 January 2014. Plainly this method would not be viable in a test of spoken English.

40. **Staff filling in of answers** This method too is referred to in the statement of Rebecca Collings (2) and which in turn quotes from a letter from the BBC dated 6 January 2014. Again, this method would not be viable in a test of spoken English.

41. **Remote Control Software** Under this arrangement, candidates attend a test centre, and perhaps input their own basic registration details. But the computer terminal they are using has been loaded with a small piece of software which enables it to be controlled remotely from elsewhere – either from other machines in effect on the same local area network or (and without technical difficulty)

from anywhere in the world with Internet connectivity. At the end of the test, control is given back to the candidate. During the test, the candidate may be able to see activity on the screen in front of him or her, and hear audio via headphones, but this depends on the software being used.

42. This is the method discovered during Project Façade (11). In this instance, the specific remote control software used is called TeamViewer. I use this product myself. Its main normal usages are, firstly, to enable someone to access an office or home based computer from outside and using someone else's computer. Secondly, it is widely used by computer support technicians in large organisations so that they can assist users without necessarily having to visit them in person. There are a number of similar products. Covert remote control is also a very common feature in cybercrime activity allowing a perpetrator to take control of a victim's computer for such purposes as executing frauds and acquiring confidential information.

43. Project Façade was an inquiry into a test centre in Birmingham. Investigators were able to seize computers and see that TeamViewer had been installed. In the case of Synergy, my understanding is that no computers were seized so that no forensic examination was possible.

44. **Faked input** One of the oldest forms of "computer fraud" consists of inputting misleading information into a computer system. The reason why this may be possible is usually attributable to poor controls over who has access to a system and what the system allows them to do without further checking. The computer system then processes the data it has received perfectly. Similar problems for reliability arise when incorrect data is input is as a result of **accident** or **clumsiness**.

45. **File manipulation** he feasibility of this method depends on the infrastructure of the testing environment. If it is the case that file responses are held on the local server at the testing centre, then there could be a point at which that file is available for alteration by staff at the test centre. However, compared with the other methods set out here, this would require relatively high orders of skill both to understand the structure of the information within the file and then to conceal the alteration that has taken place. As noted above, in paragraph 15 of his witness statement Hae Jim Kim notes that ETS has the ability to "monitor the success of the uploads" but it is not known whether this occurred here or the detail of what was actually being monitored. It would be useful to see any records that exist of the upload of Mr Mohibullah's test.

46. **Administrative Clumsiness** If we assume that Synergy staff had unsupervised access to a computer by which examinees are registered, there arises the possibility that they did not see the need for care in data input. The aim of Synergy staff was simply to take a number of candidates and deliver to those candidates a certificate saying that the test had been passed. Up to a point, it did not matter whether a candidate was going to pass on the basis of their own activities or because there had been a substitute. From the perspective of the candidates what was wanted was a certificate which could be forwarded to the Home Office. Under normal circumstances the administrative clumsiness would not be manifest.

Forensics

47. I have been asked to consider the extent to which the techniques of digital forensics may be of assistance in this matter.

48. My understanding is that none of the computers and data media associated with Synergy is available. Had this material been

available, then some of the conjectures about the technical infrastructure referred to above would have been less speculative as among other things there might have been audit, log and configuration files and all files would have carried date and time stamps. In addition, the general business records of Synergy might have been very helpful.

49. There are bound to be extensive records held by ETS in relation to Synergy and the various candidates that used it as a test centre. Reference is made to "raw files" received are from ETS in the statement of Adam Sewell (33) but we do not know how these were derived and the reliability of their provenance. Hae Jim Kim tells us – his paragraph 16 – that ETS's "servers are accessible only by authorised personnel and the voice responses are typically stored for 999 days. ETS is not aware of any file manipulation, corruption or misapplication of these files on its systems.". But he does not address the possibility of manipulation by test centres before they are received by ETS. Mr Sewell's statement is concerned with how he transformed the raw data into various forms of use to investigators – and the tribunal. We can also see references to ETS stored data in the statement of Raymond Nicosia (39 and Ahmad Bdour (25).

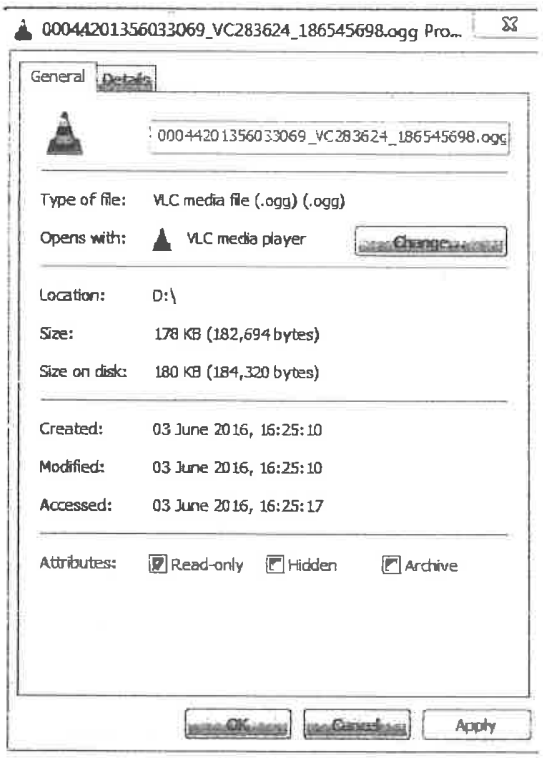
50. **Voice recordings** The only digital files I have been given are the voice recordings which ETS say are associated with Mr Mohibullah and which were analysed as part of the biometric testing that ETS conducted to identify those who had used proxies:

00044201356033069_VC283624_186545698.ogg
00044201356033069_VC286161_186545798.ogg
00044201356033069_VC286753_186545639.ogg
00044201356033069_VC287957_186545623.ogg
00044201356033069_VC287969_186545668.ogg
00044201356033069_VC288421_186545649.ogg

51. The file names contain a number – "0044201356033069" - which corresponds to the one that appears against Mr Mohibullah's entry in the two Ahmed spreadsheets exhibited in (33). We have no explanation of the remainder of the file names (beginning with VC). It would be helpful if these file names were explained. But we also understand that new registration numbers are issued for each test (on the first page of Mr Mohibullah's TOEIC test is the registration number 0545993).

52. There are a number of different formats of digital audio, of which MP3 and .WAV are the most familiar. In this instance the format in which the files were delivered is .OGG. I have consulted the academic and scientific literature and also used a hex editor to examine the contents of the files. My hope was that there might be some embedded meta data which would be of value. For example in the MP3 format information about the title of a tune, a composer, performer, music category, dates of recording can be embedded – this information can be used, for example, to display while a file is playing and for cataloguing purposes. Meta data also occurs in other common computer files such as documents created using Microsoft's Word program. Meta data can often be displayed on a computer screen by looking for the "properties" of an individual file.

53. However, although the technical specification for .OGG files seems to allow for the optional provision of meta data, my examination of the supplied files shows none. The only information is that of date and time, and in this instance the date and time shown is that of the creation of the file on a CD media upon which it was delivered – in early June 2016.



54. It would be useful to have the full voice recordings (i.e. not just the extracts which were analysed by ETS in their investigation) in their original format (i.e. the 'raw' files) as these might provide additional useful information.

Audit

55. At paragraph 30 above, speaking of my analysis of the procedures as indicated by the supplied ETS Manuals I said: "What is striking about all of these procedures is the extent to which trust is placed by ETS on the reliability and probity of staff in the test centre."

56. The main mechanism appears to have been the unannounced audit. Ahmad Bdour (25) says: "individual audits were generated in a number of ways. Analysis of ETS data relating to test results may indicate unusually high test taker numbers. At times, correspondence, either from the Home Office i.e. score verification requests or anonymous emails from individuals will also highlight

concerns as to how tests will be conducted. Such material will usually require a visit to the test centre, either by an announced or unannounced visit."

57. We can see one such audit took place on 15 May 2012. This is referred to by Richard Shury (27) and he provides a copy of a handwritten audit report by someone called Matthieu. Matthieu expressed mild concern, but not, it appears to the point of suggesting remedies or sanctions.

58. We have already referred to the unannounced ETS audit which took place on 16 January 2013, details of which appear in the statement of Ahmad Bdour (25) and which led to the termination of the Synergy's contract in the letter of 8 February 2013 (17).

Possible additional security features

59. There are a number of precautions which ETS could have considered if they had concerns about the reliability and probity of the various test centres and in particular the risk of the use of proxies:

- **Use of webcam verification**: each candidate (client) computer has a webcam which periodically takes random snapshots of the person sitting at the terminal during the course of the examination. The pictures are uploaded to ETS. The webcam pictures can then be compared with the official photo ID such as a passport.

- **Video camera in examination room**: a video camera is placed such as to have a view over the entire examination room. If the camera is part of the local network (and is an IP camera), then it is possible for an

invigilator located anywhere in the world to see if proxy substitution or other irregularity is taking place.

- **Arbitrary testing of CBT Manager and CBT Client computers** for integrity, including the presence of remote control and other unauthorised software. In effect, a TeamViewer installation (or similar monitoring software) run by ETS would be able to examine the configuration of each machine and do so remotely from the United States.

Hypotheses - could Mr Mohibullah's files be mis-labelled?

60. I now turn to examine a scenario under which Mr Mohibullah may have properly attended and taken part in a test, but the data held by ETS is incorrect. It is common ground that the voice recordings which ETS say should belong to Mr Mohibullah are in fact not of him.

61. The question to be answered is the extent to which trust can be placed in the probity of ETS's remote test sites and in particular what was happening at Synergy. The reliability of evidence produced from ETS depends entirely on assuming that the actions of and records produced by the remote test sites are accurate and cannot be compromised.

62. It seems quite clear that Synergy were providing fraudulent activity on behalf of some of their examinees. The bundle also includes statements from examinees who say that no proxying or other compromising activity took place.

63. Among the tasks of the test centre is to carry out verification of the ID credentials tendered by candidates. The particular tasks for which attention would normally be needed include: registering the

candidate under the right name and checking that there was a proper match between each the ID credentials provided by the person and their identity on the system as it was to be recorded by ETS. There also needs to be a check linking the candidate to a specific computer terminal in the room. As I observe above in paragraphs 23 and 24, information currently available to me about methods of candidate registration are unclear. Moreover, this issue does not appear to have been addressed during the audit report which we have. A particular puzzle arises from the redacted spread sheet exhibited by Adam Sewell (33) where it appears that 71 candidates including Mr Mohibullah apparently took the test at 1410 that day and all apparently in the same room – Room A. My understanding is that this room was not large enough for 71 candidates all sitting at computer terminals. To repeat an earlier comment: If we assume that Synergy staff had unsupervised access to a computer by which examinees are registered, there arises the possibility that they did not see the need for care in data input. The aim of Synergy staff was simply to take a number of candidates and deliver to those candidates a certificate saying that the test had been passed. Up to a point, it did not matter whether a candidate was going to pass on the basis of their own activities or because there had been a substitute. If this guess is correct, then it is only in the particular circumstances in which the activities of Synergy come to question, that the inaccuracies of the data input become an issue.

64. If remote control software of the sort used in Project Façade and discussed in paragraph 41 above is being deployed there is further scope for mis-recording of candidates' activity. The fraudulently-behaving test centre has to arrange to match the activity of a remotely-sited proxy operator to candidates who are to be "helped" but with little means of detecting that a mistake is being made. It seems possible that during any one test session there could be several candidates who are being aided and several who are not.

65. This hypothesis is based on incomplete evidence and it may well be that ETS are able to produce manuals and properly provenanced records which undermine it. There is also, I suppose, the possibility that witness statements are forthcoming from former Synergy staff.

66. A further possibility is that ETS itself is not keeping its records in a sufficiently reliable fashion. It would be helpful in order to eliminate this possibility to know something of the audit regime within ETS. It would also assist, if ETS are able to say whether there have been any questions or complaints in the past about the quality of its data management. All we have at the moment are the assurances given in the statement of Hae Jim Kim.

67. In order to further investigate the possibility of file manipulation further information is required, including a detailed description of the process of recording and downloading the tests, the database onto which they are stored, and the system of uploading them to ETS. We have some information in the Test Centre Administration Manual (20) which indicates opportunities for file manipulation, including following the end of the test but before the data is submitted into the database (see page 31) and following submission into the database but before the data is uploaded to ETS (pages 23-24). It would be helpful to have the raw files in their totality, which might provide useful meta data.

Computer related alibis for Mr Mohibullah?

68. I am asked by my instructing solicitors to consider ways in which Mr Mohibullah could establish his movements on the days in which testing is said to have taken place. I understand that unsuccessful enquiries have already been made in relation to the mobile phone traffic and the use of an oyster card. Mobile phone

"communications data" which includes geolocation information is only held for 12 months.

69. Another possibility might be to arrange to see if there is a Google Dashboard for Mr Mohibullah. If he has used any Google service and has registered with them it is possible that geolocation data might exist. It will be in the Timeline, However such data may not go back as far as 2012.

70. A further option is to see if there are any digital photographs dating from mid-April 2012. Many digital photographs contain embedded metadata – it is in a format called EXIF - and if the camera or phone used also had GPS, then it is likely that GPS data will be included in the overall metadata.

71. It may be that banking records, which could include the locations of ATMs and PoS terminals used, are also of assistance.

72. But the most productive method of identifying Mr Mohibullah's movements in relation to the exam dates are likely to be via the records held by ETS – as discussed above.

Further information

73. It will be seen throughout this Report that I as the author and the Tribunal as a reader could benefit from further information from ETS. In asking for it now I imply no criticism that it has not already been supplied. I set out the questions below:

    a) In relation to the ETS User Guides and Manuals supplied by Jones Day in their letter of 10 May 2016: is it the case that these documents were in effect in April 2012?

    b) In relation to paragraph 17 of my report and my conjecture that construction of the networking arrangements at ETS test centres

covering the Client and Management computers and their linkages to ETS in the United States: can ETS confirm or correct the understandings I have formed from their supplied manuals and the statement of Hae Jim Kim

c) In relation to the taking of photographs of candidates either via an iPhone or a personal computer as described by me in paragraph 20: can ETS confirm the position as it was in April 2012? Do they have records relating to this as it affects Synergy in April 2012? Do they have a file containing Mr Mohibullah's photograph?

d) At paragraphs 23 and 24, I identify apparent contradictions in the descriptions of the ways in which candidates are registered. Can ETS explain what processes were in place in April 2012 and can they produce records of registrations at Synergy during April 2012? One explanation suggests that candidates were pre-registered and used candidate numbers generated by ETS; on other occasions candidates were allocated numbers by the system at the time of registration. It would be helpful to me, and I suspect the Tribunal, to know what security precautions were in place against the possibility of malfeasance or administrative clumsiness by test centres. A particular concern, if there are inadequate controls over the actions of test centres, is that as a consequence it becomes possible for there to be a mismatch between a candidate's identity and his/her registration number on the system. This then might explain how ETS have voice recordings which they ascribe to Mr Mohibullah but which are manifestly not of him. It would be helpful if ETS could say whether they thought that this was possible or, in the alternative with reasons to be given, impossible.

e) A further hypothesis about the allocation of test registration numbers I would like rebutted is what happens when two

candidates "submit" registration information at exactly the same time: is it possible that registration numbers could become misallocated?

f) In relation to my comments at paragraph 27, I say that I am not certain whether candidates' responses are immediately sent back to ETS centrally or whether they are collected and held on the CBT Manager computer and then sent on separately. Although it appears from the Test Centre Administration Manual (20) that there was flexibility in the process whereby test centre staff could choose when to send the data to ETS. Can ETS explain what the position was in April 2012?

g) In the statement of Adam Sewell there are references to his obtaining "raw files" from ETS. What were the contents of these files and what was their provenance? What assurances can be given as to their accuracy and completeness? An immediate worry is a conflict between the letter from Synergy on 13 April 2012 to Mr Mohibullah (9) which states the second part of the test was due to take place on 18 April 2012 and the redacted spread sheet exhibited by Adam Sewell (33) which shows the test as taking place on 17 April (line 84 of the spreadsheet). What records of system integrity and reliability tests exist that would pertain to conditions as they were in April 2012? For example one might expect that a system would generate acknowledgement of receipt of important files and there would be a log with date and time details to confirm. On page 24 of the Test Centre Administration Manual (20) is brief description of the uploading process with an image of the database. What records exist of the receipt of the earlier written tests which took place on 13 April 2012? Can ETS provide the raw files to us in their entirety, i.e. including all of Mr Mohibullah's tests and not just the six short voice clips that were later analysed by ETS?

Can ETS explain the file names of the files already given to us (see paragraph 51)?

h) Also in relation to the redacted spread sheet exhibited by Adam Sewell (33) I note that 71 candidates including Mr Mohibullah apparently took the test at 1410 that day and all apparently in the same room – Room A. My understanding is that this room was not large enough for 71 candidates all sitting at computer terminals. This calls for an explanation and potentially casts doubt on the reliability of ETS's records.

i) In 2012, what were the other means of testing the reliability and probity of test centres other than the ones described in this Report?

j) It might help the Tribunal to get a better understanding of the relationship between ETS and Synergy if emails between the two up to and including February 2013were produced. Hae Jim Kim tells us that there was a change-over between a web based and mobile system. We also know that in May 2012 and an unannounced audit took place on 15 May 2012. This is referred to by Richard Shury (27). What was it that prompted this exercise?

I am happy to attend the Tribunal and give evidence before it.

Peter Sommer

15 June 2016

Appendix 1: Instructions from Bindmans LLP:

1. Is it possible to say what date and time each of the voice clips on the CD were recorded?

2. Do you have any further suggestions or could you offer assistance to determine my client's whereabouts on 17 and/or 18 April 2012? Would any additional material assist you to do so, including but not limited to further material from ETS (such as the photographs of my client taken at Synergy College or any other parts of the TOEIC test)?

3. Please provide a detailed description of the process of recording/ capture, download, storage and transmission to ETS of TOEIC speaking test recordings generally, and at Synergy College in particular. Please address the integrity/level of security of each step, as far as possible, and any concerns that you have about any aspect of the process.

4. Please provide possible explanations as to how another person's voice recordings may have been registered to my client's name by reference to the different steps of the process set out above. Is it possible that employees of Synergy College tampered with/replaced voice recordings during any of the steps set out above? It is possible that any tampering/replacing of voice recordings may have taken place without the knowledge of the person against whose name a test was registered? Please comment upon the possible use of 'Team Viewer' software and impact could have had on file creation/ corruption. Is it possible that carelessness/incompetence by Synergy College staff engaging in fraud might have caused this outcome, for example, accidental replacing of genuine voice recordings with proxy recordings?

5. Please provide any additional comments that you consider may assist the Tribunal in fairly disposing of this matter.

Appendix 2: CV

Peter Sommer combines academic and public policy work with commercial cyber security consultancy, with a strong bias towards legal issues. He has acted as an expert in many important criminal and civil court proceedings where digital evidence has been an issue.

He is currently Professor of Digital Forensics at Birmingham City University and also a Visiting Professor at De Montfort University Cyber Security Centre. Until 2011 he was a Visiting Professor in the Information Systems Integrity Group in the Department of Management at the London School of Economics and a former Visiting Reader, Faculty of Mathematics, Computing and Technology, Open University. As a consultant he is a well established expert on computer security advising stock exchanges, large companies and insurance companies on systems risk.

He is a Fellow of the British Computer Society and also a Fellow of the Royal Society of Arts.

Digital Evidence / Expert Witness Work

Legal expert witness activity has included:

- **R v Michael John Smith** - described by the Security Commission as the UK's most important official secrets case involving scientific and technical espionage
- **Rome Labs / Datastream Cowboy hack**. A major global hacking case with USAF and NASA among the targets initially thought to have been perpetrated from North Korea and Lativa but which turned out to have been by two UK schoolboys. There were hearings in the US Senate at the beginning of the "Information Warfare/Electronic Pearl Harbour" scares. The UK case involved many novel issues of the handling of technical evidence, admissibility and the problems of evidence from US covert agencies
- **R v Alibhai and others.** A large conspiracy involving the commissioning and distribution of counterfeit Microsoft software and money laundering
- **"NCS Operation Cathedral"** - the first large UK Internet paedophile ring. At the end of the trial penalties for the related offences were increased and POLIT, the precursor to CEOP, was set up. At a technical level there were significant issues of case management arising from the large numbers of computers that had to be examined.

- **"DrinkorDie"** - an international investigation into organised software piracy - "warez" groups - led to the charging of 6 UK individuals. Because of the large numbers of computers involved and the extent of complex evidence from overseas agencies - this was a further challenge in terms of case management was well as of basic investigation of the contents of computers. The UK case was one of the most expensive trials in recent years. Also known as National Crime Squad Operation Blossom
- **R v Ying Guo** - illegal immigration conspiracy in which 58 dead Chinese were found in the back of a lorry at Dover. Defendant was a translator on whose computer was discovered apparent draft immigration applications
- **"Chohan family"** - a family killed by a criminal in order to take over a transportation company which was then to be used for narcotic trafficking. Some bodies were never found - a computer was found which held drafts of important documents
- **Godfrey v Demon** - an important Internet defamation case which helped define the extent of the "innocent dissemination" defence available to ISPs
- **R v Waddon** - an obscene publications act case which defines "place of publication" for jurisdictional purpose
- **R v Atkins** - a Protection of Children Act case which clarifies the strict liability test in "possession" and also the nature of the "legitimate research" defence
- **R v Lennon, R v Cuthbert** - two Computer Misuse cases in which the ambit of the 1990 Computer Misuse Act has been clarified
- **Sorrell v FullSix and others** - An aggressively-fought defamation action by the head of the advertising group WPP against Italian former colleagues suspected of publishing defamatory blogs. But the authors had used anonymising facilities to conceal their activities. The case tested the limits of the disclosure rules in relation to forensic artefacts as well as significant technical challenges.
- **The "Red Mercury" terrorist case** - this was an allegation by the News of the World's "fake sheik" that material for a dirty bomb was being offered in the UK. ("red mercury" is a myth and the case was thrown out)
- **Operation Crevice** - the fertiliser bomb terrorist case - 14 months at the Old Bailey.
- **"Scallywag"** - a case under the Representation of the People Act, with place of publication and proof of involvement as the issues. Scallywag was a magazine that claimed to publish stories Private Eye thought too difficult.

- **R v Deamer and others** - large scale narcotics importation from Spain
- **R v Murphy and others** - long-running series of trials involving narcotics importation from Colombia - one issue was the provenance and reliability of overseas intercept material (which is admissible though the UK equivalent s not)
- **R v B and others** - the UK's first "phishing" case involving allegations of money laundering against a number of individuals from a variety of East European countries. The trial against one alleged principal was abandoned as a result of her ill-health
- **R v O** - terrorism. Allegations involving assistance given to Jemaah Islamiah.Charges dropped after defence analysis and submissions
- **Republic of South Africa v Jacob Zuma and Thint** Allegations of corruption against a South African politician, now President of the Republic and the South African branch of a French armaments company. Case eventually dismissed. Large numbers of computers had been seized from Zuma, his alleged associates and from Thint.
- **DPP v Kinsella** Irish narcotics importation case relying on ETSI standard Dutch phone intercepts
- **Pharm-a-Care Laboratories Pty Ltd v Commonwealth of Australia** Large Australian case involving compensation after regulatory action: examination and reconstruction of computers
- **R v Parker & Champkins-Howard** Faked "Banksy" prints and faked email evidence
- **UEA-CRU Independent Climate Change E-mails Review** Support for the Muir-Russell team
- **Inspire v Taylor Drew Productions** Examination of computers to establish that intellectual property relating to computer-generated children's cartoons had been fully removed.
- **Operation Alpine** Forensic aspect of Major Crime Review of a Lincs Police/CEOP investigation into commercial distribution of IIOC via newsgroup feeds
- **SRA v Gore & Miller** Solicitors' disciplinary proceedings: letters sent to file-sharers
- **R v Naqshbandi** Cash for Crash insurance fraud
- **R v Preko** Money laundering; charged with James Onanefe Ibori
- **Special Tribunal on the Lebanon / Office of the Prosecutor** Hague-based trial around the murder of Rafiq Hariri
- **International Criminal Court** Case of Uhuru Kenyatta
- **FCA v Steve Graham** Second (and aborted) trial of ISoft director

- **SIAC: Re: Y** Report for Special Immigration Appeals Commission about varying the Internet-access aspects of bail conditions
- **R v Moazzem Begg** Terrorism trial was abandoned after MI5 disclosure but prior to that technical issues about the files that were the subject of charges
- **R v Seth Nolan-McDonough** Newton hearing on extent of damage caused by juvenile accused of "slowing down the Internet" via DDoS attacks
- **R v Tailor & others** Alleged "card-sharing" fraud against Virgin cable services (ongoing)
- **Privacy International & others v GCHQ & SoS FCO** Hearing before the Investigative Powers Tribunal on "computer network exploitation" and "equipment interference" powers (on going)

Other cases have included fraud on a National Lottery terminal, fraud via cloned credit cards, telecommunications fraud via cloned cellular phones, fraud on the Post Office's internal Horizon system, an alleged theft of a large quantity of credit card numbers from hacked e-commerce sites - the credit card numbers were subsequently published as a "boast", allegations of stolen data and computer programs, pirated computer games, and industrial espionage. Civil instructions, not proceeding to litigation, have included requests to define the role of Wireless ISPs and the impact of the use of Internet "scraping" software on the Computer Misuse Act, Regulation of Investigatory Powers Act and the Data Protection Act. Advice has also been provided on the techno-legal aspects of implementing particular forms of behavioral advertising via ISP activity. There have also been a number of "internet paedophile" cases including some under Operation Ore (some instructions from the Ministry of Skills and Education about fitness to work with children).

The practical legal work has always gone hand-in-hand with an interest in professionalising computer forensics and developing "the reliability of digital evidence" as an academic discipline both on its own and as part of the broader Information Assurance agenda. Peter Sommer spoke at some of earliest law enforcement conferences on the subject and continues to do so, including a number of closed conferences. In 1999 he was invited to speak at a FBI conference on cybercrime and in October 2000 he was part of the UK delegation to the G8 Government-Industry Dialogue on Security and Confidence in Cyberspace Workshops in Berlin. In January 2002 he was appointed by the Royal Military College of Science (Cranfield University) as an external examiner to their MSc course in Forensic Computing having previously acted as the external academic evaluator. In April 2002 he became an advisor to the UK's National High Tech Crime Training Centre During 2005 and 2006 he served on a Technical Working Group to develop a training scheme for digital evidence run by the US National Institute of Justice (part of the Department of Justice), one of only two non-

US citizens to do so. In November 2005 the Home Office-backed Council for the Registration of Forensic Practitioners (www.crfp.org.uk) launched a section devoted to digital evidence and Professor Sommer was Joint Lead Assessor from then until 2009. He now advises the Forensic Science Regulator. In 2013 he was included in the List of Experts before the International Criminal Court at the Hague. In 2013 also he was invited by the International Information Systems Security Certification Consortium - $(ISC)^2$ - to act as the only non US reviewer of its Certified Cyber Forensics Professional – CCFP – program. In 2014 he was appointed to the Home Office Digital Signature Expert Panel. Since 2014 he has acted as a consultant to NRGD, the Netherlands Register for Court Experts.

He is on the Editorial Boards of *Computer Fraud and Security Bulletin*, *Secure Computing, Digital Investigation* and *International Journal of Digital Crime and Forensics* and has served on the conference committees of a number of academic symposia, including RAID (Recent Advances in Intrusion Detection), FIRST2000 Conference, Chicago, EICAR 2005 and 2007, DIGEV 2005 and WDFIA 2007, 2008 2009 and 2010 and DFRWS 2006-2016.

Previous Career / Information Security Consultancy

Peter Sommer read law at Oxford and spent thirteen years as a book publisher.

He has always had a subsidiary career as author and journalist. His interest in computing dates from the late 1960s when he was a guinea pig in work carried out by the late Dr Christopher Evans at the National Physical Laboratory.

He was among the first generation of writers on micro-computers in the mid-1970s and entered professional computing via electronic publishing.

As an electronic publisher he set up a variety of services on Prestel, the pioneering public access database run by British Telecom, and on TOPIC, the information system of the London Stock Exchange and has also been an external Information provider for Reuters and Extel. In the run-up to the Big Bang changes in the London markets he set up a prototype investment exchange for over-the-counter securities. He has also carried out a wide range of consultancy assignments involving the commercial exploitation of new technologies and system assessment.

In 1985 he wrote, under the pseudonym, Hugo Cornwall, the best- selling *Hacker's Handbook* which was in the Sunday Times list for seven weeks and finally went into four editions, of which Mr Sommer wrote the first three. The book was about accessing the online world from personal computers and computer security. From then on Mr Sommer moved into

computer security consultancy, initially as a freelance for two leading UK security companies and then as a founder-director of Data Integrity where he was Technical Director responsible for surveys. He left Data Integrity in March 1989 and since then worked principally for leading loss adjusters and corporate security companies, and under the umbrella of his own company, a specialist London-based computer security consultancy Virtual City Associates which provides services to insurers, lawyers and corporate security companies world-wide. He helped develop one the earliest cyber crime insurance polices, the SPP, which was a computer-related consequential loss/business interruption cover, and has also carried out surveys for the Bankers Blanket Bond and Computer Crime policies as well as computer- related special covers. Survey subjects have included a major international payment system, a major global securities trading system, a large securities settlement service, an Internet-only bank and two fast- growing Stock Exchanges, advising insurers initially on formats for cover as well as later carrying out the risk analysis for the policy selected. More routine assignments have included insurance surveys / loss adjustment support on many large commercial and state-owned financial institutions in Europe, South America and South East Asia.

Non-insurance assignments have included advising a major UK-based international conglomerate operating in nearly sixty countries and about to install a series of complex local and wide areas networks, a large UK retailer with a suspected unwanted intruder on its internal computer networks, and an extended risk management survey for European-based securities settlement service.

The *Hackers's Handbook* was followed in 1988 by *DataTheft* and *The Industrial Espionage Handbook* was published in October 1991.Mr Sommer regularly appears in television and radio programs and at conferences for the commercial, academic, law enforcement and government communities.Mr Sommer has been a Member of the British Computer Society since 1988 and has served on its Legal Affairs Committee.

Academic Interests

Peter Sommer became a Visiting Fellow in what was the Information Systems Department at the London School of Economics since 1994 and was a Visiting Professor 2008-2011. With Dr Jim Backhouse he developed and taught a range of Information System Security courses, with their emphases on social science, management, law and policy. The aim has been to balance theory and analysis with the problems of implementation and is in contrast to the more usual approach which consists largely of finding technical solutions to what are wrongly perceived as purely technical problems.

He has examined at doctoral level at Cranfield and Oxford Brookes Universities.

Academic interests include: Computer-related Crime, Computer Misuse, White Collar Crime, Frauds, Industrial Espionage, Methods of Information Security research including case material collection and evaluation, Legal Implications of Information Security, Methods of Risk Analysis, Insurance of Computer-related risks, ECommerce, Digital Signatures, Issues of Contingency Planning / Disaster Recovery, Electronic Publishing, Internet control issues, Intellectual Property.

In 2003-4, he was expert member of UK DTI *Foresight* Project *Cyber Trust and Crime Prevention* (http://www.foresight.gov.uk/cybertrust.html). Other funded research included the forensic aspects of identity systems under FIDIS (www.fidis.net) which was a European Commission-funded Network of Excellence and PRIME (http://www.prime-project.eu.org/) which was a European Commission Framework 6 Integrated Project on Privacy Enhancing Technologies (Reference Group member). Together with LSE colleagues he provided "Best Practice" consultancy to a syndicate of central government departments and UK clearing banks and to APACS. In September 2000 a LSE team headed by Professor Sommer was awarded a contract by the UK's Financial Services Authority to provide advice on consumer use of e-commerce facilities in the purchase of financial products such as banking, insurance, pensions, savings, and share-dealing to assist in the development of a suitable regulatory regime.

In 2009 Professor Sommer won a contract from the UK National Audit Office to support its examination of Internet Crime,

In February 2006 Mr Sommer was appointed a Visiting Research Fellow at the Faculty of Mathematics and Computing, Open University, and has since been elevated to Visiting Reader. He is the Course Consultant for a Masters' course module on Computer Investigations and Forensics – M889 - and is currently working on a Legal IT Course. In 2012 he joined the Cyber Security Centre at De Montfort University as Visiting Professor. Since December 2015 he has been Professor of Digital Forensics at Birmingham City University.

Public Policy Work

In December 1998 Peter Sommer was appointed Specialist Advisor to the House of Commons Select Committee on Trade and Industry to support their inquiry into ecommerce. This has produced four published Reports. Seventh Report (HC 187); "Building confidence in Electronic Commerce" . Tenth Report of Session (HC 648), "Electronic Commerce", Fourteenth Report of Session (HC 862), "Draft Electronic Communications Bill" , Eighth Report of Session (HC66): UK Online Reviewed: The First Annual

Report Of The E-Minister And E-Envoy. More recently he also given evidence to the Home Affairs Select Committee and the All Party Privacy Group.

In December 2000 Professor Sommer and colleagues were awarded a European Commission contract to carry out the Intermediate Evaluation of the EC Internet Action Plan (on illegal and harmful content on the Internet). He is on the Advisory Council of the Foundation for Information Policy Research, is a Member of the Information Assurance Advisory Council and has Observer status at EURIM.

Between July 2003 and March 2009 he was a member of the Scientific Advisory Panel on Emergency Response (SAPER) run by the Government's Chief Scientific Advisor. In 2008 he was appointed to the Digital Forensics Specialist Group which advises the Forensic Science Regulator.

In 2009, with colleagues in the LSE's Public Engagement Network, he authored a study of the UK Government's *Interception Modernisation Program*.

In February 2010 he took part in the work of the United Nations Counter-Terrorism Implementation Task Force (http://www.un.org/terrorism/internet.shtml).

In November 2010 he provided written and oral evidence to the Commons Science and Technology Select Committee's enquiry into *Scientific advice and evidence in emergencies* and in November 2011 to its enquiry into *Malware and cybercrime*

In 2011, with Ian Brown of the Oxford Internet Institute he wrote *Reducing Systemic Cyber Security Risk* for the Organisation of Economic Co-operation and Development (OECD), part of its Future Global Shocks Program.

In 2013 he provided written and oral evidence to the Joint Committee examining the draft Communications Data Bill and in the same year to the Commons Home Affairs Select Committee investigation of e-Crime. In 2014 he gave written and oral evidence to the Intelligence and Security Committee of Parliament in their inquiry into Privacy and Security.

In 2014 he was invited to join the Home Office Digital Signature Expert Panel within the Office of Security and Counter Terrorism Communications Capability Development program

Between November 2015 and February 2016 he acted as a Specialist Advisor to the Lords and Commons Joint Committee scrutinizing the Draft Investigatory Powers Bill.

Selected Publications

Under the pseudonym "Hugo Cornwall":
The Hacker's Handbook, Random-Century, 1985, 1986, 1988, 1989.
DataTheft, Heinemann Professional, 1987, Mandarin Paperbacks, 1990.
The Industrial Espionage Handbook , Century 1991, Ebury Press, 1992.
Under own name: *The PC Security Guide 1993-1994*, Elsevier, 1993. *Why Legislation is the not the answer; the limits of the Law* Compacs 91, 15th International Conference on Computer Audit, Control and Security, IAA. *Computer Forensics: an Introduction* Compsec '92, Elsevier. *Computer-Aided Industrial Espionage* Compsec '93, Elsevier. *Industrial Espionage: Analysing the Risk* Compsec '94, Elsevier.Various practitioner-orientated articles appear passim in *Computer Fraud and Security Bulletin*, published by Elsevier and *Virus News International* and *Secure Computing*, published by West Coast Publishing.
The computer security sections of *Handbook of Security* and *Purchasing and Supply Guide to Guide to IT* both published by Croner.
Imaged documents code,. Computer Fraud & Security, Apr 1996.
England ponders trade secrets law, Computer Fraud & Security, Jan 1998
Investigating Computer Crime (book review) Computer Fraud & Security, Sep 1997. *Fraud Watch: A Guide for Business - Ian Huntington and David Davies* (book review). Computer Fraud & Security, Apr 1995.
Information Warfare: Chaos on the Electronic Superhighway - Author: Winn Schwartau (book review). Computer Fraud & Security, Jun 1995.
Computer-Related Risks - Author: Peter G Neumann. (book review) Computer Fraud & Security, Jul 1995 *Downloads, Logs and Captures: Evidence from Cyberspace* Journal of Financial Crime, October, 1997, 5JFC2 138-152; *Intrusion Detection Systems as Evidence* RAID 98 Conference, Louvain-la-Neuve, Belgium; also in *Intrusion detection systems as evidence*, Computer Networks, Volume 31, Issues 23-24, 14 December 1999, Pages 2477-2487. *Legal Reliability in Large Scale Distributed Systems* IEEE Symposium on Reliable Information Systems, COAST/Purdue University, 1998; *Digital Footprints: Assessing Computer Evidence* Criminal Law Review (Special Edition, December 1998, pp 61-78) Co-author: *CyberCrime: Risk and Response*. International Chamber of Commerce ICC Publication 621, 1999 Sommer, P: *Evidence in Internet Paedophilia Cases* Computer and Telecommunications Law Review, Vol 8 Issue 7; [2002] CTLR, pp 176-184. Sommer, P: *Evidence in Internet Paedophilia Cases; a case for the Defence* in "Policing Pacdophiles on the Internet" ed McVean & Spindler, New Police Bookshop for the John Grieve Centre, 2003. *Computer Forensics Education* , Yasinac, Erbacher, Marks, Pollitt, Sommer, IEEE Security & Privacy Vol 1 No 4 p 15 , July 2003; *The future for the Policing of Cybercrime* Computer Fraud & Security Bulletin, January 2004, pp 8-12
Cybercrime (co-author) and *Computer Aids* chapters in *Fraud: Law, Procedure and Practice*, Lexis-Nexis / Butterworths, 2004, 2009, 2013

The challenges of large computer evidence cases Digital Investigation Vol 1 Issue 1 2004 16-17, *Digital Evidence: a Guide for Directors and Corporate Advisors*, Information Assurance Advisory Council, September 2005., revised edition November 2008. *Two Computer Misuse Prosecutions* Computers and Law Vol 16 issue 5, 2006. *Criminalising Hacking Tools* Digital Investigation Vo 3 Issue 3 2006 68-72
Meetings Between Experts: a route to simpler fairer trials Digital Investigation diin.2008.11.002. Forensic science standards in fast-changing environments *Science and Justice 50:11, 12-17, March 2010*
Reducing Systemic Cyber Security Risk, OECD, Paris, January 2011. http://www.oecd.org/dataoecd/3/42/46894657.pdf

Police Powers to Hack CTLR, 2012 *Digital Surveillance,* Open Rights Group, May 2013, 2 sections Two *Guardian Comment is Free* pieces on GCHQ oversight: http://www.theguardian.com/commentisfree/2013/aug/02/whos-watching-gchq and http://www.theguardian.com/commentisfree/2013/aug/02/whos-watching-gchq
Stronger Oversight of GCHQ – How? http://www.opendemocracy.net/ourkingdom/peter-sommer/stronger-oversight-of-gchq-how

Website

www.pmsommer.com:

Appendix 3: Material Considered

TAB	DOCUMENT	DATE
	Home Office witness statements (served in all 'ETS cases')	
1.	Witness statement of Peter Millington in the case of *R (Zahir Hussain Muhammed) v SSHD [JR/6299/2014]*	23.06.2014
2.	Witness statement of Rebecca Collings in the case of *R (Zahir Hussain Muhammed) v SSHD [JR/6299/2014]*	23.06.2014
	Expert reports – JP French Associates	
3.	Dr Philip Harrison, Report on testing of Samples Undertaken by ETS (instructed by Salima Budhani on behalf of the National Union of Students)	05.02.2015
4.	Professor Peter French, Report on Forensic Speaker Comparison Tests Undertaken by ETS (instructed by the Government Legal Department on behalf of the SSHD)	20.04.2016
5.	Dr Richard Rhodes, Report on Forensic Speaker Comparisons (instructed by Salima Budhani on behalf of Mr Mohibullah)	03.05.2016
6.	Dr Philip Harrison, Report on Timing & Dating of TOEIC Recordings (instructed by Salima Budhani on behalf of Mr Mohibullah)	03.05.2016
	Witness statement of Mohammad Mohibullah	
7.	First witness statement of Mohammad Mohibullah	20.02.2015
	Mohammad Mohibullah TOEIC documents	
8.	CD of Mr Mohammad's speaking test	Date disputed
9.	Letter from Synergy Business College	13.04.2012
10.	Mohammad Mohibullah TOEIC certificate	13.04.2012 17.04.2012
	Project Façade report by Home Office, provided by lawyers in another case	
11.	Project Façade – criminal inquiry into abuse of the TOEIC, College of Skills and Learning, Birmingham	15.05.15
	Disclosure from ETS received 10 May 2016	
12.	Letter from Jones Day, with schedule of documents	10.05.16

TAB	DOCUMENT	DATE
13.	Email, regarding ordering of speaking and writing tests for 17/18 April 2012	10.04.12
14.	Email regarding payment for speaking the writing tests	24.02.12
15.	Email regarding speaking and writing score reports	27.02.12
16.	Synergy audit	16.01.13
17.	Letter of termination from ETS Global to Synergy	08.02.13
18.	Speaking and writing Admin Day Guide	Undated
19.	Speaking and writing Test Day Guide	Undated
20.	TOEIC speaking and writing – Test Centre Administration Manual	Undated
21.	Test Centre Photo Registration Guide	Undated
22.	Test Administration Procedures	Undated
23.	TOEIC Speaking and Writing Examinee Handbook	Undated
24.	PTPix TCA user documentation – ETS Global	Undated
	Disclosure from Crown Prosecution Service received 1 June 2016	
25.	Witness statement Ahmad Bdour, with exhibit	20.11.14
26.	Interview record, [redacted] MMH	27.11.14
27.	Witness statement of Richard Shury	11.12.14
28.	Interview record, [redacted] MAIK	03.12.14
29.	Witness statement of [redacted] MHM	30.01.15
30.	Witness statement of [redacted] MS	17.02.15
31.	Witness statement of [redacted] PNS	17.02.15
32.	Witness statement Ahmad Bdour	06.03.15
33.	Witness statement of [redacted] AAH	11.05.16
34.	Witness statement of Adam Sewell	06.07.15
35.	Witness statement Ahmad Bdour, with exhibit	08.09.15
36.	Witness statement of Hae Jin Kim	22.10.15
37.	Witness statement David Stuart Thompson	26.10.15
38.	Witness statement of Randolph John Cline	26.10.15
39.	Witness statement of Frederick Alan Cline	30.10.15
40.	Witness statement of Raymond Nicosia	19.11.15
41.	Statement of Dr Christin Kirchubel	11.12.15
42.	Witness statement of [redacted] MJP	12.05.16
	Judgments in other 'ETS cases'	
43.	R (on the application of Gazi) v SSHD (JR/12120/2014): Judgment made by Mr Justice McCloskey, President of the Upper Tribunal Immigration and Asylum Chamber ("UTIAC")	22.05.15
44.	SM & Ihsan Qadir v SSHD: Judgment made by Mr	21.04.16

TAB	DOCUMENT	DATE
	Justice McCloskey, President of the UTIAC and Deputy UTJ Saini	

Secretary of State v MA (anonymity direction granted by the Tribunal)

Appeal number IA/39899/2014

DRAFT Addendum Report of Christopher Stanbury in The HM Courts and Tribunals Service

Dated: 24th June 2016

Specialist field: Computing, Database programming, Web Design and Search Engine Marketing

On behalf of the Appellant: MA

On the instructions of: Oaks Solicitors (for Appellant)

Report on the additional material received

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My Reference: OAKS-06.SAM

1 *Introduction:*

1.0.1 In the last few days I have received additional evidence which I have been asked to assess and comment on.

2 *Documents reviewed for this addendum report*

2.0.1 Draft Expert Report from Richard Heighway

2.0.2 Report of Peter Sommer

2.0.3 Speaking and Writing ADMIN DAY Guide

2.0.4 TOEIC Speaking & Writing Test Center Administration Manual from the Generic Bundle of documents from ETS - Tab 8

3 *My Opinion*

3.1 The following comments (and paragraph numbers) relate to the DRAFT report from Richard Heighway of Kroll Ontrack

3.1.1 **Richard Heighway (9.1.5)** - "... I have identified a number of ways a candidate with the right technical skillset ma[y] be able to abuse the examination process and manipulate the data being stored behind the user interface of the TCL. I have outlined the points for consideration below and they are expanded upon in the following sections (10 to 12) of this [Richard Heighway's] REPORT."

3.1.2 I agree with Richard Heighway that, in theory, a candidate might be able to gain access to the files on their computer and manipulate the results. This would, as he points out, require excellent computer skills and a poor level of security by the test centre. The candidate would have very limited opportunity to learn how the system worked in terms of file location because they are only called to the test room 30 minutes before the test starts (Para 10 in the Speaking and Writing ADMIN DAY Guide).

3.1.3 The candidate would have to know where their test result files were being stored on the PC they were using. Bear in mind that at this point of the

process no files would have yet been recorded. They would also need to be able to access the rest of the network of candidate's computers and crucially, know which candidate was likely to have passed the test. When the test had ended, they would then need to copy the "clever" candidate's files to their PC and replace their own results files with the results from the "clever" candidate. This would involve renaming each of the several files with the numbers allocated to the cheating candidate. All this would have to be done BEFORE they left their PC following the test and before the answers were uploaded to the administration PC.

3.1.4 If security was even weaker and they could view the files on the admin PC it would theoretically be possible to amend the files on this PC but they would still need to know which files contained test results that would attract a pass grade. This would be virtually impossible.

3.1.5 In order for this scenario to work, the administration security would need to be VERY poor and the cheating candidate VERY clever. A candidate with this level of skill would be likely to be able to pass the test on his or her own merit.

3.1.6 The scenario portrayed by Panorama, where the candidates are replaced by proxy test takers is much easier to control but does require the co-operation of the cheating candidates and the test centre staff.

3.1.7 **Richard Heighway (10.1.6)** - "If the user account was left with administrator rights, then the candidate may have had unrestricted access to the file system."

3.1.8 It is also true that if the administrator account was unprotected, then in theory, a user could access the network with that account.

3.1.9 This does appear to be the case. On page 1 of the Speaking and Writing ADMIN DAY Guide paragraph 2 states that at least one PC (2nd last PC) has no password for the administrator account. ("just hit ENTER").

3.1.10 It is possible, depending on whether users are allocated across the network or individually on each PC, that the same administrator account is used for all the PCs. Even if this is the case, a candidate would need to log off the PC and log in as the administrator in able to be able to gain all the privileges of the administrator account. This would end any programs that were running at the time and would make it obvious what had been done. I therefore do not believe this is likely to have happened but it does show weak security in the system.

3.1.11 Richard Heighway (16.1.2) - "When a recording is made an audit log should be created and as the recordings are transferred, it should be maintained. The audit file would contain similar details to the database record such as, name, size and hash value."

3.1.12 There is no evidence that I have seen to suggest that there is any audit log created. Nor is there any evidence of a database or hash values being assigned to files.

3.1.13 Even if an audit log did exist, in the event that the test centre were set up with a parallel test facility, then the audit log would appear completely genuine.

3.1.14 Richard Shury, in his witness statement (page 5) states that he believes that TCAs were substituting test results from a "hidden room" in place of those fror the room in which the candidates were sitting. I believe it is possible a test centre could have, for example, a test room upstairs and a test room downstairs that worked in parallel. The proxy test takers all sat in the upstairs room whilst the genuine and non-genuine test takers sat in the downstairs room. The genuine test takers thought they were taking the test but, in fact, their answers were being discarded and the answers of the proxy test takers were being used.

3.1.15 This system would require careful planning by the test centre staff, at least some of whom would need to be acting dishonestly. However, it would not be

massively difficult to set up from a technical point of view. I would envisage a second PC for every PC is the genuine test room. These PCs would be clones of the genuine PCs with the same IP number (IP numbers are usually unique to each PC but can be allocated manually). There is an instruction at paragraph 7 (page 25) of the "TOEIC Speaking and Writing Test Center Administration Manual" on how to clone the IP address for the administration PC should there be an "unexpected error" with it.

3.1.16 It would even be possible with the use of a switch to flip between use of the proxy PCs and the genuine ones.

3.1.17 **Richard Heighway (12)** - We do not know whether there was a database. I doubt there was, beyond a simple list of candidates, but if there was and a candidate wanted to manipulate the files then I agree with Richard Heighway that the candidate would need prior knowledge (or be extremely competent with computers). In order to gain prior knowledge they would probably have had to find documentation detailing the file structure. I have not seen any such documentation. Even if it existed, the candidate would have needed a good command of English in order to be able to digest the data.

3.1.18 **Richard Heighway (14)** - I agree with Richard Heighway that an administrator would have the opportunity to amend files before they are uploaded to the ETS servers in the USA. Richard refers (15.1.1) to a document he calls V which is in the Generic Bundle of documents from ETS - Tab 8 - titled TOEIC Speaking & Writing Test Center Administration Manual This document sets out how a test centre can set up a laptop to be used as the CBT Manager PC so that the laptop can be taken off-site to a location where the Internet is available in order that the test results can be upload the candidate's responses to ETS in the USA. If this method were used, it would give ample opportunity to amend the files for each candidate and potentially replace them with those of proxy takers.

3.1.19 **Richard Heighway (14.1.6)** - "If the TCA or PROC did not know the candidates registration number, it would lead to them guessing which candidates audio files they should replace and could lead to a genuine candidate having their recording replaced."

3.1.20 I believe it might have been possible to find out a candidate's registration number but that it is more likely that the administration staff would take the easier option of replacing ALL the candidate's results with those of proxy test takers on the basis that all the candidates would pass the test regardless of whether they were paying extra or not and this would be easier and less prone to error than selectively replacing files for those candidates prepared to pay extra to cheat.

3.1.21 **Richard Heighway (18)** - Richard Heighway discusses the "Cleanup" option detailed at paragraph 6 (page 25) of the "TOEIC Speaking and Writing Test Center Administration Manual" which states that the cleanup process should be carried out at the end of the day, after all the data has been uploaded to ETS in the USA. Whilst I have not seen an "Archive" function documented, whether or not this facility is available from the software provided by ETS, an archive (or backup copy) of the test results could be made before the cleanup process is invoked. This archive could be to a separate PC or to a different folder on the CBT Manager PC.

3.1.22 Paragraph 3 of CBT Client section (page 31) of the "TOEIC Speaking and Writing Test Center Administration Manual" details how, at the end of the test, the candidate can check the response they gave to a question BEFORE the files are uploaded to the CBT Manager PC. However, it also makes it clear that "Changing a response is not allowed for any reason". What is clear from this, is that the files reside solely on the candidate's PC, until they are submitted to the CBT Manager PC after the test is completed.

3.1.23 **Richard Heighway (18.1.9)** - "The examination candidate is given the opportunity to review the audio recordings before submitting to the TMA and are therefore likely to notice if a recording was not their voice, so the chance of the previous example or any other reason causing a recording to be replaced on the TCL and going unnoticed by the candidate is low"

3.1.24 At the end of the test, assuming the test was not taken by a proxy test taker with the knowledge of the candidate, the recording on the TCL WILL be that of the test taker. This does not preclude the genuine recording being replaced at a stage further down the process.

3.2 The following comments (and paragraph numbers) relate to the Report of Professor Peter Sommer

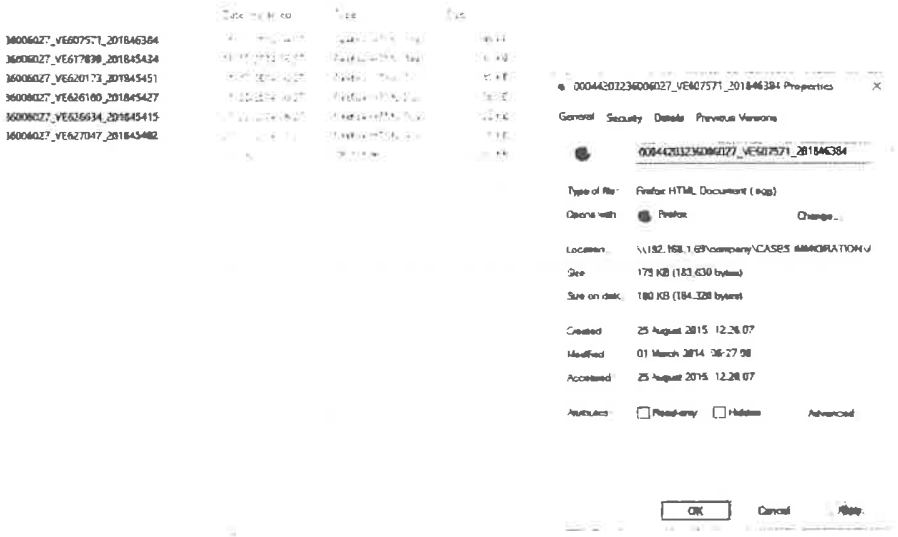
3.2.1 **Prof. Peter Sommer (46)** - this is the same assumption that I have come to. That the administration staff would potentially falsify all the test results in order to assist those candidates that were paying extra to cheat. This course of action would be easier than trying to identify specific candidates and only substituting their results. Until ETS became suspicious, there appears to have been insufficient checking to highlight the impropriety.

3.2.2 **Prof. Peter Sommer (49)** - with reference to Hae Jim Kim's witness statement, Peter points out "...he does not address the possibility of manipulation by test centres before they are received by ETS." I agree that this possibility is not addressed. I would add that, in my view, it would be significantly easier to manipulate the files prior to them being transmitted to ETS in the USA rather than after they have left the test centre.

3.2.3 **Prof. Peter Sommer (59)** - Possible additional security features. I also suggested in my report that use of a Webcam would have provided additional validation that the correct candidate was taking the test.

3.3 File dates

3.3.1 In my original expert report in section 5.12 (Dates relating to files) I gave an example of the properties for a file. I have now received a screen shot of the properties for the voice recordings on the CD supplied into evidence. (see below)



3.3.2 Whilst not being a very clear image, it is possible to see that the Modified date is 1st March 2014 and both the Created and Accessed dates are 25th August 2015. I would expect the Created and Accessed dates to have changed since the file was created because the file is not on the original PC. The Creation date is reset when the file is copied or moved from one PC to another.

3.3.3 The Modified date ought to have remained unchanged through this process which is how it can be earlier than the "Created" date. The fact that the Modified date is not the date that MA took his test is only significant in that it indicates that some process has been undertaken on the file since it was originally recorded. It does mean that it is not "untouched" since the date it was recorded OR it was not recorded until, at the latest, 1st March 2014. Any processing by ETS could result in the Modified date being re-written, even if the actual content of the file remained unchanged.

3.4 TOEIC Speaking & Writing Test Center Administration Manual

3.4.1 The manual makes it clear that it is possible to conduct the test without an Internet connection to either the CBT Manager server or the CBT Client PCs. The Program Installation page for CBT Manager on page 18 and the page for CBT Client (page 19) both contain instructions at the foot of the page stating that "If the test room does not have an Internet connection on the admin date, you can launch [either the manager or client software] from the Start Menu of Windows"

3.5 Registration number vs Unique ID vs Identification number

3.5.1 ETS's responses to questions - page 196-199 of the Bundle gives some detail relating to the way the various numbers are allocated.

3.5.2 MA's Speaking and writing tests - Official Score Report contains the registration number 0044[redacted]

3.5.3 The registration number is unique to the candidate and for that test administration. It is automatically generated by the CBT Client software.

3.5.4 The document also states that "The voice files in relation to that registration number would then be automatically linked to the personal details that were entered onto the computer prior to the start of the test" - I have not seen any documentation that shows how this link was set up or maintained.

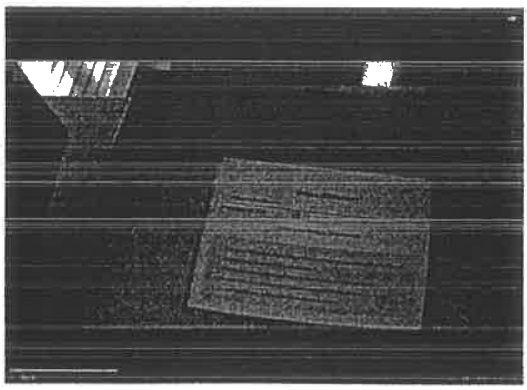
3.5.5 The registration number is made up of the country code - 0044 for the UK - plus the test taker number for that administration-[redacted] in MA's case

3.5.6 The file names for the voice recordings are formed of the country code, test taker number, the ID allocated to the question (this is the same for each test taker answering the question at the same centre on the same day. The third element is another automatically generated number relating to the test taker's response to the question.

3.5.7 His Listening and Reading - Official Score Report contains an "identification number" [redacted]

3.5.8 The "Speaking and Writing Examinee Handbook" refers to "registration number" in the Terms and Conditions (page 29 - para 1 & 3) but I am not sure this is the same as the registration number on the Official Score Report.

3.5.9 As I mentioned in my original report, the Panorama documentary briefly shows a screen with some bespoke software. The first screen shown is an input screen with space for the candidate's "Unique ID number" In the documentary, the exam invigilator indicates that he will enter this number. The choices offered are "National ID", "Passport ID" , "Driver's License ID" or "Other ID".



3.5.10 This screen is also shown in the TOEIC Speaking & Writing Test Center Administration Manual on page 28.

3.5.11 The next page (29) in the manual shows a screen with a Unique ID number and an "Examinee Number", It is not clear to me whether this "examinee number" is allocated automatically at this point, or whether it is somehow linked to the list on the CBT Manager PC.

3.6 The TOEIC Speaking & Writing Test Center Administration Manual shows on page 22 a screen shot from the CBT manager software which shows the registration number, Unique ID number, Name, Status, IP address of the client PC, % complete and Uploaded date for each candidate. It is unclear to me whether this information is downloaded from ETS in the USA before the test starts or whether the screen is built up of inforamtion entered on the day of the test. What is clear, is that the admin staff can see the registration number for each candidate along with their name and unique ID.

4 Definitions (alphabetical):

4.1 **TC** - Test Centre - the venue where the tests were undertaken

4.2 **TCA** - Test Centre Administrator - the person who sets up and administers the tests

4.3 **TMA** - Test Manager - the computer within the test centre used to administer the tests. The individual answers would be transferred to this computer sometime following the end of the tests

4.4 **TCL** - Test Client - the computer used by the candidate to actually sit the test.

5 *Statement of compliance*

5.0.1 I understand my duty as an expert witness is to the court. I have complied with that duty. This report includes all matters relevant to the issues on which my expert evidence is given. I have given details in this report of any matters which might affect the validity of this report. I have addressed this report to the court.

6 *Statement of truth*

6.0.1 "I confirm that insofar as the facts stated in my report are within my own knowledge I have made clear which they are and I believe them to be true, and that the opinions I have expressed represent my true and complete professional opinion."

Signature .....

Date January 26, 2016

Christopher Stanbury
Wilbury Barn
Swallowcliffe
Salisbury
Wilts
SP3 5QH

JR/2171/2015

IN THE UPPER TRIBUNAL IMMIGRATION & ASYLUM CHAMBER

BETWEEN:

THE QUEEN (ON THE APPLICATION OF MOHAMMAD MOHIBULLAH)

Applicant

-v-

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

REPORT of PROFESSOR PETER SOMMER

25 July 2016

I, Peter Michael Sommer, certify that this statement (which consists of 31 pages plus appendices all which have been signed by me today), has been prepared by me and is true to the best of my knowledge and belief. I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer. I make it known that if it is tendered in evidence I shall be liable to prosecution if I have wilfully stated anything in it which I know to be false or do not believe to be true. I acknowledge that, although I am instructed by the Applicant, my over-riding and continuing duty is to the Court. I am aware of the operation of the Civil Procedure Rules Part 35. I am over 21.

---

1. I am instructed by Messrs Bindmans LLP, solicitors to the Applicant, Mohammad Mohibullah, to provide expert evidence in the management of and security of computer and information systems. The term "information system" draws together both computer technical infrastructure and the ways in which human beings manage and control it.

Background, Instructions

2. Mohammad Mohibullah is bringing judicial review proceedings against the Secretary of State for the Home Department in respect of actions taken by her following the inclusion of Mr Mohibullah's name in a list of people who had been identified to have cheated in an English Language test.

3. On 15 June 2016 I produced a report which was served on the Tribunal and other parties. That report contained a number of queries requesting further information and clarification and also sought agreement that certain conjectures were correct. Some but not all issues have been addressed. This is an extended revision of that report and reflects information to hand as at 25 July 2016. Although I am not formally withdrawing my earlier report this current version can has been written to reflect the entirety of my current findings and conclusions.

4. My instructions appear in Appendix 1 of my first statement.

5. My instructions are that in April 2012 Mr Mohibullah took a test to establish, among other things, his skills in spoken English. The test is known as TOEIC.

6. The tests were run by an international company called ETS which uses a series of local test centres here in the United Kingdom. The particular test centre in this instance was run by a company called Synergy Business College (hereafter "Synergy"). During the test of aptitude in spoken English an audio recording is made which is then assessed by ETS against a number of agreed criteria. Following a series of investigations, including one by the BBC *Panorama* programme, the integrity of the activities of a number of test centres similar to Synergy came into question. In particular, evidence which is generally accepted indicated that in a number of instances proxy candidates had been used in order to provide "passes" and their associated certificates to individuals who would otherwise not have been successful. There have since been admissions both from former staff members of Synergy and from candidates who allowed their activities to be proxied. As a result, enquiries were instituted against all past candidates of the TOEIC test. The principal means of investigation consisted of examining samples of the archived recordings made during the tests and comparing them with other archived samples to identify which voices appeared on several occasions, thus suggesting that the voice belonged to a proxy and not to the candidate.

7. It is common ground that the archived recordings held by ETS and which their records say are associated with the tests taken by Mr Mohibullah are of an individual who is not Mr Mohibullah. I now understand that this person's voice was used as a proxy on 6 occasions over 17 and 18 April 2012. For his part Mr Mohibullah insists that he did take the ETS test and that no proxy or impersonation took place.

8. My task is to review the evidence and circumstances to test the proposition that the recordings held by ETS and labelled as being associated with Mr Mohibullah, are in fact incorrectly labelled. On

this basis the various biometric voice comparison testing results become pointless. The hypotheses I am asked to consider are that the overall security regime of the circumstances in which the ETS test was run – and these circumstances include the operations at Synergy as well as at ETS – were such that misleading or mislabelled inputting of data into ETS main systems was able to take place. "Misleading" or "mislabelling" in this context could be the result of either deliberate or clumsy action, or a combination of both.

Qualifications

9. I am currently Professor of Digital Forensics at Birmingham City University. This post takes up 10% of my time. I combine academia, public policy work and expert witness instructions. My undergraduate degree was in Jurisprudence at Oxford. I have been acting as an expert witness since 1993, acting for both defence and prosecution in criminal matters, as well as acting in civil and international litigation. Between 1994 and 2011, I held various visiting posts at the London School of Economics teaching CyberSecurity within a social science and management context; for the last four years I was a Visiting Professor. I have held posts, lectured and examined at a number of other universities in the fields of digital forensics and cybersecurity. Most of my commercial consultancy has been concerned with the risk analysis of complex information systems, largely for underwriters and loss adjusters in the London (Lloyds) insurance market. During its existence, I was the joint lead assessor for the digital forensics specialism at the government backed Council for the Registration of Forensic Practitioners. Since then and until April 2016, I sat on the digital forensics panel for the Forensic Science Regulator. My full curriculum vitae can be seen at http://www.pmsommer.com/PMSCV042015_leg.pdf and this

includes references to my publications and activities in the public policy field. It appears at Appendix 2 of my first statement.

Material Considered

10. I was initially supplied with a large bundle of documents and list those in Appendix 3 of my first statement. There is also a CD containing copies of audio files. Of particular importance are a number of procedural guides used during the testing of candidates, the reports of investigations and the statements of individuals who took the tests in question. I have also viewed a BBC Panorama programme originally broadcast on 10 February 2014.

11. On 22 June 2016 I was supplied with a copy of an 11-page letter of the same date plus schedules from Messrs Jones Day, solicitors to ETS. I also received a 4 page letter from Messrs Jones Day dated 23 June 2016, a 2 page letter dated 27 June 2016 and a 3 page letter dated 21 July 2016 with enclosures.

12. On 28 June 2016 I was supplied with a witness statement dated 31 March 2016 by Richard Green from the Home Office Performance Reporting and Analysis Unit along with a suerveyor's floor plan of Synergy College.

13. I have also been supplied with a report commissioned by the Home Office and dated 17 June 2016 by Richard Heighway of Kroll Ontrack in relation to another appeal, that of 'MA'. I have also been supplied with a report dated 31 January 2016 by Christopher Stanbury, instructed by Oaks Solicitors for MA. My understanding is that both these experts may produce further reports in the light of information now to hand. But as of this writing I have not seen them. Messrs Heighway, Stanbury and I have arranged to meet

shortly to see how far we can produce a joint statement of points of agreement and disagreement.

14. My instructing solicitors sought further information from Messrs Jones Day and, via the Government Legal Department, from the Home Office. As a result of this further information became available via letters and statements from Jones Day dated 7 and 21 July 2016. I am aware that there was some dispute about the extent to which ETS, via Jones Day should, or was practically able to comply with all requests. For the purpose of this Report I am limiting myself to commenting on what is available for scrutiny.

15. It is important to understand that none of the computers used by Synergy appear to be available for inspection. I have not seen in operation the overall ETS system either as it is today or as it was in 2012. The information supplied by ETS is still potentially incomplete in terms of providing an unambiguous picture of events. I understand that ETS outsourced some of its computing facilities to a company called YBM and may to an extent be dependent on them for access to historic records. I also draw attention to the fact that former personnel associated with Synergy have not provided any relevant explicit information.

16. The new material since my first statement has been helpful but it is still the position that some of my conclusions must be regarded as informed conjecture based on information currently available. If as a consequence of this report further information becomes available, I will make appropriate adjustments.

Information used by the Home Office in making its decisions

17. The statement of Adam Sewell a Home Office Junior Intelligence Analyst within the Immigration and Intelligence Directorate dated 6 July 2015 (33) refers to his being provided with what he describes

as "raw data" from ETS and his production of a series of "usable" Excel spreadsheets.

18. From the statement of Richard Green from the Home Office Performance Reporting and Analysis Unit, 31 March 2016, we get further information:

> This witness statement is intended to assist the Upper Tribunal in understanding how the evidence of an invalid TOEIC test result, provided to the Home Office by ETS and which was produced in court before the First-tier Tribunal, was obtained from the lookup tool.
>
> The lookup tool is an Excel spreadsheet which is able to search a list of thousands of test certificates provided by ETS. Though it is sometimes referred to as the "ETS lookup tool" it was wholly developed within the Home Office to enable the information provided by ETS of invalid and questionable test results to be checked and cross-referenced against the details of those who have made applications for leave to enter and remain.
>
> The personal details in the ETS list have been matched against Home Office data using the name, date of birth and nationality of the test taker. The matching process was carried out entirely within the Home Office.
>
> A search can be made on the lookup tool using the ETS test certificate number, the person's passport reference number or the unique number allocated to their record on the Home Office casework information and management system.

19. In effect everything depends on the quality of the information provided by ETS to the Home Office and the ability of the Home Office to match this with the data from other sources which they hold.

Understanding the risks in the ETS testing regime

20. In order to test the proposition that Mr Mohibullah's audio files were mislabelled we need to build up a picture of the technical and administrative infrastructure behind the testing. Once we have this we can attempt to identify weaknesses. The relevant documents appear to be (the figure in brackets is the tab number in the bundle – and I will be using this reference method throughout in this report):

- Synergy Audit (16)
- Speaking And Writing Admin Day Guide (18)
- Speaking And Writing Test Day Guide (19)
- TOEIC Speaking And Writing – Test Centre Administration Manual (20)
- Test Centre Photo Registration Guide (21)
- Test Administration Procedures (22)
- TOEIC Speaking And Writing Examinee Handbook (23)
- PTPix TCA user documentation – ETS global (24)
- Witness statement of Hae Jin Kim (35)
- Letter from Jones Day dated 22 June 2016 ("the Jones Day letter 22/06/2016") together with attachments.
- Statement and exhibits of Glyn Powell of Jones Day, 7 July 2016 ("Glyn Powell")
- Letter from Jones Day dated 21 July 2016 ("the Jones Day letter 21/07/2016")
- BBC Panorama *UK Student Visa English Testing Scandal* broadcast 10 February 2014 (viewed separately online at http://www.dailymotion.com/video/x1bx5uj_panorama-uk-student-visa-english-testing-scandal_news)

21. With the exception of the Synergy Audit, which was carried out on 16 January 2013, none of the ETS documents bear a date and so it is on their face is not entirely clear whether they accurately refer to circumstances as they existed in April 2012 when Mr Mohibullah took his test (see further below). But for the purposes of this report I am assuming that they do unless information has been produced to show the contrary.

22. We can get a general overview from the Affidavit of Peter Millington (1):

> ETS operates a decentralised process in which they have an ETS preferred network of local third party distributors around the world ("the EPN") which provide a localised service for clients. In this model the EPN is responsible for the administrative tasks such as test registration and administration, customer service and recruitment and certification of test centres to administer the test on behalf of ETS.

> Under this model ETS, centrally in the USA, has responsibility for designing and developing the tests and developing new products. Whilst the EPN offices administer tests, the responsibility for marking the results and analysing the overall statistics and management information rests with ETS. Having produced a tests score, ETS will pass the results back to the relevant EPN office for them to report back to the test taker.
>
> In practice this means that after a test is administered in the UK, a test takers spoken and written responses to each of the individual questions are divided into individual electronic files and transmitted to ETS and stored securely on servers in its data centre. These servers are accessible only by authorised personnel and the files are typically stored for 999 days. ETS has advised that file manipulation, corruption or misapplication has not been an issue once files are received in the USA.

23. Three of the manuals put flesh on the practical arrangements: *Speaking and Writing Admin Day Guide* (18), *Speaking And Writing Test Day Guide* (19) and *TOEIC Speaking And Writing – Test Centre Administration Manual* (20). This last document may not have been in effect in 2012 (Jones Day letter, paragraph 2). The following is my conjecture based on reading these manuals and using my general experience of computer systems.

24. Further information is available from the statement of Hae Jim Kim (35) starting at his paragraph 13.

25. At a local ETS test centre there is a room with a number of computers. One of them is designated for an administrator and acts as a local server; the others are for the examinees/candidates. All the computers are linked via a local area network. The computers typically run on the Microsoft Windows operating system; at the relevant time this may have been Windows XP or Windows 7. In order to set the computers up, specialist software must be downloaded from ETS centrally via the Internet. The administrator downloads "CBT Manager" and the other computers download "CBT Client". Once that has taken place and some checks run, the computers used by the examinees no longer need to have direct Internet connectivity. The CBT Manager acts as a server for the computers used by the examinees and has the connection over the Internet to ETS centrally. In effect the CBT Manager mediates the

connections between the client computers and ETS. The CBT Manager has login credentials which have been provided by ETS. Having run a few connectivity tests, the next step is to ensure that all the computers to be used by the examinees are appearing on the local network. (See page 21 of the *Test Centre Administration Manual*). A further series of tests are run to make sure that everything is communicating properly. Some of the tests require verification/acknowledgement from the ETS systems in the United States.

26. Other aspects of running the test centre include the placement of the individual client computers in relation to each other and some other physical matters such as one would normally expect in an examination environment.

27. Hae Jim Kim (35) tells us at paragraphs 13 and 15 of his statement:

> The TOEIC speaking and writing tests were originally delivered in the UK using a web based system (ID number beginning with 1000) which was changed towards the end of 2011/ early 2012 to a mobile delivery system (ID number beginning with 0044). In the web based system, ETS provided ETS Global with a list of Authorisation (registration) Numbers for a specific administration. ETS would provide the list of Authorisation (registration) Numbers to the test centre in advance of the test date. Before the test day, a test centre administrator ("TCA") at a test centre had to fill out the test taker information (e.g. name, date of birth) for each Authorisation Number. On the test day, the TCA distributed a pre-populated form which contained the Authorisation Number and the candidate details (e.g. last name, first name, birth date) to each test taker to confirm that the pre-populated information was accurate. After the administration was finished, the test centre sent the registration file to ETS Global and ETS Global then sent it to ETS via a secure file transfer method. In the mobile delivery system, the registration number is created during the computer log-in process on the test day. The registration number is generated as soon as the test taker enters the required personal information and ETS Global has access to that information. In both systems the registration number is unique to the candidate and any associated voice samples provided during that test administration. If a candidate retakes the test, the candidate will receive a new candidate number for each re-test....
>
> After the speaking and writing test is administered in the UK, the test taker's spoken and written responses are transmitted to ETS. [On the web based system, the system detects when a test taker has completed test and transmits the test taker's responses to ETS via the web.][1] On the mobile system, once the test taker has completed the test, the test taker has the opportunity to

[1] The system in use at the relevant time was "mobile" as opposed to "web-based"

> review his/her responses but with no ability to make amendments. If the test taker discovers that there are technical difficulties which mean that his/her responses are inaudible, the test taker can choose not to submit to the test response and this has the effect of cancelling that test taker's test. If the test taker wishes to proceed, all of the test taker's responses are submitted. At the end of the session the TCA uploads all responses which had been submitted by the test takers by activating the "response upload" function. The TCA has no ability to make any amendments to these responses once they have been submitted by the test taker. ETS Global has the ability to monitor the success of the upload and to assist the TCA if there were upload problems but does not have the ability to make any amendments to the responses. All uploaded speaking and writing responses sent electronically to ETS for marking.

28. The manuals make reference to the use of an iPhone to take photographs of the candidates. See paragraph 8 in the *Test Day Guide* and pages 36 and following of the *Test Centre Administration Manual*. The latter document refers also to photo registration via a personal computer which is run by the centre administrator but should not be the same personal computer as is running the CBT Manager application. Jones Day say they are unable to confirm that this procedure was in place in April 2012 and have not been able to locate any records (Jones Day letter paragraphs 4 and 5). ETS did not maintain photograph files in April 2012.

29. At this point the test centre is ready to receive candidates.

30. In addition to whoever is acting as the administrator of the CBT Manager computer, the documentation makes reference to individuals who act as "proctors" who have the role of on-the-ground invigilators. Proctors have their own passwords to the system distinct from that used by the person who is acting as the administrator of the CBT Manager.

31. In the earlier version of this statement I said: "The supplied documentation is not particularly clear about how registration of candidates takes place." Jones Day has this to say in their letter of 22 June 2016 at paragraphs 6 and 7:

> ... a test taker such as Mr Mohibullah would have been required to enter his personal details into the computer prior to taking the test. This includes

> entering relevant ID details. In the case of Mr Mohibullah, he entered [redacted]. As soon as the relevant information is entered into the system by the test taker the system automatically generates a unique Registration Number. The Registration Number is unique to that candidate and for that test administration. If a candidate re-takes the test (whether at the same centre or any other centre) the candidate will receive a new unique Registration Number for that test. The voice files in relation to that Registration Number would then be automatically linked to the personal details that were entered onto the computer prior to the start of the test....the voice recordings are automatically linked to the personal details that are entered onto the computer at the start of the test and coded accordingly. There is no ability within the system for the test centre to make any amendments to those responses before they were sent to the Online Scoring Network at ETS in the US.

32. I am told that "[redacted]" is Mr Mohibullah's passport number. It may be more accurate to say that the number "was entered" rather than the definitive claim that Mr Mohibullah himself made the entry. It appears from the material attached to the Jones Day letter of 22 June 2016 that Mr Mohibullah's passport number was available to Synergy staff at least from 13 April 2012 because it is on the handwritten attendance list completed when he undertook the listening and reading test. We have no information about how securely or otherwise that information was held between 13 April and 18 April 2012 when ETS say Mr Mohibullah took his speaking and writing test and Mr Mohibullah says he took the test. We understand from the Jones Day letter of 23 June 2016 at paragraph 9 that ETS is unlikely to have seating information for the tests of 17 and 18 April 2012 which were "speaking and writing" and computer-based.

33. In the information provided by Jones Day on 22 June 2016 as "Schedule 1" we can see what was recorded for 13 April 2012. There is both a handwritten "Attendance List" and a computer version, showing Mr Mohibullah's passport number and the fact that he was sitting in Hall 1 at Seat D2.

34. It will be noted that the *Test Day Guide* at paragraph 10 suggests that this log is overseen by proctors. But the *Guide* is not particularly clear about what actually happens. It may be that

candidates did their own registration, unsupervised. It appears that registration could occur very shortly before the running of the test.

35. The test is then downloaded and run. In my earlier statement I said: "Here too, there is a lack of immediate clarity as to what is actually happening. One possibility is that the test materials have previously been downloaded to the CBT Manager which then releases the information to each client on demand. Another option is that the material is downloaded direct from ETS in the United States with the CBT Manager computer simply mediating the transmission through the local area network. It would be helpful to have clarity from ETS on this point." This question remains partially unanswered. We know what was happening on 17 April 2012. Jones Day say at paragraph 9:

> In April 2012 there was flexibility in the process in the UK, in that test centre staff could determine when the data was uploaded following the completion of the test administration. In relation to the test administration at 14:10 on 17 April 2012, the test finish time was 15:34:31 and the upload time was as follows (in relation to the relevant sections of Mr Mohibullah's test): (There then follows uploads between 15:36 and 15:39)

We do not explicitly know what happened on 18 April 2012.

36. Where malfeasance is suspected, plainly there are more opportunities for rogue behaviour if candidates' responses to tests are stored on a machine local to a test centre. There are also implications for this sort of evidence of activity at any given test centre which is likely to be held or has been held by ETS centrally.

37. I note in the Schedule 2 of the 22 June 2016 Jones Day letter (page 19 of the print-out) there are references to the supply of CDs as well as test booklets. It would be useful to know what was on those CDs.

38. The manuals also provide instructions about what to do in some forms of emergency. These could include the failure of one or more computers, the failure of an Internet link and the need in particular circumstances of a candidate to move from one terminal to another.

39. What is striking about all of these procedures is the extent to which trust is placed by ETS on the reliability and probity of staff in the test centre. The assumption seems to have been that appropriate checks had taken place at the point at which the test centre and its staff were recruited. I will pursue this matter a little later.

40. Hae Jim Kim tells us a little of the identification of irregularities (paragraph 19 of his statement):

> ETS has sought to identify and address irregularities where they occur. Where it believes it has detected irregularities it will not release score reports. Examples of the sorts of the irregularities that would lead to a score report to being withheld in relation to a Speaking and Writing test would include:
>
> - where there has been a repeat test and the voice of the test taker is different from the previous test;
> - where are the voice of the test taker changes from one question to the next (this would suggest another person has been substituted during the test);)
> - where it appears imposters were sitting the tests in place of the test taker;
> - where the recordings revealing a voice other than the test taker giving them assistance; or
> - where an answer is unusually similar to another test taker's answer

41. But he also provides an important caveat (paragraph 20):

> Markers and supervisors are encouraged (through training and day-to-day management messages) to be vigilant to detect these irregularities. However, the deliberately fractured nature of the marking process means that, to a large degree, irregularities of this sort would only be uncovered if one marker was able to recognise patterns across items that he/she was marking. The irregularity would need to occur with sufficient frequency within the responses being reviewed by a single marker to cause that marker to flag the issue to his/her supervisor

42. The position therefore, subject to any further information which ETS is able to provide, is that the security precautions are concentrated on malfeasance by candidates rather than ETS test centres.

What records have been supplied for Mr Mohibuillah's tests in April 2012?

43. Within Schedule 1 of the Jones Day letter 22 June 2016 are records which appear to concern the listening and reading tests on 13 April 2012. These tests were part of the overall the overall TOEIC test. The questioned speaking tests took place, depending on which version you accept, on 17 or 18 April 2012. The copies of records I have are in places indistinct. I am of course aware that there is a conflict between the ETS certificate which says 17 April 2012 and other evidence in this case including Synergy's letter to Mr Mohibullah telling him to come to a speaking test on 18 April 2012 (9). As already noted, Schedule 1 contains what appears to be Mr Mohibullah's registration to take the tests on 13 April 2012. There is also is a Delivery/Returns Note which refers to the supply of test books, etc and whether they were used. It is interesting to note that on this occasion 40 test booklets were used and returned. If we now turn to the spreadsheets produced by Adam Sewell (33), we see that the following week the size of the group doing the spoken test had leapt to 71.

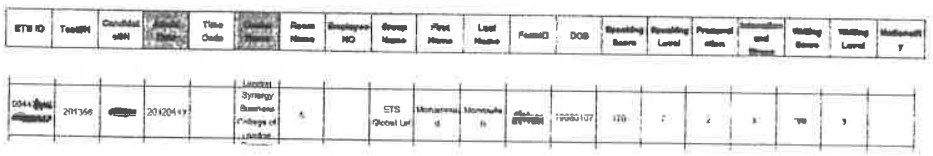
44. Schedule 2 also refers to the test on 13 April, not 17 or 18 April 2012. 60 tests are requested, 40 for the morning, 20 for the afternoon.

45. Schedule 3 provides some invoices. The first is for tests on 13 April 2012 and is for 46 tests plus a further 12 retakes. The second refers to 17 and 18 April 2012 where there is an invoice for 22 Speaking tests and 259 Speaking and Writing tests. It is important to note that this invoice seems to indicate that tests took place on 18 April as well as 17 April 2012.

46. Schedule 4 is a copy of Mr Mohibullah's Official Score Report for the Speaking and Writing test. It records it as having occurred on

17 April 2012. The registration number is for that test and does not uniquely identify Mr Mohibullah for all the tests he might take – there is no reference to his passport number. See what the 22 June 2016 Jones Day letter has to say at their paragraphs 6 and 7 and also my paragraph 31. I note again that the letter from Synergy to Mr Mohibullah letter of 13 April 2012 (9) refers to the Speaking and Writing test date as to take place at 18 April 2012.

47. In a letter dated 21 July 2016 Jones Day provided, *inter alia,* a PDF file named "Synergy data 13-17&18 April 2012". There is no explanation as to its provenance. I draw attention to the absence from the table of a column for the identity document (in the case of Mr Mohibullah this would be his passport number; it appears in the Seating Arrangement and the Attendance List for April 13 in the Schedule 1 documents produced by Jones Day). The header and the line referring to Mr Mohibullah are reproduced below from screen grabs:



It will be seen that it appears to refer to 17 April 2012; there is no column for Mr Mohibullah's unique identity provided at registration – his passport number. At the time this statement is being completed I do not have a spreadsheet for activity on 18 April 2012.

Analytic Activity by Home Office

48. The above information comes from Jones Day, acting for ETS. But we also need to look at the data provided by ETS to the Home Office during 2014 and relied on by Adam Swell (33) as per his statement of 6 July 2015. He says: "I identified that the data received from ETS was stored electronically within a folder called

Full data ETS." (He then identifies the folder's location within Home Office systems). The particular document of interest appears to be "S&W data 01.01.2012 to 30.04.2012" and which was apparently created by Richard Shury on 6 February 2014. Adam Sewell exhibits this as AS/020615/11. At the point this statement is being completed I have not seen this document. Richard Shury provides a witness statement (27) but it does not deal with the supply of data to the Home Office.

49. At page 4 of his statement Adam Sewell tells us that he "performed various tasks to cleanse the data". I have read the passages carefully but cannot see that the data supplied to him makes it possible for the candidate ID to be inextricably linked to each test. The data, as it appears to have been supplied, refers to each individual test and its associated result. The name of the candidate appears but not the candidate's unique identity. As a result, if the data provided by Synergy to ETS – and which in turn is relied on by the Home Office – mismatches the candidates and their test, no check exists against the candidate ID.

Opportunities for proxy impersonation and other means of system deception / corruption

50. We can first turn to the various reports and admissions of frauds known or alleged to have taken place at Synergy in April 2012 and other ETS test centres. I have also been able to turn to the initial reports of the two other experts in this case, David Heighway instructed by the Home Office and Chris Stanbury instructed for another applicant. Although the reports of all three experts have slightly different emphases in terms of what scenarios they considered, there is nevertheless substantial agreement in terms of conclusions.

51. **Simple impersonation** Under this arrangement the candidate arrives at the test site, presents his credentials including ID documents, is admitted to the examination room and enters sign-on information on to the terminal. At some point, a photograph is supposed to be taken (but we know that this was not via the iPhone application which was not then in place). So far no photographs of Mr Mohibullah either on 17 or 18 April 2012 taken by any means have been produced by ETS. Once the sign-on has been completed, the candidate leaves the terminal and examination room and is replaced by the proxy who then proceeds to respond to the tests. At the conclusion of the test, the candidate returns, picks up his identity documents and leaves. Later the candidate receives the test results.

52. This is the method described as being witnessed during the unannounced ETS audit which took place on 16 January 2013, details of which appear in the statement of Ahmad Bdour (25) and which led to the termination of the Synergy's contract in the letter of 8 February 2013 (17).

53. This was also the experience of [redacted] (31) on 15 January 2013, [redacted] (29) and [redacted] (30), though the latter two do not provide dates when the impersonations took place.

54. It should be noted that within the bundle there are interview summaries with individuals who say that they took tests at Synergy and that neither they nor anyone else then present was using proxies. See [redacted] (25) and [redacted] (28). There is also a witness statement of a police officer, [redacted] (42) which refers to police interviews with nine others who denied dishonesty.

55. This method would be vulnerable in any "speaking" test.

56. **Dictated answers** This method is referred to in the statement of Rebecca Collings (2) and which in turn quotes from a letter from the BBC dated 6 January 2014. The BBC *Panorama* programme shows this taking place. Plainly this method would not be viable in a test of spoken English.

57. **Staff filling in of answers** This method too is referred to in the statement of Rebecca Collings (2) and which in turn quotes from a letter from the BBC dated 6 January 2014. Again, this method would not be viable in a test of spoken English.

58. **Remote Control Software** Under this arrangement, candidates attend a test centre, and perhaps input their own basic registration details. But the computer terminal they are using has been loaded with a small piece of software which enables it to be controlled remotely from elsewhere – either from other machines in effect on the same local area network or (and without technical difficulty) from anywhere in the world with Internet connectivity. At the end of the test, control is given back to the candidate. During the test, the candidate may be able to see activity on the screen in front of him or her, and hear audio via headphones, but this depends on the software being used, some software in this class operates wholly covertly.

59. This is the method discovered during Project Façade (11). In this instance, the specific remote control software used is called TeamViewer. I use this product myself. Its main normal usages are, firstly, to enable someone to access an office or home based computer from outside and using someone else's computer. Secondly, it is widely used by computer support technicians in large organisations so that they can assist users without necessarily having to visit them in person. There are a number of similar products. TeamViewer operates overtly – popups on the screen announce its presence and mouse movements would also be visible

- but covert remote control is also a very common feature in cybercrime activity allowing a perpetrator to take control of a victim's computer for such purposes as executing frauds and acquiring confidential information. The legitimate owner is normally not aware that remote control is taking place. In his second statement Mr Mohibullah says that his recollection is that TeamViewer might have been present on the computer he used. But he says he was not aware of its use.

60. Project Façade was an inquiry into a test centre in Birmingham. Investigators were able to seize computers and see that TeamViewer had been installed. In the case of Synergy, my understanding is that no computers were seized so that no forensic examination was possible.

61. **Faked input** One of the oldest forms of "computer fraud" consists of inputting misleading information into a computer system. The reason why this may be possible is usually attributable to poor controls over who has access to a system and what the system allows them to do without further checking. The computer system then processes the data it has received perfectly. Similar problems for reliability arise when incorrect data is input is as a result of **accident** or **clumsiness**. I pursue this possibility below.

62. **File manipulation** The feasibility of this method depends on the infrastructure of the testing environment. In theory it might be possible to carry out file manipulation on individual CBT Client computers but if this tactic is to be used at all it makes more sense to attempt it on the CBT Manager. If it is the case that file responses are held on the local server at the testing centre, then there could be a point at which that file is available for alteration by staff at the test centre. However, compared with the other methods set out here, I am of the opinion that this would require relatively high orders of skill both to understand the structure of the information within the

file and then to conceal the alteration that had taken place. I note the remarks in the 22 June 2016 Jones Day letter at paragraphs 49 and 50 in response to hypotheses promoted in the Kroll Ontrack report. I also note the upload times on 17 April 2012 which were very shortly after the completion of the tests, thus leaving almost no time in which file manipulation could occur (Jones Day letter 22 June 2016 at paragraph 9). Nevertheless, at least with a "mass" substitution this could be a possibility; much would depend on the skill of any fraudsters with access to Synergy computer systems. If this took place the "monitoring the success of the uploads" methods referred to by Hae Jim Kim might be defeated.

63. **Administrative Clumsiness** If we assume that Synergy staff had unsupervised access to a computer by which examinees are registered, there arises the possibility that they did not see the need for care in data input. The Jones Day letter at paragraph 17 says:

> On 24 June 2014 the Minister for Immigration announced in Parliament that the ETS Global network in the UK had been infiltrated by organised crime and confirmed that following review 48,000 test results had been cancelled by ETS Global. It was also announced that individual criminal investigations had been launched against ETS Global and certain test centres. It is our understanding from the Home Office that these criminal investigations being undertaken by the Home Office are both complex and ongoing.

64. As noted above Hae Jim Kim, says:

> The voice files in relation to that Registration Number would then be automatically linked to the personal details that were entered onto the computer prior to the start of the test.... the voice recordings are automatically linked to the personal details that are entered onto the computer at the start of the test and coded accordingly.

65. The question is whether this universally true. The data, as it appears to have been supplied, refers to each individual test and its associated result. The name of the candidate appears but not the candidate's unique identity. As a result, if the data provided by Synergy to ETS mismatches the candidates and their tests no check exists against the candidate ID.

66. The aim of Synergy staff was simply to take a number of candidates and deliver to those candidates a certificate saying that the test had been passed. Up to a point, it did not matter whether a candidate was going to pass on the basis of their own activities or because there had been a substitute or other form of cheating. From the perspective of the candidates what was wanted was a certificate which could be forwarded to the Home Office. Particular opportunities for mistakes appear to arise if the actual registration on the ETS system is sometimes carried out by test centre staff and not by the candidates themselves, though obviously the candidates would have had previously to provide test centre staff with identity information such as a passport number (though as I note above, that would seem to be possible here given that Synergy staff had had Mr Mohibullah's details for several days). Presumably, and depending on how precisely any fraud was being carried out, it would be possible for test centre staff to hand out the wrong registration details to a proxy who then (wrongly) enters the details of a legitimate test taker instead of his intended "client". It is not clear to me how ETS would detect any of this other than by surprise audit. Under normal circumstances administrative clumsiness in the form of misallocating identity details during the registration process would not be manifest. I also note that as I understand it, had this happened on 17 April 2012, and Mr Mohibullah had then turned up to take his test on 18 April 2012, that would not necessarily trigger any alert because re-entering the same details a day later would simply produce a different (legitimate) test certificate with an entirely new registration number.

Forensics

67. I have been asked to consider the extent to which the techniques of digital forensics may be of assistance in this matter.

68. My understanding is that none of the computers and data media associated with Synergy is available. Had this material been available, then some of the conjectures about the technical infrastructure referred to above would have been less speculative as among other things there might have been audit, log and configuration files and all files would have carried date and time stamps. In addition, the general business records of Synergy might have been very helpful.

69. There are bound to be extensive records held by ETS in relation to Synergy and the various candidates that used it as a test centre. Reference is made to "raw files" received are from ETS in the statement of Adam Sewell (33) but we do not know how these were derived and the reliability or their provenance. Jones Day at paragraph 10 of their letter say that they do not know what is meant by "raw files". This is a term used by witness Adam Sewell (34). He uses it in the context of producing spreadsheets which he wishes the Tribunal to accept as reliable. Hae Jim Kim tells us – his paragraph 16 – that ETS's "servers are accessible only by authorised personnel and the voice responses are typically stored for 999 days. ETS is not aware of any file manipulation, corruption or misapplication of these files on its systems". I note also that ETS outsourced some of its facilities to a specialist company called YBM. But he does not address the possibility of manipulation by test centres before they are received by ETS. Mr Sewell's statement is concerned with how he transformed the raw data into various forms of use to investigators – and the tribunal. We can also see references to ETS stored data in the statement of Raymond Nicosia (39 and Ahmad Bdour (25).

70. **Voice recordings** The only digital files I have been given are the voice recordings which ETS say are associated with Mr Mohibullah

and which were analysed as part of the biometric testing that ETS conducted to identify those who had used proxies:

00044[redacted]_VC283624_186545698.ogg
00044[redacted]_VC286161_186545798.ogg
00044[redacted]_VC286753_186545639.ogg
00044[redacted]_VC287957_186545623.ogg
00044[redacted]_VC287969_186545668.ogg
00044[redacted]_VC288421_186545649.ogg

71. The file names contain a number – "0044[redacted]" - which corresponds to the one that appears against Mr Mohibullah's entry in the two Ahmed spreadsheets exhibited in (33). The 22 June 2016 Jones Day letter at paragraph 15 explains how they are made up.

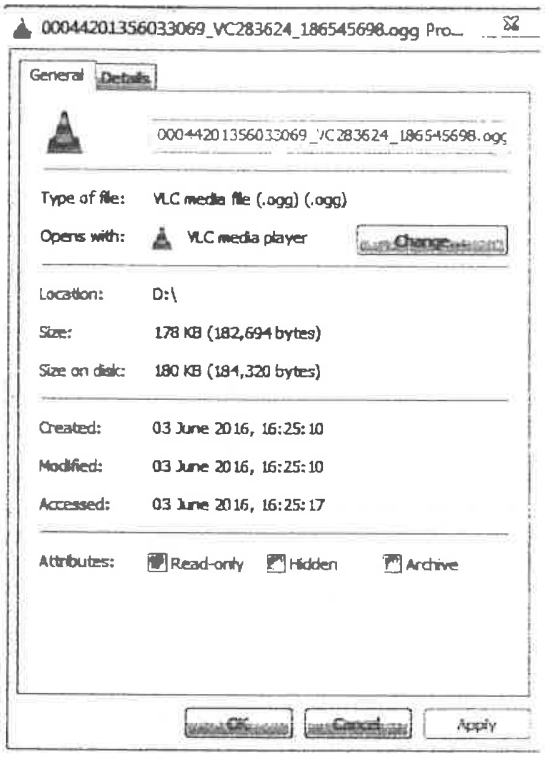
> The file names on voice recordings are made up of three elements. The first is a combination of the country where the test occurs, here "0044" for the UK, and the test taker number for that test administration - using Mr Mohibullah's voice recordings as an example ([redacted]). The voice recordings previously provided to the Tribunal in respect of Mr Mohibullah *all contain the same unique registration code linked to his personal details* for that test administration. The second element, for example in Mr Mohibullah's first voice recording, "VC283624" is the ID that is specifically allocated to the particular question that the test taker is answering (this element would be the same for each test taker answering the particular question at the relevant test administration (or, indeed, at any other test administration at any test centre)). The third element is the response ID number which is a number that is automatically generated and is unique to that test taker's response to the specific question. So continuing with the same example of Mr Mohibullah's first voice recording "186545698".

Please note that the elements in italics do not appear to be true – the file name does not include the "unique registration code".

72. In the current context what this naming system does is to provide linkage between a registered candidate and the responses and recording but assumes that that the unique registration code is reliably linked to the real Mr Mohibullah. In the two spreadsheets exhibited by Adam Sewell (33), there are no columns uniquely to identify candidates by reference to the ID they originally tendered (eg the passport number).

73. There are a number of different formats of digital audio, of which MP3 and .WAV are the most familiar. In this instance the format in which the files were delivered is .OGG. I have consulted the academic and scientific literature and also used a hex editor to examine the contents of the files. My hope was that there might be some embedded meta data which would be of value. For example in the MP3 format information about the title of a tune, a composer, performer, music category, dates of recording can be embedded – this information can be used, for example, to display while a file is playing and for cataloguing purposes. Metadata also occurs in other common computer files such as documents created using Microsoft's Word program. Metadata can often be displayed on a computer screen by looking for the "properties" of an individual file.

74. However, although the technical specification for .OGG files seems to allow for the optional provision of metadata, my examination of the supplied files shows none. The only information is that of date and time, and in this instance the date and time shown is that of the creation of the file on a CD media upon which it was delivered – in early June 2016.



75. On July 21 2016 I supplied with audio further files in .WAV format but these too lack any embedded metadata, the file date stamps appear to be the dates of last copying not of origination and do not add anything to the investigation.

Audit

76. At paragraph 39 above, speaking of my analysis of the procedures as indicated by the supplied ETS Manuals I said: "What is striking about all of these procedures is the extent to which trust is placed by ETS on the reliability and probity of staff in the test centre."

77. The main mechanism appears to have been the unannounced audit. Ahmad Bdour (25) says: "individual audits were generated in a number of ways. Analysis of ETS data relating to test results may indicate unusually high test taker numbers. At times,

correspondence, either from the Home Office i.e. score verification requests or anonymous emails from individuals will also highlight concerns as to how tests will be conducted. Such material will usually require a visit to the test centre, either by an announced or unannounced visit."

78. We can see one such audit took place on 15 May 2012. This is referred to by Richard Shury (27) and he provides a copy of a handwritten audit report by someone called Matthieu. Matthieu expressed mild concern, but not, it appears to the point of suggesting remedies or sanctions.

79. We have already referred to the unannounced ETS audit which took place on 16 January 2013, details of which appear in the statement of Ahmad Bdour (25) and which led to the termination of the Synergy's contract in the letter of 8 February 2013 (17).

Possible additional security features

80. There are a number of precautions which ETS could have considered if they had concerns about the reliability and probity of the various test centres and in particular the risk of the use of proxies:

- **Use of webcam verification**: each candidate (client) computer has a webcam which periodically takes random snapshots of the person sitting at the terminal during the course of the examination. The pictures are uploaded to ETS. The webcam pictures can then be compared with the official photo ID such as a passport.

- **Video camera in examination room**: a video camera is placed such as to have a view over the entire examination room. If the camera is part of the local

network (and is an IP camera), then it is possible for an invigilator located anywhere in the world to see if proxy substitution or other irregularity is taking place.

- **Arbitrary testing of CBT Manager and CBT Client computers** for integrity, including the presence of remote control and other unauthorised software. In effect, a TeamViewer installation (or similar monitoring software) run by ETS would be able to examine the configuration of each machine and do so remotely from the United States.

Hypotheses - could Mr Mohibullah's files be mis-labelled?

81. I now turn to examine scenarios under which Mr Mohibullah may have properly attended and taken part in a test, but the data held by ETS is incorrect. It is common ground that the voice recordings which ETS say should belong to Mr Mohibullah are in fact not of him.

82. The question to be answered is the extent to which trust can be placed in the probity of ETS's remote test sites and in particular what was happening at Synergy. The reliability of evidence produced from ETS depends entirely on assuming that the actions of and records produced by the remote test sites are accurate and cannot be compromised.

83. It seems quite clear that Synergy were providing fraudulent activity on behalf of some of their examinees. The bundle also includes statements from examinees who say that no proxying or other compromising activity took place.

84. Among the tasks of the test centre is to carry out verification of the ID credentials tendered by candidates. The particular tasks for

which attention would normally be needed include: registering the candidate under the right name and checking that there was a proper match between each the ID credentials provided by the person and their identity on the system as it was to be recorded by ETS. There also needs to be a check linking the candidate to a specific computer terminal in the room. Moreover, this issue does not appear to have been addressed during the audit report which we have. A particular puzzle arises from the redacted spread sheet exhibited by Adam Sewell (33) where it appears that 71 candidates including Mr Mohibullah apparently took the test at 1410 that day and all apparently in the same room – Room A. The 71 figure contrasts with the 40 who took the related tests on 13 April- see my paragraphs 1 and following above. My understanding is that this room was not large enough for 71 candidates all sitting at computer terminals (though that is a matter for evidence). To repeat an earlier comment: If we assume that Synergy staff had unsupervised access to a computer by which examinees are registered, there arises the possibility that they did not see the need for care in data input. The aim of Synergy staff was simply to take a number of candidates and deliver to those candidates a certificate saying that the test had been passed. Up to a point, it did not matter whether a candidate was going to pass on the basis of their own activities or because there had been a substitute. Further, if Synergy staff were complicit in a relatively large-scale fraud, and were selling proxy test taker packages to a number of individuals, and this fraud was executed carelessly so that genuine test taker details were mixed up with those who had bought a fraudulent service, then the records will not be reliable and it is not easy to see how the problem would be identified save by criminal investigation or the process with which we are now concerned.

85. If remote control software of the sort used in Project Façade and discussed in paragraph 58 above is being deployed there is further

scope for mis-recording of candidates' activity. The fraudulently-behaving test centre has to arrange to match the activity of a remotely-sited proxy operator to candidates who are to be "helped" but with little means of detecting that a mistake is being made. It seems possible that during any one test session there could be several candidates who are being aided and several who are not.

86. This hypothesis is based on incomplete evidence and it may well be that ETS are able to produce manuals and properly provenanced records which undermine it. There is also, I suppose, the possibility that witness statements are forthcoming from former Synergy staff.

87. A further possibility is that ETS itself is not keeping its records in a sufficiently reliable fashion. It would be helpful in order to climinate this possibility to know something of the audit regime within ETS. It would also assist, if ETS are able to say whether there have been any questions or complaints in the past about the quality of its data management. All we have at the moment are the assurances given in the statement of Hae Jim Kim. We also know that ETS had outsourced some of his computer facilities to a company called YBM.

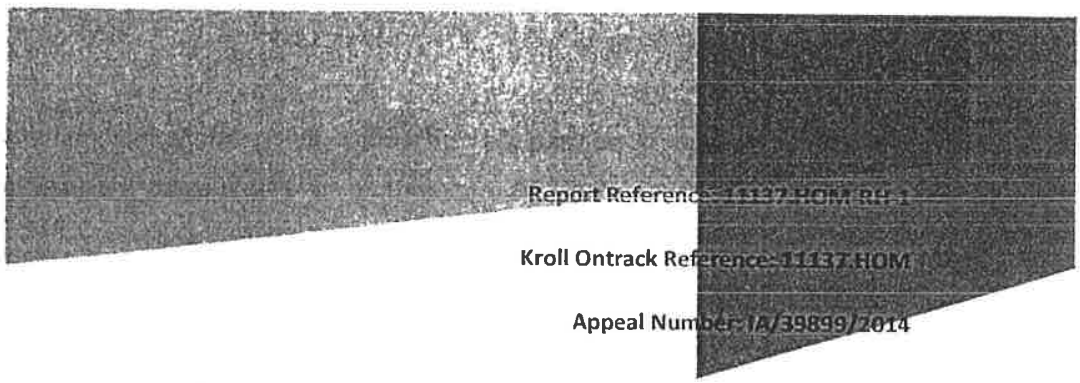
88. In order to further investigate the possibility of file manipulation further information is required, including a detailed description of the process of recording and downloading the tests, the database onto which they are stored, and the system of uploading them to ETS. We have some information in the Test Centre Administration Manual (20) which indicates opportunities for file manipulation, including following the end of the test but before the data is submitted into the database (see page 31) and following submission into the database but before the data is uploaded to ETS (pages 23-24). It would have been helpful to have the raw files in their totality, which might provide useful metadata such as date and time stamps of receipt and uploading. However I understand that there

would have been practical difficulties in providing this material, partly because of ETS's outsourcing to YBM, partly because of their bulk and partly for reasons of confidentiality.

I am happy to attend the Tribunal and give evidence before it.

Peter Sommer

25 July 2016



Secretary of State for the Home Department

(Appellant)

-and-

MA

(Respondent)

Upper Tribunal, Immigration and Asylum Chamber

Expert Report of Richard HEIGHWAY

26th July 2016

STRICTLY PRIVATE AND CONFIDENTIAL

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Kroll Ontrack.

1 INTRODUCTION

Report by Mr Richard **HEIGHWAY**
Kroll Ontrack Legal Technologies Ltd
25 Farringdon Street
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EC4A 4AB

On behalf of Secretary of State for the Home Department
Litigation Group
One Kemble Street
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WC2B 4TS

2 INSTRUCTIONS

2.1.1 On 5th **April 2016**, Kroll Ontrack Legal Technologies Ltd ("**KOLT**") was engaged by Nicola **HAMMOND**, acting on behalf of the Secretary of State for the Home Department ("**SSHD**"), to act as an independent computer forensic expert in order to produce this report ("**REPORT**") for use in the appeal involving **MA**. This respondent has had their name redacted due to an anonymity order.

2.1.2 The appeal involves the Educational Testing Service ("**ETS**") Test of English for International Communication ("**TOEIC**") examination that was being conducted at Cauldon College ("**CC**") and Synergy Business College ("**SBC**").

2.1.3 The examination consists of **two (2)** elements, namely '**Listening and Reading**' and '**Speaking and Writing**'. It is the '**Speaking and Writing**' element that **KOLT** has been instructed to scrutinise, specifically the integrity of the speaking examination.

2.1.4 I have prepared this **REPORT** following instructions provided by **SSHD** as detailed below

a) *"Is it possible that a recording of a genuine test-taker's voice might be re-used by a fraudulent test centre and submitted to ETS as the TOEIC speaking test of other test-takers?"*

b) *"Is it possible that a genuine test-taker could take the ETS TOEIC test honestly and yet it could transpire, without that test-taker's knowledge, that ETS's recordings of that person's test have someone else's voice?"*

Kroll Ontrack.

3 ITEMS SUBMITTED FOR REVIEW

3.1.1 The items that were provided to me for the preparation of this **REPORT** are set out below with a corresponding letter used to reference in this **REPORT**.

a) A portable document format (**"PDF"**) file named **'ltr to Koll Ontrack.pdf'** containing **four (4)** pages. This is a letter to Danielle Rowe from Nicola Hammond dated **5th April 2016**.

b) A PDF file named **'enclosure i-iii.pdf'** containing **twenty eight (28)** pages.

c) A PDF file named **'enclosure iv.pdf'** containing **two (2)** pages. This is a letter to Mike Wells from Jones Day dated **13th May 2015**.

d) A PDF file named **'enclosure v.pdf'** containing **fifteen (15)** pages.

e) A PDF file named **'Enclosure vi.pdf'** containing **twenty nine (29)** pages. This is a report of Christopher Stanbury dated **31st January 2016**.

f) A PDF file named **'enclosure vii.pdf'** containing **four (4)** pages. This is a letter to Jones Day from Nicola Hammond dated **15th February 2016**.

g) A PDF file named **'enclosure viii.pdf'** containing **four (4)** pages. This is a letter to Oaks Solicitors from Nicola Hammond dated **18th February 2016**.

h) A PDF file named **'enclosure ix.pdf'** containing **two (2)** pages. This is a letter to Jones Day from Nicola Hammond dated **26th February 2016**.

i) A PDF file named **'enclosure x.pdf'** containing **four (4)** pages. This is a letter to Nicola Hammond from Venuka Balakumar dated **3rd March 2016**.

j) A PDF file named **'Document.pdf'** containing **three (3)** pages. This is a letter to Julian Smith from Jones Day dated **26th February 2016**.

k) A PDF file named **'enclosure xii.pdf'** containing **twelve (12)** pages.

l) A word processed document named **'enclosure xiii.doc'** containing **three (3)** pages.

m) A PDF file named **'Peter Millington.pdf'** containing **fourteen (14)** pages. This is a statement of Peter Millington dated **23rd June 2014**.

n) A PDF file named **'Rebecca Collings.pdf'** containing **nine (9)** pages. This is a statement of Rebecca Collings dated **23rd June 2014**.

o) A PDF file named '[redacted] **skeleton.pdf'** containing **eighteen (18)** pages.

p) A PDF file named **'EUI_1200448612_1_Letter to Government Legal Department.pdf'** containing **seven (7)** pages.

q) A PDF file named **'Response received from ETS.pdf'** containing **fifteen (15)** pages.

r) A compressed ZIP file named **'UK_RUSH.zip'** containing **six (6)** ogg files.

s) A PDF file named **'EUI_1200521765_1_Letter to Government Legal Department 13 May 2016.pdf'** containing **three (3)** pages. This is a letter to Government Legal Department from Jones Day dated **13th May 2016**.

t) A PDF file named **'SW Admin Day Guide.pdf'** containing **four (4)** pages. This is a document titled **'Speaking and Writing ADMIN DAY Guide'**.

u) A PDF file named **'SW Test Day Guide.pdf'** containing **seven (7)** pages. This is a document titled **'Speaking and Writing TEST DAY Guide'**.

v) A PDF file named **'TOEIC Speaking and Writing - Test Centre Administration Manual.pdf'** containing **fifty seven (57)** pages. This is a document titled **'Test Center Administration Manual'**.

w) A PDF file named **'Test Centre Photo Registration Guide.pdf'** containing **five (5)** pages. This is a document titled **'UK Photo Registration'**.

x) A PDF file named **'Test Administration Procedures.pdf'** containing **twenty six (26)** pages. This is a document titled **'Test Administration Procedures'**.

y) A PDF (Portable Document Format) file named '**TOEIC Speaking and Writing Examinee Handbook.pdf**' containing **thirty six (36)** pages. This is a document titled '**Examinee Handbook**'.

z) A PDF file named '**TCA User Guide.pdf**' containing **five (5)** pages. This is a document titled '**PTPix TCA user documentation**'.

aa) Video of BBC Panorama documentary ('**http://youtu.be/ailj8zNc2DA**')

bb) A PDF file named '**EXHIBIT RS-2 SYNERGY MATTHIEU AUDIT REPORT.pdf**' containing **one (1)** page. This is a document detailing an audit by '**Matthieu**' dated **15th May**.

cc) A PDF file named '**EXHIBIT RS-111214-003 BDOUR AUDIT REPORT.pdf**' containing **one (1)** page. This is a document detailing an audit by '**Ahmad Bdour**' dated **16th January 2013**.

dd) A PDF file named '**MG11 - ADAM SEWELL.pdf**' containing **ten (10)** pages. This is a statement of Adam Sewell dated **6th July 2015**.

ee) A PDF file named '**MG11 - AHMAD BDOUR 08092015.pdf**' containing **two (2)** pages. This is a statement of Ahmad Bdour dated **8th September 2015**.

ff) A PDF file named '**MG11 - AHMAD BDOUR 20112014.pdf**' containing **five (5)** pages. This is a statement of Ahmad Bdour dated **20th November 2014**.

gg) A PDF file named '**MG11 - AHMAD BDOUR EXHIBITING 06032015 CONFESSIONS AND DVD.pdf**' containing **two (2)** pages. This is a statement of Ahmad Bdour dated **6th March 2015**.

hh) A PDF file named '**MG11 - DAVID THOMSON.pdf**' containing **three (3)** pages. This is a statement of David Stuart Thomson dated **26th October 2015**.

ii) A PDF file named '**MG11 - DR CHRISTIN KIRCHHUBEL.pdf**' containing **fourteen (14)** pages. This is a statement of Dr Christin Kirchhübel dated **11th December 2015**.

jj) A PDF file named '**MG11 -** MS [redacted] **f**' containing **four (4)** pages. This is a statement of Mazharuddin Syed dated **17th February 2015**.

HM

kk) A PDF file named '**MG11 - [redacted].pdf**' containing **four** (**4**) pages. This is a statement of Hasan Murad dated **30th January 2015**.

PNS

ll) A PDF file named '**MG11 - [redacted].pdf**' containing **four** (**4**) pages. This is a statement of Prayas Nareshbhai Shah dated **17th February 2015**.

mm) A PDF file named '**MG11 Abdul AHMED Spreadsheets.pdf**' containing **one** (**1**) page. This is a statement of Abdul Ahmed dated **11th May 2016**.

nn) A PDF file named '**MG11 FREDERICK ALAN CLINE.pdf**' containing **eight** (**8**) pages. This is a statement of Frederick Alan Cline dated **30th October 2015**.

oo) A PDF file named '**MG11 HAE JIN KIM.pdf**' containing **ten** (**10**) pages. This is a statement of Hae Jin Kim dated **22nd October 2015**.

pp) A word processed document named '**MG11 Power Disclosure re MOHIBULLAH revised.doc**' containing **six** (**6**) pages. This is a statement of Michael John Power dated **12th May 2016**.

qq) A PDF file named '**MG11 R NICOSIA 19-11-2015 (1).pdf**' containing **five** (**5**) pages. This is a statement of Raymond Nicosia dated **19th November 2015**.

rr) A PDF file named '**MG11 R SHURY 11-12-14 (2).pdf**' containing **ten** (**10**) pages. This is a statement of Richard Shury dated **11th December 2014**.

ss) A PDF file named '**MG11 RANDOLPH JOHN CLINE.pdf**' containing **six** (**6**) pages. This is a statement of Randolph John Cline dated **26th October 2015**.

AK

tt) A PDF file named '**MJP02 SDN INTERVIEW WITH [redacted]pdf**' containing **two** (**2**) pages. This is a document detailing the interview of Ariful Islam Khan dated **3rd December 2014**.

MH

uu) A PDF file named '**MJP2 SDN INTERVIEW OF [redacted]pdf**' containing **two** (**2**) pages. This is a document detailing the interview of Mohammad Moazzem Hossen dated **27th November 2014**.

vv) A PDF file named **'S1 Randolph Cline SOE final 261015.pdf'** containing **six (6)** pages. This is a statement of Randolph John Cline dated **26th October 2015**.

ww) A PDF file named **'S2 Frederick Cline 301015.pdf'** containing **nine (9)** pages. This is a statement of Frederick Alan Cline dated **30th October 2015**.

xx) A PDF file named **'S3 HJK final 221015.pdf'** containing **ten (10)** pages. This is a statement of Hae Jin Kim dated **22nd October 2015**.

yy) A PDF file named **'16.05.03 Mohibullah Mohammad - Report by Dr Rhodes.pdf'** containing **sixteen (16)** pages. This is a report by Dr Richard Rhodes dated **3rd May 2016**.

zz) A PDF file named **'16.05.03 Mohibullah Mohammad - Report by Dr Harrison.pdf'** containing **eight (8)** pages. This is a report by Dr Philip Harrison dated **3rd May 2016**.

aaa) A Microsoft Excel spreadsheet named **'Exhibit ARA1105161 AHMED spreadsheet.xlsx'**.

bbb) A Microsoft Excel spreadsheet named **'Exhibit ARA1105162 AHMED spreadsheet Redacted..xlsx'**.

ccc) A Microsoft Excel spreadsheet named **'Exhibit AS02061545SEWELL spreadsheet.xlsx'**.

ddd) A PDF file named **'EUI_1200652463_1_2016 06 22 Letter to Bindmans.pdf'** containing **eleven (11)** pages. This is a letter to Bindmans LLP from Jones Day dated **22nd June 2016**.

eee) A PDF file named **'EUI_1200652105_1_Schedules PDF.pdf'** containing **nineteen (19)** pages. This is a collection of documents depicting various forms pertaining to the **TOEIC** examination.

fff) A PDF file named **'16.05.15 Mobibullah Professor Sommer report.pdf'** containing **forty (40)** pages. This is a report by Professor Peter **SOMMER** dated **15th June 2016**.

ggg) A PDF file named **'Updated Stanbury report - 24.6.2016.pdf'** containing **thirteen (13)** pages. This is a draft report by Christopher **STANBURY** dated **24th June 2016**.

hhh) A PDF file named '**Document.pdf**' containing **two** (**2**) pages. This is a letter to Bindmans LLP from Jones Day dated **27th June 2016**.

3.1.2 In preparing this **REPORT**, I have not analysed any other documentation other than that stated in paragraph 3.1.1 and I have not had full access to any **ETS** computer systems.

4 EXPERT DUTIES

4.1.1 I understand that I have been retained by **SSHD** as an independent expert but that my duty is to assist the Court should this be necessary. Specifically:

4.1.2 I understand that my duty is to help the Court on matters within my own expertise and that this duty is paramount and overrides any obligation to the person from whom I have received my instructions or who pays me;

4.1.3 I understand that my role is to provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within my expertise and that I should not assume the role of advocate;

4.1.4 I have endeavoured in the **REPORT** to state the facts or assumptions on which my opinions are based and confirm that I have considered all material facts, including those which could detract from my opinion and that I have made it clear if a particular question fall outside my expertise;

4.1.5 I have also made it clear in my **REPORT** where any opinion of mine is only provisional because I have been provided with insufficient data or where I have had insufficient time to consider data which is available to me;

4.1.6 I confirm that if, after producing my **REPORT** or for any other reason, I will communicate, through **SSHD**, such a change of view to all parties and the Court if appropriate without delay; and

4.1.7 I understand that I must take reasonable care in trying to meet the duties and standards that apply to me as an independent witness.

5 REPORT LEGEND

5.1.1 Where I have defined terms, these are capitalised throughout this **REPORT** and I have listed them in the **Index of Defined Terms** at the end of this **REPORT**.

5.1.2 Where I have referred to technical terms, they are shown in bold text and I have listed them in the **Index of Technical Terms** at the end of this **REPORT**.

6 EXECUTIVE SUMMARY

6.1.1 The documentation available to me supports the fact that test centre staff and test candidates are unable to replace audio recordings within the **ETS TOEIC** user interface.

6.1.2 The audio recordings for speaking test candidates are stored in a password protected database, with this storage being utilised there appears to be **two (2)** possible causes that could lead to a genuine candidate's recording being swapped outside of the **TOEIC** user interface:

1. A computer user with nefarious intent and advanced knowledge of the systems in place has attempted to deliberately replace recordings.
2. An undocumented system fault has misidentified and reused the audio recordings.

6.1.3 No evidence has been found in the information made available to me to suggest the **two (2)** causes have occurred, these are purely speculative ideas.

7 TOEIC EXAMINATION (OVERVIEW)

7.1.1 A **TOEIC** examination is taken at a test centre (**"TC"**) based in the United Kingdom (**"UK"**), such as **CC** and **SBC**, where strict guidelines and procedures, set in place by **ETS**, must be adhered to.

7.1.2 The examination is configured and carried out at the **TC** under the supervision of a Test Centre Administrator (**"TCA"**) and helped by support staff known as Proctors (**"PROC"**), these are collectively referred to as the **"STAFF"**.

7.1.3 A **UK TC** is typically configured with a local network consisting of a number of computers running a mobile delivery platform on **Microsoft Windows. One (1)** computer is configured as the test manager (**"TMA"**) and the remaining computers are configured as a test client (**"TCL"**).

7.1.4 The installation files to configure a **TMA** or **TCL** on a computer are available to download from the websites **'center.toeicswt.com/admin'** and **'center.toeicswt.com'** respectively.

7.1.5 For the **TC STAFF** to install these applications on a computer, they must have administrator privileges in the **Microsoft Windows** operating system. After installation, the **STAFF** or candidate would not need these elevated privileges to commence the **TOEIC** examination.

7.1.6 When the network is configured and applications are installed, there appears to be a function on the **TMA** that is initiated by the **TCA** that uploads the examination questions to each connected **TCL**.

7.1.7 A candidate would attend a **TC** to take the examination during a specified test session that has been given an allocated time slot. A number of candidates are permitted to take the examination in the same test session. The examinations are carried out by the candidates on the computers running the **TCL**. When the examination is complete the answers are automatically submitted to the **TMA**.

7.1.8 At the end of a test session, the answers from each examination are uploaded from the **TMA** to the **ETS** servers in the United States of America (**"USA"**) for grading.

8 TOEIC EXAMINATION (KOLT SETUP)

8.1.1 Based on the computer requirements referred to in item **V** (pg55), it is understood that all computers at a **TC** would be running the **Microsoft Windows** operating system.

8.1.2 To get a better understanding of the **TOEIC** examination process, an instance of the **TMA** and **TCL** was installed onto **two (2)** computers connected to the same network in the **KOLT** secure laboratory.

8.1.3 I was able to navigate to the website '**center.toeicswt.com/admin**' and download the **TMA** onto a **KOLT** computer configured with the Internet Protocol ("**IP**") address '**192.168.1.64**'.

8.1.4 After installation of the **TMA** was complete, the Window as shown in Figure 1 was opened, this is similar to the screen capture shown in item **V** (pg20). This Window indicated that the application version I had installed was **16.509.0.1**.

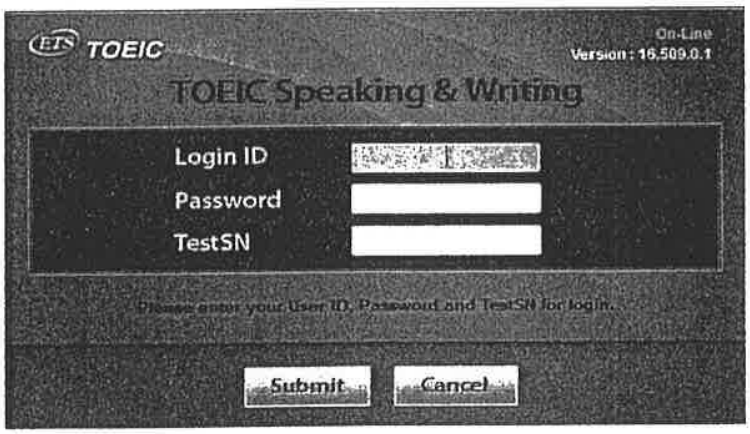

Figure 1 TMA Welcome Screen

8.1.5 I could not progress passed this screen as I do not have a '**Login ID**', '**Password**' or '**TestSN**'.

8.1.6 I was also able to download the **TCL** from the website '**center.toeicswt.com**'. This was installed onto a **KOLT** computer connected to the same network as the computer running the **TMA**. The **TCL** computer was assigned the **IP** address '**192.168.1.149**'.

8.1.7 As with the **TMA**, I could not progress passed the Windows shown in Figure 2 and Figure 3 that had opened in the **TCL**.

Figure 2 TCL Configuration

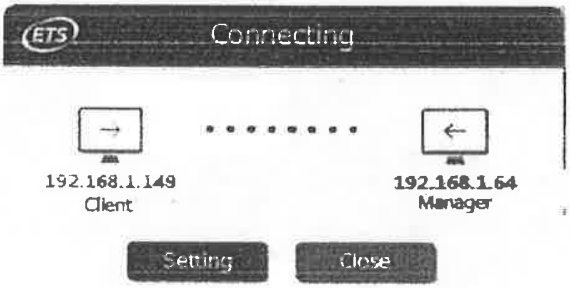

Figure 3 TCL Status

8.1.8 With the limited access to the **TOEIC** system that I had, I have made a number of observations:

1. The **TMA** and **TCL** Windows stay on top of all other Windows
2. The **TMA** and **TCL** Windows cannot be moved
3. Other applications and Windows behind the **TMA** and **TCL** Windows can be accessed.

8.1.9 Previous versions of the **TOEIC** system may not have had the above characteristics.

9 TEST CLIENT (GENERAL)

9.1.1 Each computer running the **TCL** would be connected to the **TMA** computer via the network infrastructure in place at the **TC**.

9.1.2 It is the **TCL** that the candidate utilises to take the examination.

9.1.3 The item referred to as **V** depicts various screen captures from within the **TCL**. Without having full access to the **TCL**, my knowledge of the application is limited to these screen captures.

9.1.4 Based on my review of item **V**, I cannot see an option available to the candidate that would allow an audio recording to be swapped for another recording. Therefore, under normal circumstances, it appears a candidate would not be able to replace a test recording with someone else's voice and this is consistent with item **J** (pg2).

9.1.5 However, I have identified a number of possible ways a candidate with the right technical skillset may be able to abuse the examination process and manipulate the data being stored behind the user interface of the **TCL**. I have outlined the points for consideration below and they are expanded upon in the following sections (10 to 12) of this **REPORT**.

1. Access to **Windows Explorer** with administrator privileges
2. Knowledge of audio storage formats and locations
3. Knowledge of audit logs and records

9.1.6 The points listed in paragraph 9.1.5 are not exhaustive and if given full access to the **TCL**, additional points may come to light.

10 TEST CLIENT (OBSERVATION 1)

10.1.1 When software developers design an application they may implement a feature that forces a computer user to maintain focus on the application; thus, preventing access to other applications and features on the host operating system.

10.1.2 In this case, if the candidate is not restricted to just the **TCL** then they may be able to access the file system on the local computer.

10.1.3 Based on the initial screen that opened in the **TCL** during my review, the candidate would have been able to open **Windows Explorer** but still have the **TCL** visible in the centre of the screen, thus obscuring the view of the user.

10.1.4 I noted that during the Panorama documentary, referred as item **AA**, the user interface on the **TCL** does appear to utilise the full screen but I am unable to confirm if my initial observations from paragraph 8.1.8 (pg15) are valid for the application version that was in use at the time and I am unable to confirm if the Window would fill the screen of a larger monitor.

10.1.5 At the time of installation, the **Microsoft Windows** user account utilised to install the **TCL** at the **TC** would have had administrator privileges. These privileges are not required to run the **TCL** as a candidate.

10.1.6 If the user account was left with administrator rights, then the candidate may have had unrestricted access to the file system.

10.1.7 The item referred to as **U** (pg1) states that **one (1)** computer has the username '**Administrator**' and all other computers have the username '**test**'. To make further comment, the privileges for these user accounts would need to be determined as it is possible within **Microsoft Windows** to assign administrator rights to any computer user.

10.1.8 With full access to the system, the candidate may have the opportunity to manipulate files and thus replace audio recordings made during the **TOEIC** speaking examination if they have the correct technical knowledge.

10.1.9 To overcome this issue, the **TCL** would need to restrict access to the **Microsoft Windows** environment by carrying out the examination using a 'normal' user account that has no elevated privileges, having the **TCL** Windows automatically adjust to full screen to block access to the **Microsoft Windows** environment, and prevent the use of keyboard shortcuts.

10.1.10 After reviewing the item referenced as **DDD** (pg8) I have the understanding that when the test candidate comes to use the **TCL** on a computer, it is in a fully locked down state. This means that the candidate would not be able to access the **Microsoft Windows** environment regardless of what user account was being utilised on the computer. **KOLT** would need clarification to determine if this was the same on every version of the **TCL** that has been used in the examination process.

11 TEST CLIENT (OBSERVATION 2)

11.1.1 The item referred to as **J** (pg2) details the naming convention used to name audio files generated in the **TOEIC** speaking examination.

11.1.2 The filename for example '**00044[redacted]_VE607571_201846384.ogg**' consists of **five (5)** elements shown in Table 1.

Element	Description	Example
Country of examination	0044	00044
Candidate registration number	unique to candidate examination	[redacted]
Question ID	unique to question	VE607571
Response ID	unique to answer	201846384
File extension	.ogg	.ogg

Table 1 Audio File Naming Convention

11.1.3 It is unclear to me at this stage when these audio files are created, as using item **DDD** (pg8) as a basis, it appears that the actual audio files are not stored as single files on computers running the **TCL**. The audio from each answer given by the test candidate appears to be stored within a database on the computer running the **TCL**.

11.1.4 In this database I would expect to see tables with entries for each candidate's answer detailing the registration number, question ID, response ID, audio data, timestamp, and special hash value.

11.1.5 Good practice to validate the integrity of the generated audio recordings throughout the processing lifecycle would be for the **TCL** to generate a digital fingerprint, known as a hash value. The hash value is a unique value given to a file's contents or string of text. This value will change if any of the data is altered. This hash value could then be confirmed at any stage to determine if the recorded content had been changed.

11.1.6 Every audio recording submitted to the **ETS** server should be unique and therefore every hash value should be different. Identifying a duplicate hash value would suggest a repeat recording.

11.1.7 It should be noted that if the audio recordings are put through any conversion process as detailed in item **M** (pg11), then the hash value of the source data will be different to the resulting file.

11.1.8 Further information has been provided (item **HHH**, pg2) to suggest that no hash values are used within the **TOEIC** examination.

12 TEST CLIENT (OBSERVATION 3)

12.1.1 Should a candidate gain access to the **Microsoft Windows** environment, in order for them to replace audio recordings they would need prior knowledge of the database format being used to store these details, and how to manipulate the records. The format of this data could be based on commercially available software or could be in a proprietary format.

12.1.2 I have seen spreadsheets depicting results from examinations (items **AAA**, **BBB** and **CCC**) that may have been exported from the database system; however, these exports do not show the extent of the data available from within the database nor the format being used.

12.1.3 The item referred to as **DDD** (pg9) states the database is password protected to prevent unauthorised users from accessing the contents; however, no further documentation has been provided to me that may indicate the storage format of the database.

12.1.4 When a record is inserted into a database, each field can be given a default value or can be left blank. It is expected that most of the fields to store values specific to a candidate would be blank at the initial stage of record creation.

12.1.5 Timestamps are typically used in a database to determine when a recorded is created and when it was last modified. According to item **DDD** (pg9) a process is in place to add a timestamp to the database when a voice recording is made by a candidate. These values can be verified to determine if any of these dates are out of chronological order which could indicate if any unauthorised modifications may have happened.

13 TEST MANAGER (GENERAL)

13.1.1 **One (1)** computer is configured as a **TMA** in each examination room at a **TC** and this is connected, via the network, to all computers running the **TCL**. The **TMA** is for **STAFF** use only.

13.1.2 When a test is completed on a computer running the **TCL**, the answers are then transferred to the **TMA**.

13.1.3 The item referred to as **V** depicts various screen captures from within the **TMA**. Without having full access to the **TMA**, my knowledge of the application is limited to these screen captures.

13.1.4 Based on my review of item **V**, I cannot see an option available to the **TCA** that would allow an audio recording to be swapped for another recording.

13.1.5 However, I have identified a number of possible ways a **TCA**, **PROC** or external party with the right technical skillset may be able to abuse the examination process and manipulate the data being stored behind the user interface of the **TMA**. I have outlined the points for consideration below and they are expanded upon in the following sections (14 to 15) of this **REPORT**.

1. Knowledge of audio storage formats and locations
2. Delayed upload to **ETS** servers

13.1.6 The points listed in paragraph 13.1.5 are not exhaustive and if given full access to the **TMA** additional points may come to light.

13.1.7 The same issues as the **TCL** would exist with the **TMA** if the **TCA**, **PROC** or external party had full access to the **Microsoft Windows** environment.

14 TEST MANAGER (OBSERVATION 1)

14.1.1 Before the **TMA** uploads the answers from the examinations to the **ETS** servers the **STAFF** appear to have the opportunity to modify the audio recordings.

14.1.2 If a **TCA** or **PROC** using the **TMA** was attempting to replace a candidate's audio recording they would need knowledge of the database structure in place and how to query or update this data.

14.1.3 According to item **DDD** (pg9), the **TCA** is able to see the last **six (6)** digits of a test candidate's unique test number in the **TMA** and the candidate's real name is also visible. With these details a **TCA** with the required knowledge could identify the response records pertaining to a certain candidate within the database. The **TCA** would need to then identify which record pertained to which question.

14.1.4 **KOLT** would need clarification how easy it would be to correlate the internal question ID used in the database to the actual question, for instance, the question ID could be displayed on the **TCL**.

14.1.5 If the **TCA** or **PROC** had entered the incorrect candidate's test number when attempting to query the database, it could lead to a genuine candidate having their recording replaced and the fraudulent candidate would still have their original recording forwarded for grading.

14.1.6 There is the possibility that a small bespoke application may have been utilised to automate and speed up this replacement process. Depending on how this application operated it could still involve an element of human interaction; thus is open to mistake. **One (1)** such idea could be for the **TCA** to enter the **IP** address of the computer where the fraudulent test taker is sat in order for the application to determine which audio recordings to prevent storing on the **TMA**. In this scenario the application would insert pre-recorded answers as the fraudulent test takers responses. If the **TCA** entered the incorrect **IP** address it could again lead to a genuine candidate having their recording replaced.

14.1.7 It should be noted that from all the information that I have received there is no evidence that this has happened.

15 TEST MANAGER (OBSERVATION 2)

15.1.1 In the item referred to as **V** (pg55) there is a recommendation that if there is no internet connectivity present at the **TC**, a laptop should be used to run the **TMA** and then taken offsite to use the internet at another location for the uploading process. It is therefore conceivable that there is an option available in the **TMA** to allow the **TCA** to exit the application before submitting the answers in order to configure the internet at the other location; thus, any restrictions to the operating system that may have been in place by the **TMA** would no longer be in effect.

15.1.2 Also in this situation, the candidate's answers will be leaving the **TC** with the laptop. This could pose a security risk depending on how the data is stored. There is no suggestion to what user credentials should be configured on this laptop or if any encryption should be present.

15.1.3 While the data is offsite this would negate the security measures that are in place at the **TC**, and could allow anyone the opportunity to manipulate the database before uploading to the **ETS** servers.

15.1.4 Giving the option to upload at a later date could enable a **TCA** to delay the uploading process while file manipulation is carried out.

15.1.5 This does not appear to have happened at **SBC** during the examination period detailed in the audit reports (**BB** and **CC**).

15.1.6 According to item **DDD** (pg9) the time of upload is stored in the database and any significant delay between the time of test and upload time would be detected. Clarification is required on how long **ETS** sees as a significant delay and what measures are in place to verify if there is a valid reason for a lengthy delay.

16 TOEIC EXAMINATION (OBSERVATION 1)

16.1.1 The candidate responses generated at the time of the speaking examination, will be transferred to a minimum of **three (3)** different systems during the examination process before the grading begins:

1. Test Client
2. Test Manager
3. ETS Server

16.1.2 There would need to be an audit log to show all database records have been successfully transferred from the originating system to the next system, and validated to show no changes were made during transfer.

16.1.3 This log would need to stamp each entry with the current date and time. A mechanism to ensure the system clock is accurate and a way to prevent a candidate, **TCA, PROC** or external party altering this log, if accessible, would also need to be in place.

16.1.4 The resulting log file could be used for verification purposes, and to identify any inconsistencies with the records at different transfer points.

16.1.5 The generated audio files (ogg files), that I assume are exported from the database stored on the **ETS** servers, have the facility to store additional attributes pertaining to the file, this is known as internal metadata. These audio files do not appear to have been stamped with a date of origin in the internal metadata as referenced in item **E** (pg19). By solely looking at the exported audio file, it may not be possible to deduce when it was originally recorded, but having this log file may overcome these issues as it could show time at origin and would help support why there is an inconsistency.

17 TOEIC EXAMINATION (OBSERVATION 2)

17.1.1 As discussed earlier in this **REPORT** (pg22), a candidate is assigned a unique registration number for each **TOEIC** examination that they take.

17.1.2 According to item **DDD** (pg10) this unique number is generated by the **TMA** by using a candidate's personal identity number from a source such as passport or driving licence. The method used to generate this value and confirm its uniqueness would need to be clarified. The method used to link the candidate to this unique number would also need to be confirmed.

17.1.3 Without being able to check if the number is unique, there is a possibility the same number could be generated for **two (2)** test candidates.

17.1.4 I have not seen any evidence of duplicate candidate test numbers in the spreadsheets provided for review (items **AAA, BBB** and **CCC**) so they all appear to be unique.

17.1.5 If the **TMA** is connected to the internet while generating the registration numbers then a validation process may be taken with the **ETS** server to ensure the value is unique.

17.1.6 If the uniqueness of the candidate test number is confirmed by the **ETS** server, then the examination would rely on the system accurately attributing these numbers to the correct candidates.

17.1.7 If the numbers were attributed to the wrong candidates then it would be feasible that at least **two (2)** candidates could genuinely take the examination but have the wrong answers attributed to their results, eg **'Bill'** and **'Bob'** could inadvertently be given the other test takers candidate test number at the **TCL** computer. This would lead to the examination results for **'Bob'** reflecting the answers that were given by **'Bill'**.

18 TOEIC EXAMINATION (OBSERVATION 3)

18.1.1 At the end of an examination, the databases that have been generated in the examination process to store the candidate and audio data are 'cleaned up' from the **TMA** and the **TCL** (**V**, pg25). This suggests they are deleted from the computers. Further details would be required to determine the process used in this procedure.

18.1.2 Prior to this 'clean up' procedure, the **STAFF** may have the opportunity to archive a copy of the audio data generated by the candidate.

18.1.3 I have not seen any reference to restrictions placed on external media being attached to computers at a **TC**. This could allow a **TCA** or **PROC** to connect a device, such as a USB thumb drive, and copy these audio recordings off the computer.

18.1.4 A candidate's voice could then be replaced at a later date using a previous genuine test takers recording or new recordings could be made outside of examine conditions and used to replace a candidates response.

18.1.5 If the 'clean' up process does not successfully complete then remnants of old recordings may be left behind on either the **TMA** or **TCL** and could inadvertently be used as the new candidates recording. This depends on how the audio recording is generated at the time of answering the question, as there may be temporary files created on the **TCL** before being stored into the database. If this is the case then the format used to name these temporary files would need to be determined. As an example, question 1 for '**Jen**' may generate a temporary file named '**Q0001**', then as the recording completes this will be inserted into the corresponding record in the database.

18.1.6 Using the above example, '**Kat**' sits the examination at the same computer as '**Jen**' in the next test session, if the temporary file '**Q0001**' does not get deleted and for some unforeseen circumstance question 1 for '**Kat**' doesn't get recorded, the **TCL** may think that the '**Q0001**' pertaining to '**Jen**' is the answer given by '**Kat**' then as before is inserted into the corresponding record in the database; therefore, the recording for question 1 for both '**Jen**' and '**Kat**' would be the same.

18.1.7 The examination candidates are given the opportunity to review the audio recordings before submitting to the **TMA** and are therefore likely to notice if a recording was not their voice, so the chance of the previous example or any other reason causing a recording to be replaced on the **TCL** and going unnoticed by the candidate is low.

18.1.8 Further details provided in item **DDD** (pg10) state that the questions given to all candidates are different in each test session, so even if the voice sounded similar to the genuine test taker, the response is highly likely to be answering a completely different question, ie question 1 will be different in all test sessions and will require a different answer. As the answer would effectively be incorrect this would be marked as wrong at the grading stage.

19 CONCLUSIONS

19.1.1 All views expressed in this **REPORT** are based on the user manuals, video footage and expert reports that have been provided by **SSHD**, and are therefore theoretical and not definitive.

19.1.2 The ability for a test candidate, **TCA**, **PROC** or external party to replace a candidate's voice recording appears to largely depend on how easy it is to access the file system and identify the audio recordings that were generated.

19.1.3 The examination candidate appears to be fully restricted to the **TCL** so it would be difficult for the candidate to knowingly swap their voice for another voice as there does not appear to be an option in the **TCL** interface to facilitate this action.

19.1.4 If a candidate, that was a competent computer user with a high level of knowledge, did attempt to manipulate the audio recordings outside of the **TCL**, then one would expect **STAFF** invigilating the examination to notice this fraudulent activity taking place.

19.1.5 The opportunity to manipulate a candidate's audio recording appears to be more likely on the computer running the **TMA**; however if this happened the same principle would apply, and the **TCA** or a **PROC** should notice, unless all **STAFF** were aware of the misconduct.

19.1.6 A computerised error that a candidate, **TCA** or **PROC** is unaware of may occur which could lead to a genuine test taker's voice being reused by a **TC** such as 'clean up' routines not completing successfully or unforeseen faults occurring within the **TOEIC** system.

19.1.7 If a system was in place that tracks the movement and integrity of audio recordings from the time a candidate answers a question up until grading, then the log files or records from this system would help support or disprove allegations of manipulation.

19.1.8 The item referred to as **V** (pg17), refers to a trial session that can be used for testing purposes. **KOLT** would require access to the **TOEIC** system and this trial session to test any observations or theories posed in this **REPORT**. Availability of a technical user manual would also be beneficial. **KOLT** appreciates the sensitivity of such material and would assure that it is handled discretely and remained confidential.

19.1.9 With the information available to me, I conclude that without a highly computer literate person being involved, it is unlikely that the **TOEIC** system would attribute a genuine test takers recording to a different candidate or that a genuine test takers recording would be submitted by multiple candidates.

20 EXPERTS DECLARATION

20.1.1 There are no actual or potential conflicts of interest, which could influence the opinions expressed in this report.

20.1.2 I have no prior knowledge of, nor am I related to the individuals in this investigation.

20.1.3 I Richard **HEIGHWAY**, declare that I understand that my duty included in my providing written reports and giving evidence is to help the Court, and that duty overrides any obligations to the party who has engaged me. I confirm that I believe that I have complied with my duty.

21 STATEMENT OF TRUTH

21.1.1 I confirm that in so far as the facts stated in my report are within my own knowledge I have made it clear which they are and I believe them to be true and that the opinions I have expressed represent my true and complete professional opinion.

21.1.2 Signature .....

22 INDEX OF DEFINED TERMS

Defined Term	Definition	Paragraph Reference
CC	Cauldon College	2.1.2
ETS	Educational Testing Service	2.1.2
IP	Internet Protocol	8.1.3
KOLT	Kroll Ontrack Legal Technologies Ltd	2.1.1
PDF	Portable Document Format	3.1.1
PROC	Test Centre Proctor	7.1.2
REPORT	First expert report of Richard **HEIGHWAY**	2.1.1
SBC	Synergy Business College	2.1.2
SSHD	Secretary of State for the Home Department	2.1.1
STAFF	TCA and PROC	7.1.2
TC	Test Centre	7.1.1
TCA	Test Centre Administrator	7.1.2
TCL	Test Client	7.1.3
TMA	Test Manager	7.1.3
TOEIC	Test of English for International Communication	2.1.2
UK	United Kingdom	7.1.1
USA	United States of America	7.1.8

Table 2 Index of Defined Terms

23 INDEX OF TECHNICAL TERMS

Technical Term	Explanation
Computer network	A group of computers connected together that can share resources.
Database	A file containing **one (1)** or more tables. Each table can consist of a number of fields and rows. It is common for each row to have a unique value. Multiple tables are typically joined together by using this value.
Hash value	A unique value or digital fingerprint, known as a hash value, can be generated from a file's content. MD5 (Message Digest) is a common hash value used to verify **two (2)** items are the same.

Table 3 Index of Technical Terms

Kroll Ontrack.

24 EXPERIENCE AND QUALIFICATIONS

24.1 Career History

24.1.1 I have worked in the digital forensics industry for over **seven** (**7**) years. During this time I have been employed as a Digital Forensic Analyst for an owner managed consultancy where we were a contractor for the Metropolitan Police Service and more recently as a Computer Forensics Consultant for **KOLT**.

24.1.2 I have assisted in over **six hundred** (**600**) criminal investigations in the United Kingdom dealing with cases such as harassment, murder, fraud, and possession of indecent material.

24.2 Training

24.2.1 I have a Bachelor of Science Degree in Forensic Computing and, I am an EnCase Certified Examiner (EnCE v6 and v7) and a Nuix eDiscovery Specialist.

24.2.2 My academic record includes the following vendor specific training:

Guidance Software

Network Intrusion Investigations (v6)	September 2011
Examination of NTFS (v6)	April 2011
Examination of Macintosh and Linux Operating Systems (v6)	March 2011
Advanced Computer Forensics (v6)	March 2011
Advanced Internet Examinations (v6)	February 2011
Computer Forensics II (v6)	October 2010
Computer Forensics I (v6)	October 2010

Report Reference: 11137.HOM.RH-2

Kroll Ontrack Reference: 11137.HOM

Appeal Number: IR/21711/2015

Secretary of State for the Home Department

(Appellant)

-and-

MM

(Respondent)

Upper Tribunal, Immigration and Asylum Chamber

Expert Report of Richard HEIGHWAY

26th July 2016

STRICTLY PRIVATE AND CONFIDENTIAL

CONTENTS

Kroll Ontrack.

1 INTRODUCTION

Report by Mr Richard **HEIGHWAY**
Kroll Ontrack Legal Technologies Ltd
25 Farringdon Street
London
EC4A 4AB

On behalf of Secretary of State for the Home Department
Litigation Group
One Kemble Street
London
WC2B 4TS

2 INSTRUCTIONS

2.1.1 On 5th **April 2016**, Kroll Ontrack Legal Technologies Ltd (**"KOLT"**) was engaged by Nicola **HAMMOND**, acting on behalf of the Secretary of State for the Home Department (**"SSHD"**), to act as an independent computer forensic expert in order to produce this report (**"REPORT"**) for use in the appeal involving **MM**. This respondent has had their name redacted due to an anonymity order.

2.1.2 The appeal involves the Educational Testing Service (**"ETS"**) Test of English for International Communication (**"TOEIC"**) examination that was being conducted at Cauldon College (**"CC"**) and Synergy Business College (**"SBC"**).

2.1.3 The examination consists of **two (2)** elements, namely **'Listening and Reading'** and **'Speaking and Writing'**. It is the **'Speaking and Writing'** element that **KOLT** has been instructed to scrutinise, specifically the integrity of the speaking examination.

2.1.4 I have prepared this **REPORT** following instructions provided by **SSHD** as detailed below

a) *"Is it possible that a recording of a genuine test-taker's voice might be re-used by a fraudulent test centre and submitted to ETS as the TOEIC speaking test of other test-takers?"*

b) *"Is it possible that a genuine test-taker could take the ETS TOEIC test honestly and yet it could transpire, without that test-taker's knowledge, that ETS's recordings of that person's test have someone else's voice?"*

3 ITEMS SUBMITTED FOR REVIEW

3.1.1 The items that were provided to me for the preparation of this **REPORT** are set out below with a corresponding letter used to reference in this **REPORT**.

a) A portable document format ("**PDF**") file named '**ltr to Koll Ontrack.pdf**' containing **four** (4) pages. This is a letter to Danielle Rowe from Nicola Hammond dated **5th April 2016**.

b) A PDF file named '**enclosure i-iii.pdf**' containing **twenty eight** (28) pages.

c) A PDF file named '**enclosure iv.pdf**' containing **two** (2) pages. This is a letter to Mike Wells from Jones Day dated **13th May 2015**.

d) A PDF file named '**enclosure v.pdf**' containing **fifteen** (15) pages.

e) A PDF file named '**Enclosure vi.pdf**' containing **twenty nine** (29) pages. This is a report of Christopher Stanbury dated **31st January 2016**.

f) A PDF file named '**enclosure vii.pdf**' containing **four** (4) pages. This is a letter to Jones Day from Nicola Hammond dated **15th February 2016**.

g) A PDF file named '**enclosure viii.pdf**' containing **four** (4) pages. This is a letter to Oaks Solicitors from Nicola Hammond dated **18th February 2016**.

h) A PDF file named '**enclosure ix.pdf**' containing **two** (2) pages. This is a letter to Jones Day from Nicola Hammond dated **26th February 2016**.

i) A PDF file named '**enclosure x.pdf**' containing **four** (4) pages. This is a letter to Nicola Hammond from Venuka Balakumar dated **3rd March 2016**.

j) A PDF file named '**Document.pdf**' containing **three** (3) pages. This is a letter to Julian Smith from Jones Day dated **26th February 2016**.

k) A PDF file named '**enclosure xii.pdf**' containing **twelve** (12) pages.

l) A word processed document named '**enclosure xiii.doc**' containing **three** (3) pages.

m) A PDF file named **'Peter Millington.pdf'** containing **fourteen (14)** pages. This is a statement of Peter Millington dated **23rd June 2014**.

n) A PDF file named **'Rebecca Collings.pdf'** containing **nine (9)** pages. This is a statement of Rebecca Collings dated **23rd June 2014**.

o) A PDF file named **'[redacted] skeleton.pdf'** containing **eighteen (18)** pages.

p) A PDF file named **'EUI_1200448612_1_Letter to Government Legal Department.pdf'** containing **seven (7)** pages.

q) A PDF file named **'Response received from ETS.pdf'** containing **fifteen (15)** pages.

r) A compressed ZIP file named **'UK_RUSH.zip'** containing **six (6)** ogg files.

s) A PDF file named **'EUI_1200521765_1_Letter to Government Legal Department 13 May 2016.pdf'** containing **three (3)** pages. This is a letter to Government Legal Department from Jones Day dated **13th May 2016**.

t) A PDF file named **'SW Admin Day Guide.pdf'** containing **four (4)** pages. This is a document titled **'Speaking and Writing ADMIN DAY Guide'**.

u) A PDF file named **'SW Test Day Guide.pdf'** containing **seven (7)** pages. This is a document titled **'Speaking and Writing TEST DAY Guide'**.

v) A PDF file named **'TOEIC Speaking and Writing - Test Centre Administration Manual.pdf'** containing **fifty seven (57)** pages. This is a document titled **'Test Center Administration Manual'**.

w) A PDF file named **'Test Centre Photo Registration Guide.pdf'** containing **five (5)** pages. This is a document titled **'UK Photo Registration'**.

x) A PDF file named **'Test Administration Procedures.pdf'** containing **twenty six (26)** pages. This is a document titled **'Test Administration Procedures'**.

y) A PDF (Portable Document Format) file named **'TOEIC Speaking and Writing Examinee Handbook.pdf'** containing **thirty six (36)** pages. This is a document titled **'Examinee Handbook'**.

z) A PDF file named **'TCA User Guide.pdf'** containing **five (5)** pages. This is a document titled **'PTPix TCA user documentation'**.

aa) Video of BBC Panorama documentary (**'http://youtu.be/ailj8zNc2DA'**)

bb) A PDF file named **'EXHIBIT RS-2 SYNERGY MATTHIEU AUDIT REPORT.pdf'** containing **one (1)** page. This is a document detailing an audit by **'Matthieu'** dated **15th May**.

cc) A PDF file named **'EXHIBIT RS-111214-003 BDOUR AUDIT REPORT.pdf'** containing **one (1)** page. This is a document detailing an audit by **'Ahmad Bdour'** dated **16th January 2013**.

dd) A PDF file named **'MG11 - ADAM SEWELL.pdf'** containing **ten (10)** pages. This is a statement of Adam Sewell dated **6th July 2015**.

ee) A PDF file named **'MG11 - AHMAD BDOUR 08092015.pdf'** containing **two (2)** pages. This is a statement of Ahmad Bdour dated **8th September 2015**.

ff) A PDF file named **'MG11 - AHMAD BDOUR 20112014.pdf'** containing **five (5)** pages. This is a statement of Ahmad Bdour dated **20th November 2014**.

gg) A PDF file named **'MG11 - AHMAD BDOUR EXHIBITING 06032015 CONFESSIONS AND DVD.pdf'** containing **two (2)** pages. This is a statement of Ahmad Bdour dated **6th March 2015**.

hh) A PDF file named **'MG11 - DAVID THOMSON.pdf'** containing **three (3)** pages. This is a statement of David Stuart Thomson dated **26th October 2015**.

ii) A PDF file named **'MG11 - DR CHRISTIN KIRCHHUBEL.pdf'** containing **fourteen (14)** pages. This is a statement of Dr Christin Kirchhübel dated **11th December 2015**.

MS

jj) A PDF file named **'MG11 - [redacted]pdf'** containing **four (4)** pages. This is a statement of [redacted] dated **17th February 2015**.

MS

HM

kk) A PDF file named '**MG11 - [redacted].pdf**' containing **four (4)** pages. This is a statement of [redacted] dated **30th January 2015**.

HM PNS

ll) A PDF file named '**MG11 - [redacted].pdf**' containing **four (4)** pages. This is a statement of [redacted] Shah dated **17th February 2015**.

PNS

mm) A PDF file named '**MG11 Abdul AHMED Spreadsheets.pdf**' containing **one (1)** page. This is a statement of Abdul Ahmed dated **11th May 2016**.

nn) A PDF file named '**MG11 FREDERICK ALAN CLINE.pdf**' containing **eight (8)** pages. This is a statement of Frederick Alan Cline dated **30th October 2015**.

oo) A PDF file named '**MG11 HAE JIN KIM.pdf**' containing **ten (10)** pages. This is a statement of Hae Jin Kim dated **22nd October 2015**.

pp) A word processed document named '**MG11 Power Disclosure re MOHIBULLAH revised.doc**' containing **six (6)** pages. This is a statement of Michael John Power dated **12th May 2016**.

qq) A PDF file named '**MG11 R NICOSIA 19-11-2015 (1).pdf**' containing **five (5)** pages. This is a statement of Raymond Nicosia dated **19th November 2015**.

rr) A PDF file named '**MG11 R SHURY 11-12-14 (2).pdf**' containing **ten (10)** pages. This is a statement of Richard Shury dated **11th December 2014**.

ss) A PDF file named '**MG11 RANDOLPH JOHN CLINE.pdf**' containing **six (6)** pages. This is a statement of Randolph John Cline dated **26th October 2015**.

MAIK

tt) A PDF file named '**MJP02 SDN INTERVIEW WITH [redacted].pdf**' containing **two (2)** pages. This is a document detailing the interview of [redacted] dated **3rd December 2014**.

MAIK

MMH

uu) A PDF file named '**MJP2 SDN INTERVIEW OF[redacted].pdf**' containing **two (2)** pages. This is a document detailing the interview of [redacted] dated **27th November 2014**.

MMH

vv) A PDF file named **'S1 Randolph Cline SOE final 261015.pdf'** containing **six (6)** pages. This is a statement of Randolph John Cline dated **26th October 2015**.

ww) A PDF file named **'S2 Frederick Cline 301015.pdf'** containing **nine (9)** pages. This is a statement of Frederick Alan Cline dated **30th October 2015**.

xx) A PDF file named **'S3 HJK final 221015.pdf'** containing **ten (10)** pages. This is a statement of Hae Jin Kim dated **22nd October 2015**.

yy) A PDF file named **'16.05.03 Mohibullah Mohammad - Report by Dr Rhodes.pdf'** containing **sixteen (16)** pages. This is a report by Dr Richard Rhodes dated **3rd May 2016**.

zz) A PDF file named **'16.05.03 Mohibullah Mohammad - Report by Dr Harrison.pdf'** containing **eight (8)** pages. This is a report by Dr Philip Harrison dated **3rd May 2016**.

aaa) A Microsoft Excel spreadsheet named **'Exhibit ARA1105161 AHMED spreadsheet.xlsx'**.

bbb) A Microsoft Excel spreadsheet named **'Exhibit ARA1105162 AHMED spreadsheet Redacted..xlsx'**.

ccc) A Microsoft Excel spreadsheet named **'Exhibit AS02061545SEWELL spreadsheet.xlsx'**.

ddd) A PDF file named **'EUI_1200652463_1_2016 06 22 Letter to Bindmans.pdf'** containing **eleven (11)** pages. This is a letter to Bindmans LLP from Jones Day dated **22nd June 2016**.

eee) A PDF file named **'EUI_1200652105_1_Schedules PDF.pdf'** containing **nineteen (19)** pages. This is a collection of documents depicting various forms pertaining to the **TOEIC** examination.

fff) A PDF file named **'16.05.15 Mobibullah Professor Sommer report.pdf'** containing **forty (40)** pages. This is a report by Professor Peter **SOMMER** dated **15th June 2016**.

ggg) A PDF file named **'Updated Stanbury report - 24.6.2016.pdf'** containing **thirteen (13)** pages. This is a draft report by Christopher **STANBURY** dated **24th June 2016**.

hhh) A PDF file named **'Document.pdf'** containing **two (2)** pages. This is a letter to Bindmans LLP from Jones Day dated **27th June 2016.**

3.1.2 In preparing this **REPORT**, I have not analysed any other documentation other than that stated in paragraph 3.1.1 and I have not had full access to any **ETS** computer systems.

4 EXPERT DUTIES

4.1.1 I understand that I have been retained by **SSHD** as an independent expert but that my duty is to assist the Court should this be necessary. Specifically:

4.1.2 I understand that my duty is to help the Court on matters within my own expertise and that this duty is paramount and overrides any obligation to the person from whom I have received my instructions or who pays me;

4.1.3 I understand that my role is to provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within my expertise and that I should not assume the role of advocate;

4.1.4 I have endeavoured in the **REPORT** to state the facts or assumptions on which my opinions are based and confirm that I have considered all material facts, including those which could detract from my opinion and that I have made it clear if a particular question fall outside my expertise;

4.1.5 I have also made it clear in my **REPORT** where any opinion of mine is only provisional because I have been provided with insufficient data or where I have had insufficient time to consider data which is available to me;

4.1.6 I confirm that if, after producing my **REPORT** or for any other reason, I will communicate, through **SSHD**, such a change of view to all parties and the Court if appropriate without delay; and

4.1.7 I understand that I must take reasonable care in trying to meet the duties and standards that apply to me as an independent witness.

5 REPORT LEGEND

5.1.1 Where I have defined terms, these are capitalised throughout this **REPORT** and I have listed them in the **Index of Defined Terms** at the end of this **REPORT**.

5.1.2 Where I have referred to technical terms, they are shown in bold text and I have listed them in the **Index of Technical Terms** at the end of this **REPORT**.

6 EXECUTIVE SUMMARY

6.1.1 The documentation available to me supports the fact that test centre staff and test candidates are unable to replace audio recordings within the **ETS TOEIC** user interface.

6.1.2 The audio recordings for speaking test candidates are stored in a password protected database, with this storage being utilised there appears to be **two (2)** possible causes that could lead to a genuine candidate's recording being swapped outside of the **TOEIC** user interface:

1. A computer user with nefarious intent and advanced knowledge of the systems in place has attempted to deliberately replace recordings.
2. An undocumented system fault has misidentified and reused the audio recordings.

6.1.3 No evidence has been found in the information made available to me to suggest the **two (2)** causes have occurred, these are purely speculative ideas.

7 TOEIC EXAMINATION (OVERVIEW)

7.1.1 A **TOEIC** examination is taken at a test centre ("**TC**") based in the United Kingdom ("**UK**"), such as **CC** and **SBC**, where strict guidelines and procedures, set in place by **ETS**, must be adhered to.

7.1.2 The examination is configured and carried out at the **TC** under the supervision of a Test Centre Administrator ("**TCA**") and helped by support staff known as Proctors ("**PROC**"), these are collectively referred to as the "**STAFF**".

7.1.3 A **UK TC** is typically configured with a local network consisting of a number of computers running a mobile delivery platform on **Microsoft Windows. One (1)** computer is configured as the test manager ("**TMA**") and the remaining computers are configured as a test client ("**TCL**").

7.1.4 The installation files to configure a **TMA** or **TCL** on a computer are available to download from the websites '**center.toeicswt.com/admin**' and '**center.toeicswt.com**' respectively.

7.1.5 For the **TC STAFF** to install these applications on a computer, they must have administrator privileges in the **Microsoft Windows** operating system. After installation, the **STAFF** or candidate would not need these elevated privileges to commence the **TOEIC** examination.

7.1.6 When the network is configured and applications are installed, there appears to be a function on the **TMA** that is initiated by the **TCA** that uploads the examination questions to each connected **TCL**.

7.1.7 A candidate would attend a **TC** to take the examination during a specified test session that has been given an allocated time slot. A number of candidates are permitted to take the examination in the same test session. The examinations are carried out by the candidates on the computers running the **TCL**. When the examination is complete the answers are automatically submitted to the **TMA**.

7.1.8 At the end of a test session, the answers from each examination are uploaded from the **TMA** to the **ETS** servers in the United States of America ("**USA**") for grading.

8 TOEIC EXAMINATION (KOLT SETUP)

8.1.1 Based on the computer requirements referred to in item **V** (pg55), it is understood that all computers at a **TC** would be running the **Microsoft Windows** operating system.

8.1.2 To get a better understanding of the **TOEIC** examination process, an instance of the **TMA** and **TCL** was installed onto **two (2)** computers connected to the same network in the **KOLT** secure laboratory.

8.1.3 I was able to navigate to the website '**center.toeicswt.com/admin**' and download the **TMA** onto a **KOLT** computer configured with the Internet Protocol ("**IP**") address '**192.168.1.64**'.

8.1.4 After installation of the **TMA** was complete, the Window as shown in Figure 1 was opened, this is similar to the screen capture shown in item **V** (pg20). This Window indicated that the application version I had installed was **16.509.0.1**.

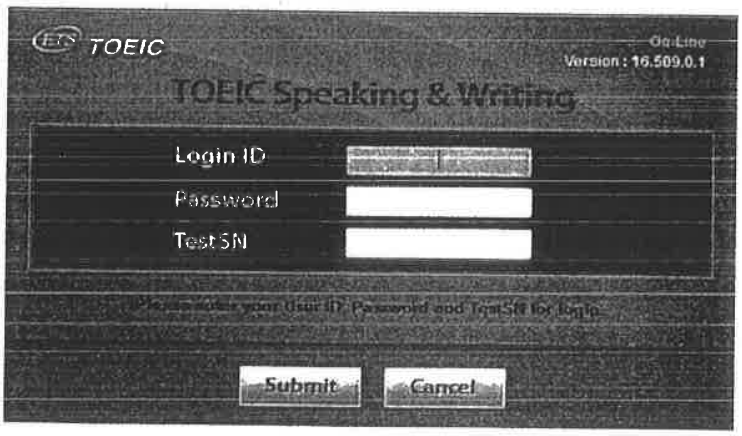

Figure 1 TMA Welcome Screen

8.1.5 I could not progress passed this screen as I do not have a '**Login ID**', '**Password**' or '**TestSN**'.

8.1.6 I was also able to download the **TCL** from the website '**center.toeicswt.com**'. This was installed onto a **KOLT** computer connected to the same network as the computer running the **TMA**. The **TCL** computer was assigned the **IP** address '**192.168.1.149**'.

8.1.7 As with the **TMA**, I could not progress passed the Windows shown in Figure 2 and Figure 3 that had opened in the **TCL**.

Figure 2 TCL Configuration

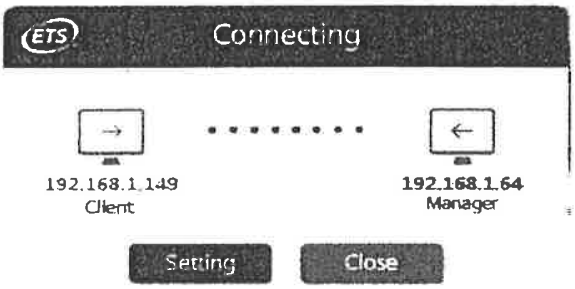

Figure 3 TCL Status

8.1.8 With the limited access to the **TOEIC** system that I had, I have made a number of observations:

1. The **TMA** and **TCL** Windows stay on top of all other Windows
2. The **TMA** and **TCL** Windows cannot be moved
3. Other applications and Windows behind the **TMA** and **TCL** Windows can be accessed.

8.1.9 Previous versions of the **TOEIC** system may not have had the above characteristics.

9 TEST CLIENT (GENERAL)

9.1.1 Each computer running the **TCL** would be connected to the **TMA** computer via the network infrastructure in place at the **TC**.

9.1.2 It is the **TCL** that the candidate utilises to take the examination.

9.1.3 The item referred to as **V** depicts various screen captures from within the **TCL**. Without having full access to the **TCL**, my knowledge of the application is limited to these screen captures.

9.1.4 Based on my review of item **V**, I cannot see an option available to the candidate that would allow an audio recording to be swapped for another recording. Therefore, under normal circumstances, it appears a candidate would not be able to replace a test recording with someone else's voice and this is consistent with item **J** (pg2).

9.1.5 However, I have identified a number of possible ways a candidate with the right technical skillset may be able to abuse the examination process and manipulate the data being stored behind the user interface of the **TCL**. I have outlined the points for consideration below and they are expanded upon in the following sections (10 to 12) of this **REPORT**.

1. Access to **Windows Explorer** with administrator privileges
2. Knowledge of audio storage formats and locations
3. Knowledge of audit logs and records

9.1.6 The points listed in paragraph 9.1.5 are not exhaustive and if given full access to the **TCL**, additional points may come to light.

10 TEST CLIENT (OBSERVATION 1)

10.1.1 When software developers design an application they may implement a feature that forces a computer user to maintain focus on the application; thus, preventing access to other applications and features on the host operating system.

10.1.2 In this case, if the candidate is not restricted to just the **TCL** then they may be able to access the file system on the local computer.

10.1.3 Based on the initial screen that opened in the **TCL** during my review, the candidate would have been able to open **Windows Explorer** but still have the **TCL** visible in the centre of the screen, thus obscuring the view of the user.

10.1.4 I noted that during the Panorama documentary, referred as item **AA**, the user interface on the **TCL** does appear to utilise the full screen but I am unable to confirm if my initial observations from paragraph 8.1.8 (pg15) are valid for the application version that was in use at the time and I am unable to confirm if the Window would fill the screen of a larger monitor.

10.1.5 At the time of installation, the **Microsoft Windows** user account utilised to install the **TCL** at the **TC** would have had administrator privileges. These privileges are not required to run the **TCL** as a candidate.

10.1.6 If the user account was left with administrator rights, then the candidate may have had unrestricted access to the file system.

10.1.7 The item referred to as **U** (pg1) states that **one (1)** computer has the username '**Administrator**' and all other computers have the username '**test**'. To make further comment, the privileges for these user accounts would need to be determined as it is possible within **Microsoft Windows** to assign administrator rights to any computer user.

10.1.8 With full access to the system, the candidate may have the opportunity to manipulate files and thus replace audio recordings made during the **TOEIC** speaking examination if they have the correct technical knowledge.

10.1.9 To overcome this issue, the **TCL** would need to restrict access to the **Microsoft Windows** environment by carrying out the examination using a 'normal' user account that has no elevated privileges, having the **TCL** Windows automatically adjust to full screen to block access to the **Microsoft Windows** environment, and prevent the use of keyboard shortcuts.

10.1.10 After reviewing the item referenced as **DDD** (pg8) I have the understanding that when the test candidate comes to use the **TCL** on a computer, it is in a fully locked down state. This means that the candidate would not be able to access the **Microsoft Windows** environment regardless of what user account was being utilised on the computer. **KOLT** would need clarification to determine if this was the same on every version of the **TCL** that has been used in the examination process.

11 TEST CLIENT (OBSERVATION 2)

11.1.1 The item referred to as **J** (pg2) details the naming convention used to name audio files generated in the **TOEIC** speaking examination.

11.1.2 The filename for example '**00044[redacted]VE607571_201846384.ogg**' consists of **five (5)** elements shown in Table 1.

Element	Description	Example
Country of examination	0044	00044
Candidate registration number	unique to candidate examination	[redacted]
Question ID	unique to question	VE607571
Response ID	unique to answer	201846384
File extension	.ogg	.ogg

Table 1 Audio File Naming Convention

11.1.3 It is unclear to me at this stage when these audio files are created, as using item **DDD** (pg8) as a basis, it appears that the actual audio files are not stored as single files on computers running the **TCL**. The audio from each answer given by the test candidate appears to be stored within a database on the computer running the **TCL**.

11.1.4 In this database I would expect to see tables with entries for each candidate's answer detailing the registration number, question ID, response ID, audio data, timestamp, and special hash value.

11.1.5 Good practice to validate the integrity of the generated audio recordings throughout the processing lifecycle would be for the **TCL** to generate a digital fingerprint, known as a hash value. The hash value is a unique value given to a file's contents or string of text. This value will change if any of the data is altered. This hash value could then be confirmed at any stage to determine if the recorded content had been changed.

11.1.6 Every audio recording submitted to the **ETS** server should be unique and therefore every hash value should be different. Identifying a duplicate hash value would suggest a repeat recording.

11.1.7 It should be noted that if the audio recordings are put through any conversion process as detailed in item **M** (pg11), then the hash value of the source data will be different to the resulting file.

11.1.8 Further information has been provided (item **HHH**, pg2) to suggest that no hash values are used within the **TOEIC** examination.

12 TEST CLIENT (OBSERVATION 3)

12.1.1 Should a candidate gain access to the **Microsoft Windows** environment, in order for them to replace audio recordings they would need prior knowledge of the database format being used to store these details, and how to manipulate the records. The format of this data could be based on commercially available software or could be in a proprietary format.

12.1.2 I have seen spreadsheets depicting results from examinations (items **AAA**, **BBB** and **CCC**) that may have been exported from the database system; however, these exports do not show the extent of the data available from within the database nor the format being used.

12.1.3 The item referred to as **DDD** (pg9) states the database is password protected to prevent unauthorised users from accessing the contents; however, no further documentation has been provided to me that may indicate the storage format of the database.

12.1.4 When a record is inserted into a database, each field can be given a default value or can be left blank. It is expected that most of the fields to store values specific to a candidate would be blank at the initial stage of record creation.

12.1.5 Timestamps are typically used in a database to determine when a recorded is created and when it was last modified. According to item **DDD** (pg9) a process is in place to add a timestamp to the database when a voice recording is made by a candidate. These values can be verified to determine if any of these dates are out of chronological order which could indicate if any unauthorised modifications may have happened.

13 TEST MANAGER (GENERAL)

13.1.1 **One** (**1**) computer is configured as a **TMA** in each examination room at a **TC** and this is connected, via the network, to all computers running the **TCL**. The **TMA** is for **STAFF** use only.

13.1.2 When a test is completed on a computer running the **TCL**, the answers are then transferred to the **TMA**.

13.1.3 The item referred to as **V** depicts various screen captures from within the **TMA**. Without having full access to the **TMA**, my knowledge of the application is limited to these screen captures.

13.1.4 Based on my review of item **V**, I cannot see an option available to the **TCA** that would allow an audio recording to be swapped for another recording.

13.1.5 However, I have identified a number of possible ways a **TCA**, **PROC** or external party with the right technical skillset may be able to abuse the examination process and manipulate the data being stored behind the user interface of the **TMA**. I have outlined the points for consideration below and they are expanded upon in the following sections (14 to 15) of this **REPORT**.

1. Knowledge of audio storage formats and locations
2. Delayed upload to **ETS** servers

13.1.6 The points listed in paragraph 13.1.5 are not exhaustive and if given full access to the **TMA** additional points may come to light.

13.1.7 The same issues as the **TCL** would exist with the **TMA** if the **TCA**, **PROC** or external party had full access to the **Microsoft Windows** environment.

14 TEST MANAGER (OBSERVATION 1)

14.1.1 Before the **TMA** uploads the answers from the examinations to the **ETS** servers the **STAFF** appear to have the opportunity to modify the audio recordings.

14.1.2 If a **TCA** or **PROC** using the **TMA** was attempting to replace a candidate's audio recording they would need knowledge of the database structure in place and how to query or update this data.

14.1.3 According to item **DDD** (pg9), the **TCA** is able to see the last **six (6)** digits of a test candidate's unique test number in the **TMA** and the candidate's real name is also visible. With these details a **TCA** with the required knowledge could identify the response records pertaining to a certain candidate within the database. The **TCA** would need to then identify which record pertained to which question.

14.1.4 **KOLT** would need clarification how easy it would be to correlate the internal question ID used in the database to the actual question, for instance, the question ID could be displayed on the **TCL**.

14.1.5 If the **TCA** or **PROC** had entered the incorrect candidate's test number when attempting to query the database, it could lead to a genuine candidate having their recording replaced and the fraudulent candidate would still have their original recording forwarded for grading.

14.1.6 There is the possibility that a small bespoke application may have been utilised to automate and speed up this replacement process. Depending on how this application operated it could still involve an element of human interaction; thus is open to mistake. **One (1)** such idea could be for the **TCA** to enter the **IP** address of the computer where the fraudulent test taker is sat in order for the application to determine which audio recordings to prevent storing on the **TMA**. In this scenario the application would insert pre-recorded answers as the fraudulent test takers responses. If the **TCA** entered the incorrect **IP** address it could again lead to a genuine candidate having their recording replaced.

14.1.7 It should be noted that from all the information that I have received there is no evidence that this has happened.

15 TEST MANAGER (OBSERVATION 2)

15.1.1 In the item referred to as **V** (pg55) there is a recommendation that if there is no internet connectivity present at the **TC**, a laptop should be used to run the **TMA** and then taken offsite to use the internet at another location for the uploading process. It is therefore conceivable that there is an option available in the **TMA** to allow the **TCA** to exit the application before submitting the answers in order to configure the internet at the other location; thus, any restrictions to the operating system that may have been in place by the **TMA** would no longer be in effect.

15.1.2 Also in this situation, the candidate's answers will be leaving the **TC** with the laptop. This could pose a security risk depending on how the data is stored. There is no suggestion to what user credentials should be configured on this laptop or if any encryption should be present.

15.1.3 While the data is offsite this would negate the security measures that are in place at the **TC**, and could allow anyone the opportunity to manipulate the database before uploading to the **ETS** servers.

15.1.4 Giving the option to upload at a later date could enable a **TCA** to delay the uploading process while file manipulation is carried out.

15.1.5 This does not appear to have happened at **SBC** during the examination period detailed in the audit reports (**BB** and **CC**).

15.1.6 According to item **DDD** (pg9) the time of upload is stored in the database and any significant delay between the time of test and upload time would be detected. Clarification is required on how long **ETS** sees as a significant delay and what measures are in place to verify if there is a valid reason for a lengthy delay.

16 TOEIC EXAMINATION (OBSERVATION 1)

16.1.1 The candidate responses generated at the time of the speaking examination, will be transferred to a minimum of **three (3)** different systems during the examination process before the grading begins:

1. Test Client
2. Test Manager
3. ETS Server

16.1.2 There would need to be an audit log to show all database records have been successfully transferred from the originating system to the next system, and validated to show no changes were made during transfer.

16.1.3 This log would need to stamp each entry with the current date and time. A mechanism to ensure the system clock is accurate and a way to prevent a candidate, **TCA, PROC** or external party altering this log, if accessible, would also need to be in place.

16.1.4 The resulting log file could be used for verification purposes, and to identify any inconsistencies with the records at different transfer points.

16.1.5 The generated audio files (ogg files), that I assume are exported from the database stored on the **ETS** servers, have the facility to store additional attributes pertaining to the file, this is known as internal metadata. These audio files do not appear to have been stamped with a date of origin in the internal metadata as referenced in item **E** (pg19). By solely looking at the exported audio file, it may not be possible to deduce when it was originally recorded, but having this log file may overcome these issues as it could show time at origin and would help support why there is an inconsistency.

17 TOEIC EXAMINATION (OBSERVATION 2)

17.1.1 As discussed earlier in this **REPORT** (pg22), a candidate is assigned a unique registration number for each **TOEIC** examination that they take.

17.1.2 According to item **DDD** (pg10) this unique number is generated by the **TMA** by using a candidate's personal identity number from a source such as passport or driving licence. The method used to generate this value and confirm its uniqueness would need to be clarified. The method used to link the candidate to this unique number would also need to be confirmed.

17.1.3 Without being able to check if the number is unique, there is a possibility the same number could be generated for **two (2)** test candidates.

17.1.4 I have not seen any evidence of duplicate candidate test numbers in the spreadsheets provided for review (items **AAA, BBB** and **CCC**) so they all appear to be unique.

17.1.5 If the **TMA** is connected to the internet while generating the registration numbers then a validation process may be taken with the **ETS** server to ensure the value is unique.

17.1.6 If the uniqueness of the candidate test number is confirmed by the **ETS** server, then the examination would rely on the system accurately attributing these numbers to the correct candidates.

17.1.7 If the numbers were attributed to the wrong candidates then it would be feasible that at least **two (2)** candidates could genuinely take the examination but have the wrong answers attributed to their results, eg **'Bill'** and **'Bob'** could inadvertently be given the other test takers candidate test number at the **TCL** computer. This would lead to the examination results for **'Bob'** reflecting the answers that were given by **'Bill'**.

18 TOEIC EXAMINATION (OBSERVATION 3)

18.1.1 At the end of an examination, the databases that have been generated in the examination process to store the candidate and audio data are 'cleaned up' from the **TMA** and the **TCL** (**V**, pg25). This suggests they are deleted from the computers. Further details would be required to determine the process used in this procedure.

18.1.2 Prior to this 'clean up' procedure, the **STAFF** may have the opportunity to archive a copy of the audio data generated by the candidate.

18.1.3 I have not seen any reference to restrictions placed on external media being attached to computers at a **TC**. This could allow a **TCA** or **PROC** to connect a device, such as a USB thumb drive, and copy these audio recordings off the computer.

18.1.4 A candidate's voice could then be replaced at a later date using a previous genuine test takers recording or new recordings could be made outside of examine conditions and used to replace a candidates response.

18.1.5 If the 'clean' up process does not successfully complete then remnants of old recordings may be left behind on either the **TMA** or **TCL** and could inadvertently be used as the new candidates recording. This depends on how the audio recording is generated at the time of answering the question, as there may be temporary files created on the **TCL** before being stored into the database. If this is the case then the format used to name these temporary files would need to be determined. As an example, question 1 for '**Jen**' may generate a temporary file named '**Q0001**', then as the recording completes this will be inserted into the corresponding record in the database.

18.1.6 Using the above example, '**Kat**' sits the examination at the same computer as '**Jen**' in the next test session, if the temporary file '**Q0001**' does not get deleted and for some unforeseen circumstance question 1 for '**Kat**' doesn't get recorded, the **TCL** may think that the '**Q0001**' pertaining to '**Jen**' is the answer given by '**Kat**' then as before is inserted into the corresponding record in the database; therefore, the recording for question 1 for both '**Jen**' and '**Kat**' would be the same.

18.1.7 The examination candidates are given the opportunity to review the audio recordings before submitting to the **TMA** and are therefore likely to notice if a recording was not their voice, so the chance of the previous example or any other reason causing a recording to be replaced on the **TCL** and going unnoticed by the candidate is low.

18.1.8 Further details provided in item **DDD** (pg10) state that the questions given to all candidates are different in each test session, so even if the voice sounded similar to the genuine test taker, the response is highly likely to be answering a completely different question, ie question 1 will be different in all test sessions and will require a different answer. As the answer would effectively be incorrect this would be marked as wrong at the grading stage.

19 CONCLUSIONS

19.1.1 All views expressed in this **REPORT** are based on the user manuals, video footage and expert reports that have been provided by **SSHD**, and are therefore theoretical and not definitive.

19.1.2 The ability for a test candidate, **TCA**, **PROC** or external party to replace a candidate's voice recording appears to largely depend on how easy it is to access the file system and identify the audio recordings that were generated.

19.1.3 The examination candidate appears to be fully restricted to the **TCL** so it would be difficult for the candidate to knowingly swap their voice for another voice as there does not appear to be an option in the **TCL** interface to facilitate this action.

19.1.4 If a candidate, that was a competent computer user with a high level of knowledge, did attempt to manipulate the audio recordings outside of the **TCL**, then one would expect **STAFF** invigilating the examination to notice this fraudulent activity taking place.

19.1.5 The opportunity to manipulate a candidate's audio recording appears to be more likely on the computer running the **TMA**; however if this happened the same principle would apply, and the **TCA** or a **PROC** should notice, unless all **STAFF** were aware of the misconduct.

19.1.6 A computerised error that a candidate, **TCA** or **PROC** is unaware of may occur which could lead to a genuine test taker's voice being reused by a **TC** such as 'clean up' routines not completing successfully or unforeseen faults occurring within the **TOEIC** system.

19.1.7 If a system was in place that tracks the movement and integrity of audio recordings from the time a candidate answers a question up until grading, then the log files or records from this system would help support or disprove allegations of manipulation.

19.1.8 The item referred to as **V** (pg17), refers to a trial session that can be used for testing purposes. **KOLT** would require access to the **TOEIC** system and this trial session to test any observations or theories posed in this **REPORT**. Availability of a technical user manual would also be beneficial. **KOLT** appreciates the sensitivity of such material and would assure that it is handled discretely and remained confidential.

19.1.9 With the information available to me, I conclude that without a highly computer literate person being involved, it is unlikely that the **TOEIC** system would attribute a genuine test takers recording to a different candidate or that a genuine test takers recording would be submitted by multiple candidates.

20 EXPERTS DECLARATION

20.1.1 There are no actual or potential conflicts of interest, which could influence the opinions expressed in this report.

20.1.2 I have no prior knowledge of, nor am I related to the individuals in this investigation.

20.1.3 I Richard **HEIGHWAY**, declare that I understand that my duty included in my providing written reports and giving evidence is to help the Court, and that duty overrides any obligations to the party who has engaged me. I confirm that I believe that I have complied with my duty.

21 STATEMENT OF TRUTH

21.1.1 I confirm that in so far as the facts stated in my report are within my own knowledge I have made it clear which they are and I believe them to be true and that the opinions I have expressed represent my true and complete professional opinion.

21.1.2 Signature .....

22 INDEX OF DEFINED TERMS

Defined Term	Definition	Paragraph Reference
CC	Cauldon College	2.1.2
ETS	Educational Testing Service	2.1.2
IP	Internet Protocol	8.1.3
KOLT	Kroll Ontrack Legal Technologies Ltd	2.1.1
PDF	Portable Document Format	3.1.1
PROC	Test Centre Proctor	7.1.2
REPORT	First expert report of Richard **HEIGHWAY**	2.1.1
SBC	Synergy Business College	2.1.2
SSHD	Secretary of State for the Home Department	2.1.1
STAFF	TCA and PROC	7.1.2
TC	Test Centre	7.1.1
TCA	Test Centre Administrator	7.1.2
TCL	Test Client	7.1.3
TMA	Test Manager	7.1.3
TOEIC	Test of English for International Communication	2.1.2
UK	United Kingdom	7.1.1
USA	United States of America	7.1.8

Table 2 Index of Defined Terms

23 INDEX OF TECHNICAL TERMS

Technical Term	Explanation
Computer network	A group of computers connected together that can share resources.
Database	A file containing **one (1)** or more tables. Each table can consist of a number of fields and rows. It is common for each row to have a unique value. Multiple tables are typically joined together by using this value.
Hash value	A unique value or digital fingerprint, known as a hash value, can be generated from a file's content. MD5 (Message Digest) is a common hash value used to verify **two (2)** items are the same.

Table 3 Index of Technical Terms

Kroll Ontrack.

24 EXPERIENCE AND QUALIFICATIONS

24.1 Career History

24.1.1 I have worked in the digital forensics industry for over **seven (7)** years. During this time I have been employed as a Digital Forensic Analyst for an owner managed consultancy where we were a contractor for the Metropolitan Police Service and more recently as a Computer Forensics Consultant for **KOLT**.

24.1.2 I have assisted in over **six hundred (600)** criminal investigations in the United Kingdom dealing with cases such as harassment, murder, fraud, and possession of indecent material.

24.2 Training

24.2.1 I have a Bachelor of Science Degree in Forensic Computing and, I am an EnCase Certified Examiner (EnCE v6 and v7) and a Nuix eDiscovery Specialist.

24.2.2 My academic record includes the following vendor specific training:

Guidance Software

Network Intrusion Investigations (v6)	September 2011
Examination of NTFS (v6)	April 2011
Examination of Macintosh and Linux Operating Systems (v6)	March 2011
Advanced Computer Forensics (v6)	March 2011
Advanced Internet Examinations (v6)	February 2011
Computer Forensics II (v6)	October 2010
Computer Forensics I (v6)	October 2010

MicroSystemation	
XACT Certification	June 2009

24.3 Previous Experience as a Witness

24.3.1 I have previously given evidence in Crown Court as an expert witness.

MicroSystemation

XACT Certification June 2009

24.3 Previous Experience as a Witness

24.3.1 I have previously given evidence in Crown Court as an expert witness.

MM - JR/2171/2015; MA – IA/39899/2014

IN THE UPPER TRIBUNAL IMMIGRATION & ASYLUM CHAMBER

BETWEEN:

THE QUEEN (ON THE APPLICATION OF MM and MA)

Applicant

-v-

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

MEETING BETWEEN EXPERTS

27 July 2016

On 26 July 2016 a meeting was held between Christopher Stanbury, expert instructed for the applicant MA, Professor Peter Sommer, expert instructed for the applicant MM, and Richard Heighway, expert instructed by the respondent to determine points of agreement and disagreement. After the meeting there were further email exchanges. This Note sets out areas of agreement and disagreement.

The participants assumed that the meeting was under CPR 35.12 and in particular agreed "The content of the discussion between the experts shall not be referred to at the trial unless the parties agree."

Although we understand that the cases of MA and MM are being heard together and although there is considerable factual overlap in the circumstances we wish to emphasise that there are also differences. MA's circumstances centre around events in March 2013, MM's in April 2012. It also became apparent during our experts' meeting that there were files and correspondence which Professor Sommer had seen in his role instructed for MM but which had not been seen by Chris Stanbury for MA and vice versa. During the meeting there was some sharing of material.

The Tribunal Order had laid down a timetable *inter alia* for respondents and others to produce material in reply to earlier requests, for experts to produce final reports for this meeting to take place and for a Note from it to be produced. Respondents and others were due to have produced their material by 20 July but had not done so until 26 July, expert reports were due for service on 25 July and the joint expert note was expected on 27 July. Although the experts appreciate the aim of the Upper Tribunal to resolve matters as promptly as possible we wish to say that this Note would have had more detail had we been given more time. None of the experts were consulted when the Order was made about feasibility. As it is, the Note will have to be read in conjunction with the individual expert reports.

Background

1. MA has an outstanding appeal before the Upper Tribunal and MM is bringing judicial review proceedings against the Secretary of State for the Home Department in respect of actions taken by her following the inclusion of their names in a list of people who had been identified to have cheated in a Speaking and Writing English Language test.

2. It is common ground that during 2012 and 2013 a number of test centres that were providing facilities for some tests to be taken by proxies. MA and MM deny that they used proxies. Files of audio

recordings of the speaking tests have been produced by the company organising the tests, ETS Global, together with computer records. It is accepted that the audio recordings which the ETS computer records say are of MA and MM are not of them but are of persons acting as proxies.

3. The task of the experts was to review the available material which consisted of a variety of print outs said to come from computers, handbooks which should have been used during the testing, testimonial evidence from the organisers of the tests and from Home Office officials and some paper records. There was also a BBC *Panorama* programme about the use of proxies and other frauds run by testing centres for the benefit of attendees. A full list of the material considered appears in the respective expert reports. The issue before the experts was to consider the plausibility of scenarios which might explain how the ETS computer records could reconcile the two conflicting assertions: that the audio recordings were created by proxies and that MA and MM's actual recordings were incorrectly married up in the ETS records.

4. Throughout, the tests were run by an international company called ETS which used a series of local test centres here in the United Kingdom.

5. In the case of MM the particular test centre was run by a company called Synergy Business College (hereafter "Synergy"). One person's voice was used as a proxy for on 6 occasions over 17 and 18 April 2012, one of which appears in the records as for MM. In the case of MM there is a conflict of evidence to show when it took place. It is accepted that a written test took place on 13 April, the ETS records say that the speaking test took place on 17 April but Synergy correspondence says the test was due to take place on 18 April. Further details appear in the Report of Professor Sommer and in other submissions made on behalf of MM.

6. In the case of MA he took a test on 20 March 2013 at Cauldon College.

Information used by the Home Office in making its decisions

7. The next paragraphs, 8-30, are adapted from the report of Professor Sommer and accepted by the experts compiling this note.

8. The statement of Adam Sewell a Home Office Junior Intelligence Analyst within the Immigration and Intelligence Directorate 6 July 2015 (33) refers to his being provided with what he describes as "raw data" from ETS and his production of a series of "usable" Excel spreadsheets.

9. From the statement of Richard Green from the Home Office Performance Reporting and Analysis Unit, 31 March 2016, we get further information:

> This witness statement is intended to assist the Upper Tribunal in understanding how the evidence of an invalid TOEIC test result, provided to the Home Office by ETS and which was produced in court before the First-tier Tribunal, was obtained from the lookup tool.
>
> The lookup tool is an Excel spreadsheet which is able to search a list of thousands of test certificates provided by ETS. Though it is sometimes referred to as the "ETS lookup tool" it was wholly developed within the Home Office to enable the information provided by ETS of invalid and questionable test results to be checked and cross• referenced against the details of those who have made applications for leave to enter and remain.
>
> The personal details in the ETS list have been matched against Home Office data using the name, date of birth and nationality of the test taker. The matching process was carried out entirely within the Home Office.
>
> A search can be made on the lookup tool using the ETS test certificate number, the person's passport reference number or the unique number allocated to their record on the Home Office casework information and management system.

10. In effect everything depends on the quality of the information provided by ETS to the Home Office and the ability of the Home Office to match this with the data from other sources which they hold.

Understanding the risks in the ETS testing regime

11. In order to test the proposition that audio files could be mislabelled we need to build up a picture of the technical and administrative infrastructure behind the testing. Once we have this we can attempt to identify weaknesses. The relevant documents appear to be (the figure in brackets is the tab number in the bundle – and I will be using this reference method throughout in this report):

    - Synergy Audit (16)
    - Speaking And Writing Admin Day Guide (18)
    - Speaking And Writing Test Day Guide (19)
    - TOEIC Speaking And Writing – Test Centre Administration Manual (20)
    - Test Centre Photo Registration Guide (21)
    - Test Administration Procedures (22)
    - TOEIC Speaking And Writing Examinee Handbook (23)
    - PTPix TCA user documentation – ETS global (24)
    - Witness statement of Hae Jin Kim (35)
    - Letter from Jones Day dated 22 June 2016 ("the Jones Day letter 22/06/2016") together with attachments.
    - Statement and exhibits of Glyn Powell of Jones Day, 7 July 2016 ("Glyn Powell")
    - Letter from Jones Day dated 21 July 2016 ("the Jones Day letter 21/07/2016")
    - BBC Panorama *UK Student Visa English Testing Scandal* broadcast 10 February 2014 (viewed separately online at http://www.dailymotion.com/video/x1bx5uj_panorama-uk-student-visa-english-testing-scandal_news)

    Further documents were considered by the experts; some of these were supplied to Chris Stanbury in his role as expert for MA; others arrived from GLD after the deadline for the service of the individual expert reports had passed – these documents are identified by their name and any dates of origination,

12. With the exception of the Synergy Audit, which was carried out on 16 January 2013, none of the ETS documents bear a date and it is not entirely clear whether they accurately refer to circumstances as they existed in April 2012 and March 2013 when the tests were taken.

13. We can get a general overview from the Affidavit of Peter Millington (1):

> ETS operates a decentralised process in which they have an ETS preferred network of local third party distributors around the world ("the EPN") which provide a localised service for clients. In this model the EPN is responsible for the administrative tasks such as test registration and administration, customer service and recruitment and certification of test centres to administer the test on behalf of ETS.
>
> Under this model ETS, centrally in the USA, has responsibility for designing and developing the tests and developing new products. Whilst the EPN offices administer tests, the responsibility for marking the results and analysing the overall statistics and management information rests with ETS. Having produced a tests score, ETS will pass the results back to the relevant EPN office for them to report back to the test taker.
>
> [In practice this means that after a test is administered in the UK, a test takers spoken and written responses to each of the individual questions are divided into individual electronic files and transmitted to ETS and stored securely on servers in its data centre.] These servers are accessible only by authorised personnel and the files are typically stored for 999 days. ETS has advised that file manipulation, corruption or misapplication has not been an issue once files are received in the USA.

14. The sentence marked in square brackets was the initial opinion of Richard Heighway; however, there is a conflict as a Jones Day letter dated 22 June 2016 appears to suggest that responses are not stored as individual electronic files. As referenced in Mr Heighway's report he would like clarification from ETS on this point.

15. Three of the manuals put flesh on the practical arrangements: *Speaking and Writing Admin Day Guide* (18), *Speaking And Writing Test Day Guide* (19) and *TOEIC Speaking And Writing – Test Centre Administration Manual* (20). This last document appears not to have been in effect in 2012 (Jones Day letter 22 June 2016 paragraph 2). The following is my conjecture based on

reading these manuals and using my general experience of computer systems.

16. Further information is available from the statement of Hae Jim Kim (35) starting at his paragraph 13.

17. At a local ETS test centre there is a room with a number of computers. One of them is designated for an administrator and acts as a local server; the others are for the examinees/candidates. All the computers are linked via a local area network. The computers typically run on the Microsoft Windows operating system; at the relevant time this may have been Windows XP or Windows 7. In order to set the computers up, specialist software must be downloaded from ETS centrally via the Internet. The administrator downloads "CBT Manager" and the other computers download "CBT Client". Once that has taken place and some checks run, the computers used by the examinees no longer need to have direct Internet connectivity. The CBT Manager acts as a server for the computers used by the examinees and has a connection, as needed, over the Internet to ETS centrally. In effect the CBT Manager mediates the connections between the client computers and ETS. The CBT Manager has login credentials which have been provided by ETS. Having run a few connectivity tests, the next step is to ensure that all the computers to be used by the examinees are appearing on the local network. (See page 21 of the *Test Centre Administration Manual*). A further series of tests are run to make sure that everything is communicating properly. Some of the tests require verification/acknowledgement from the ETS systems in the United States.

18. Other aspects of running the test centre include the placement of the individual client computers in relation to each other and some other physical matters such as one would normally expect in an examination environment.

19. Hae Jim Kim (35) tells us at paragraphs 13 and 15 of his statement:

> The TOEIC speaking and writing tests were originally delivered in the UK using a web based system (ID number beginning with 1000) which was changed towards the end of 2011/ early 2012 to a mobile delivery system (ID number beginning with 0044). In the web based system, ETS provided ETS Global with a list of Authorisation (registration) Numbers for a specific administration. ETS would provide the list of Authorisation (registration) Numbers to the test centre in advance of the test date. Before the test day, a test centre administrator ("TCA") at a test centre had to fill out the test taker information (e.g. name, date of birth) for each Authorisation Number. On the test day, the TCA distributed a pre-populated form which contained the Authorisation Number and the candidate details (e.g. last name, first name, birth date) to each test taker to confirm that the pre-populated information was accurate. After the administration was finished, the test centre sent the registration file to ETS Global and ETS Global then sent it to ETS via a secure file transfer method. In the mobile delivery system, the registration number is created during the computer log-in process on the test day. The registration number is generated as soon as the test taker enters the required personal information and ETS Global has access to that information. In both systems the registration number is unique to the candidate and any associated voice samples provided during that test administration. If a candidate retakes the test, the candidate will receive a new candidate number for each re-test....
>
> After the speaking and writing test is administered in the UK, the test taker's spoken and written responses are transmitted to ETS. [On the web based system, the system detects when a test taker has completed test and transmits the test taker's responses to ETS via the web.][1] On the mobile system, once the test taker has completed the test, the test taker has the opportunity to review his/her responses but with no ability to make amendments. If the test taker discovers that there are technical difficulties which mean that his/her responses are inaudible, the test taker can choose not to submit to the test response and this has the effect of cancelling that test taker's test. If the test taker wishes to proceed, all of the test taker's responses are submitted.[2] At the end of the session the TCA uploads[3] all responses which had been submitted by the test takers by activating the "response upload" function. The TCA has no ability to make any amendments to these responses once they have been submitted by the test taker. ETS Global has the ability to monitor the success of the upload and to assist the TCA if there were upload problems but does not have the ability to make any amendments to the responses. All uploaded speaking and writing responses sent electronically to ETS for marking.

20. The manuals make reference to the use of an iPhone to take photographs of the candidates. See paragraph 8 in the *Test Day Guide* and pages 36 and following of the *Test Centre Administration Manual*. The latter document refers also to photo registration via a personal computer which is run by the centre

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[1] The system in use at the relevant time was "mobile" as opposed to "web-based"

[2] We think this means uploaded to the CBT Manager at the local test centre

[3] We think this means uploaded to the ETS Server

administrator but should not be the same personal computer as is running the CBT Manager application. Jones Day say they are unable to confirm that this procedure was in place in April 2012 and have not been able to locate any records (Jones Day letter paragraphs 4 and 5). ETS did not maintain photograph files in April 2012. As far as MA is concerned in March 2013, Chris Stanbury says that his instructions are that MA was photographed, along with 7 or 8 others, at the point of examination. Although ETS has a photograph of MA it is not known whether this is the photograph taken at the point of examination. Chris Stanbury says his instructions are that MA is saying " I believe it was the photo taken on 20th March 2013 at the test centre"

21. At this point the test centre is ready to receive candidates.

22. In addition to whoever is acting as the administrator of the CBT Manager computer, the documentation makes reference to individuals who act as "proctors" who have the role of on-the-ground invigilators. Proctors have their own passwords to the system distinct from that used by the person who is acting as the administrator of the CBT Manager.

23. Jones Day has this to say at their paragraphs 6 and 7:

> a test taker such as [MM} would have been required to enter his personal details into the computer prior to taking the test. This includes entering relevant ID details. In the case of [MM}, he entered [passport number]. As soon as the relevant information is entered into the system by the test taker the system automatically generates a unique Registration Number. The Registration Number is unique to that candidate and for that test administration. If a candidate re-takes the test (whether at the same centre or any other centre) the candidate will receive a new unique Registration Number for that test. The voice files in relation to that Registration Number would then be automatically linked to the personal details that were entered onto the computer prior to the start of the test....the voice recordings are automatically linked to the personal details that are entered onto the computer at the start of the test and coded accordingly. There is no ability within the system for the test centre to make any amendments to those responses before they were sent to the Online Scoring Network at ETS in the US

24. It may be more accurate to say that the [redacted]number "was entered" rather than the definitive claim that MM himself made the entry. [Professor Sommer's report goes on to provide more detail about the specific circumstances around MM's tests]

25. The test is then downloaded and run. In my earlier statement I said: "Here too, there is a lack of immediate clarity as to what is actually happening. One possibility is that the test materials have previously been downloaded to the CBT Manager which then releases the information to each client on demand. Another option is that the material is downloaded direct from ETS in the United States with the CBT Manager computer simply mediating the transmission through the local area network. It would be helpful to have clarity from ETS on this point." This question remains partially unanswered. In the case of MM we know what was happening on 17 April 2012. Jones Day say at paragraph 9:

> In April 2012 there was flexibility in the process in the UK, in that test centre staff could determine when the data was uploaded following the completion of the test administration. In relation to the test administration at 14:10 on 17 April 2012, the test finish time was 15:34:31 and the upload time was as follows (in relation to the relevant sections of MM's test): (There then follows uploads between 15:36 and 15:39)

We do not explicitly know what happened on 18 April 2012 or on 20 March 2013.

26. Where malfeasance is suspected, plainly there are more opportunities for rogue behaviour if candidates' responses to tests are stored on a machine local to a test centre. There are also implications for this sort of evidence of activity at any given test centre which is likely to be held or has been held by ETS centrally.

27. The manuals also provide instructions about what to do in some forms of emergency. These could include the failure of one or more computers, the failure of an Internet link and the need in particular circumstances of a candidate to move from one terminal to another.

28. What is striking about all of these procedures is the extent to which trust is placed by ETS on the reliability and probity of staff in the test centre. The assumption seems to have been that appropriate checks had taken place at the point at which the test centre and its staff were recruited. I will pursue this matter a little later.

29. Hae Jim Kim tells us a little of the identification of irregularities (paragraph 19 of his statement):

> ETS has sought to identify and address irregularities where they occur. Where it believes it has detected irregularities it will not release score reports. Examples of the sorts of the irregularities that would lead to a score report to being withheld in relation to a Speaking and Writing test would include:
>
> - where there has been a repeat test and the voice of the test taker is different from the previous test;
> - where are the voice of the test taker changes from one question to the next (this would suggest another person has been substituted during the test);)
> - where it appears imposters were sitting the tests in place of the test taker;
> - where the recordings revealing a voice other than the test taker giving them assistance; or
> - where an answer is unusually similar to another test taker's answer

30. But he also provides an important caveat (paragraph 20):

> Markers and supervisors are encouraged (through training and day-to-day management messages) to be vigilant to detect these irregularities. However, the deliberately fractured nature of the marking process means that, to a large degree, irregularities of this sort would only be uncovered if one marker was able to recognise patterns across items that he/she was marking. The irregularity would need to occur with sufficient frequency within the responses being reviewed by a single marker to cause that marker to flag the issue to his/her supervisor

31. The position therefore, subject to any further information which ETS is able to provide, is that the security precautions are concentrated on malfeasance by candidates rather than ETS test centres. We note that this point was raised in Professor Sommer's report of 26 June and that no additional information has been supplied.

Material it would have been helpful to have available for consideration

32. The experts draw the attention of the Tribunal to material that would almost certainly have existed at some time and which would have enabled them to come to more definite conclusions. The experts are not seeking to place blame anyone or anybody for the absence of this material.

    a. Additional witness statements from staff at either Synergy or Cauldon

    b. We understand that there may be criminal investigations into staff formerly at Synergy or Cauldon which could inhibit those sources

    c. We understand that there may be criminal investigations into ETS Global that this may be inhibiting the supply of information from there.

    d. We understand that Jones Day, solicitors to ETS Global at various points have objected to some of the requests for information made by solicitors for the applicants on the grounds of quantities involved and relevance, ongoing criminal proceedings and the lack of direct contractual relationships between MM and ETS and MA and ETS.

    e. To our knowledge no forensic disk images were taken of computers in use at Synergy or Cauldon

    f. With the exception of audio files all the supplied computer files have in fact been print-out to PDF the effect of which has been not to preserve any original date-and-time stamps or internal metadata either or both of which would have

assisted analysis using digital forensic analysis and helped produce a chronology of events

g. We understand that some of the computer facilities used by ETS Global are outsourced to another company, YBM, which we understand to be based in South Korea.

h. There is no contemporaneous photograph of MM at the point of taking the test though there may be of MA

i. For some of the ETS tests, examination centres would provide seating plans and other documentation connecting candidates, their main ID and the actual seat occupied. For the Speaking test, which was carried out via computer terminals, no such record appears to have been collected.

Specific records supplied by ETS for the tests in April 2012 and March 2013

33. Information about these and consequent analyses appear in the respective individual experts' reports.

Analytic Activity by Home Office

34. We need to look at the data provided by ETS to the Home Office during 2014 and relied on by Adam Swell (33) as per his statement of 6 July 2015. He says: "I identified that the data received from ETS was stored electronically within a folder called Full data ETS." (He then identifies the folder's location within Home Office systems). Richard Shury provides a witness statement (27) but it does not deal with the supply of data to the Home Office.

35. At page 4 of his statement Adam Sewell tells us that he "performed various tasks to cleanse the data". We have looked at the various

spreadsheets provided to us and note that nowhere is there a column for the unique identity (ID) of each candidate. We have read the passages carefully but cannot see that the data supplied to him makes it possible for the candidate ID to be inextricably linked to each test. The data, as it appears to have been supplied, refers to each individual test and its associated result. The name of the candidate appears but not the candidate's unique identity. We do not know the processes by which the candidate's name is linked to each test. As a result, if the data provided by Synergy and Cauldon to ETS – and which in turn is relied on by the Home Office – mismatches the candidates and their test, no check exists against the candidate ID.

Opportunities for proxy impersonation and other means of system deception / corruption

36. We can now turn to the various reports and admissions of frauds known or alleged to have taken place at Synergy in April 2012, Cauldon in March 2013 and other ETS test centres. Although the reports of all three experts have slightly different emphases in terms of what scenarios they considered, there is nevertheless substantial agreement in terms of conclusions.

37. **Simple impersonation** Under this arrangement the candidate arrives at the test site, presents his credentials including ID documents, is admitted to the examination room and enters sign-on information on to the terminal. At some point, a photograph is supposed to be taken (but we know that this was not via the iPhone application which was not then in place in April 2012 for MM. – the position of MA in March 2013 is not clear – see paragraph 19 above) Once the sign-on has been completed, the candidate leaves the terminal and examination room and is replaced by the proxy who then proceeds to respond to the tests. At the conclusion of the

test, the candidate returns, picks up his identity documents and leaves. Later the candidate receives the test results.

38. This is the method described as being witnessed during the unannounced ETS audit which took place on 16 January 2013, details of which appear in the statement of Ahmad Bdour (25) and which led to the termination of the Synergy's contract in the letter of 8 February 2013 (17).

39. This was also the experience of [redacted] (31) on 15 January 2013, [redacted] (29) and [redacted] (30), though the latter two do not provide dates when the impersonations took place.

40. It should be noted that within the bundle there are interview summaries with individuals who say that they took tests at Synergy and that neither they nor anyone else then present was using proxies. See [redacted] (25) and [redacted] (28). There is also a witness statement of a police officer, Michael John Power (42) which refers to police interviews with nine others who denied dishonesty.

41. This simple impersonation method would be vulnerable in any "speaking" test.

42. **Dictated answers** This method is referred to in the statement of Rebecca Collings (2) and which in turn quotes from a letter from the BBC dated 6 January 2014. The BBC *Panorama* programme shows this taking place. Plainly this method would not be viable in a test of spoken English.

43. **Staff filling in of answers** This method too is referred to in the statement of Rebecca Collings (2) and which in turn quotes from a letter from the BBC dated 6 January 2014. Again, this method would not be viable in a test of spoken English.

44. **Remote Control Software** Under this arrangement, candidates attend a test centre, and perhaps input their own basic registration details. But the computer terminal they are using has been loaded with a small piece of software which enables it to be controlled remotely from elsewhere – either from other machines in effect on the same local area network or (and without technical difficulty) from anywhere in the world with Internet connectivity. At the end of the test, control is given back to the candidate. During the test, the candidate may be able to see activity on the screen in front of him or her, and hear audio via headphones, but this depends on the software being used, some software in this class operates wholly covertly.

45. This is the method discovered during Project Façade (11). In this instance, the specific remote control software used is called TeamViewer. Its main normal usages are, firstly, to enable someone to access an office or home based computer from outside using another computer. Secondly, it is widely used by computer support technicians in large organisations so that they can assist users without necessarily having to visit them in person. There are a number of similar products. TeamViewer operates overtly – popups on the screen announce its presence and mouse movements would also be visible - but covert remote control is also a very common feature in cybercrime activity allowing a perpetrator to take control of a victim's computer for such purposes as executing frauds and acquiring confidential information. (Chris Stanbury says that it is possible to hide TeamViewer popups). The legitimate owner is normally not aware that remote control is taking place.

46. Project Façade was an inquiry into a test centre in Birmingham. Investigators were able to seize computers and see that TeamViewer had been installed. In the case of Synergy and

Cauldon our understanding is that no computers were seized so that no forensic examination was possible.

47. **Faked input** One of the oldest forms of "computer fraud" consists of inputting misleading information into a computer system. The reason why this may be possible is usually attributable to poor controls over who has access to a system and what the system allows them to do without further checking. The computer system then processes the data it has received perfectly. Similar problems for reliability arise when incorrect data is input is as a result of **accident** or **clumsiness**. This possibility is considered below.

48. **File manipulation – the CBT Client** The feasibility of this method depends on the infrastructure of the testing environment. In theory it might be possible to carry out file manipulation on individual CBT Client computers but if this tactic is to be used at all it makes more sense to attempt it on the CBT Manager. A candidate or anyone else attempting file manipulation in the time surrounding a test would be bound to attract attention, quite apart from the practical problem of leaning what to do in a very limited time. The experts agreed that the use of this method is highly unlikely.

49. **File manipulation – the CBT Manager** If it is the case that file responses are held on the local server - the CBT Manager - at the testing centre, then there would be a point at which that file is available for alteration by staff at the test centre. However, compared with the other methods set out here, this would require relatively high orders of skill both to understand the structure of the information within the file and then to conceal the alteration that had taken place. The experts spent some time considering various possibilities. Chris Stanbury thinks that if test centre staff are involved in a fraud and if they have sufficient time they might be able to re-assign data between various "candidates".

50. **Hidden Room** Chris Stanbury argues that it would be possible to run a simultaneous testing session using proxies – the proxies could be in a room anywhere in the world. This hypothesis is a variant on the "remote control software" hypothesis suggested above, except that there would be no need to use remote control software. He cites the statement of Michael Isaac Kossew (8 October 2014): "It is my opinion that the technical issue which prevented uploading, reported before by TCAs at various sessions since the policy of sending codes only to ETS TCAs was enacted, is a ruse to allow the Manager PC to be reset, and the tests from a hidden room to be uploaded in place of those from the room in which the ETS TCA sits. I believe the TC is remote accessing the S&W test for the purpose of submitting fraudulent results." Chris Stanbury says that similar remarks are made by Richard Shury in an earlier statement. Richard Shury also comments in a statement dated 29 April 2015 principally about audits of Cauldon College including one 25 September 2013. "On this visit the tests could not be uploaded apparently due to technical errors. This raised our suspicion as I had experience of other colleges that purported to have technical problems in order to hide the fact that cheating by proxy test takers or remote testing was occurring[4]". Professor Sommer says he agrees with Chris Stanbury that this method would, in terms of the skills required, be feasible for a fraudulent test centre to achieve.

51. Picking up on the sequence of events after completion of the tests: as noted above Hae Jim Kim says:

> The voice files in relation to that Registration Number would then be automatically linked to the personal details that were entered onto the computer prior to the start of the test.... the voice recordings are automatically linked to the personal details that are entered onto the computer at the start of the test and coded accordingly.

[4] This observation also has an impact on the "file manipulation" hypothesis considered above

52. The question is whether this is universally true, a matter already discussed above at paragraph 34. The data, as it appears to have been supplied, refers to each individual test and its associated result. The name of the candidate appears but not the candidate's unique identity. As a result, if the data provided by Synergy and Cauldon to ETS mismatches the candidates and their tests no check exists against the candidate ID.

53. If the aim of Synergy and Cauldon staff was simply to take a number of candidates and deliver to those candidates a certificate saying that the test had been passed up to a point it did not matter whether a candidate was going to pass on the basis of their own activities or because there had been a substitute or other form of cheating. From the perspective of the candidates what was wanted was a certificate which could be forwarded to the Home Office. Particular opportunities for mistakes appear to arise if the actual registration on the ETS system is sometimes carried out by test centre staff and not by the candidates themselves, though obviously the candidates would have had previously to provide test centre staff with identity information such as a passport number. Presumably, and depending on how precisely any fraud was being carried out, it would be possible for test centre staff to hand out the wrong registration details to a proxy who then (wrongly) enters the details of a legitimate test taker instead of his intended "client". It is not clear how ETS would detect any of this other than by surprise audit. Under normal circumstances administrative clumsiness in the form of misallocating identity details during the registration process would not be manifest.

Forensics

54. Our understanding is that none of the computers and data media associated with Synergy or Cauldon is available. Had this material been available, then some of the conjectures about the technical

infrastructure referred to above would have been less speculative as among other things there might have been audit, log and configuration files and all files would have carried date and time stamps. In addition, the general business records of Synergy and Cauldon might have been very helpful.

55. There are bound to be extensive records held by ETS in relation to Synergy and Cauldon and the various candidates that used it as a test centre. We have been limited by the quantity and quality of material actually available to us.

56. **Voice recordings** The naming conventions for the digital files of the voice recordings do not provide an explicit link between the candidate and recording; the naming convention simply refers to the particular test being taken. Further steps are necessary in order to be sure that a voice recording is inextricably linked to a candidate. The Jones Day letter at paragraph 15 explains how they are made up.

> The file names on voice recordings are made up of three elements. The first is a combination of the country where the test occurs, here "0044" for the UK, and the test taker number for that test administration - using MM's voice recordings as an example ([redacted]). The voice recordings previously provided to the Tribunal in respect of MM *all contain the same unique registration code linked to his personal details* for that test administration. The second element, for example in MM first voice recording, "VC283624" is the ID that is specifically allocated to the particular question that the test taker is answering (this element would be the same for each test taker answering the particular question at the relevant test administration (or, indeed, at any other test administration at any test centre)). The third element is the response ID number which is a number that is automatically generated and is unique to that test taker's response to the specific question. So continuing with the same example of MM's first voice recording "[redacted]".

Please note that the elements in italics do not appear to be true – the file name does not include the "unique registration code".

57. In the current context what this naming system does is to provide linkage between a registered candidate and the responses and recording but assumes that that the unique registration code is reliably linked to the real candidate. As we have already pointed

out, in the two spreadsheets exhibited by Adam Sewell (33), there are no columns uniquely to identify candidates by reference to the ID they originally tendered (e.g. the passport number).

58. The experts have examined the supplied audio files and find that there is no embedded metadata which might assist their enquiries. Time and date stamps appear to be of the most recent copying of the file and not of the point of origination.

Audit

59. The experts have considered areas where the reliability of the testing procedures could have been improved. In his first report Professor Sommer said: "What is striking about all of these procedures is the extent to which trust is placed by ETS on the reliability and probity of staff in the test centre."

60. The main mechanism appears to have been the unannounced audit. Ahmad Bdour (25) says: "individual audits were generated in a number of ways. Analysis of ETS data relating to test results may indicate unusually high test taker numbers. At times, correspondence, either from the Home Office i.e. score verification requests or anonymous emails from individuals will also highlight concerns as to how tests will be conducted. Such material will usually require a visit to the test centre, either by an announced or unannounced visit."

61. We can see one such audit took place on 15 May 2012. This is referred to by Richard Shury (27) and he provides a copy of a handwritten audit report by someone called Matthieu. Matthieu expressed mild concern, but not, it appears to the point of suggesting remedies or sanctions.

62. We have already referred to the unannounced ETS audit which took place on 16 January 2013, details of which appear in the statement of Ahmad Bdour (25) and which led to the termination of the Synergy's contract in the letter of 8 February 2013 (17).

63. There are a number of precautions which ETS could have considered if they had concerns about the reliability and probity of the various test centres and in particular the risk of the use of proxies:

- **Use of webcam verification**: each candidate (client) computer has a webcam which periodically takes random snapshots of the person sitting at the terminal during the course of the examination. The pictures are uploaded to ETS. The webcam pictures can then be compared with the official photo ID such as a passport.

- **Video camera in examination room**: a video camera is placed such as to have a view over the entire examination room. If the camera is part of the local network (and is an IP camera), then it is possible for an invigilator located anywhere in the world to see if proxy substitution or other irregularity is taking place.

- **Arbitrary testing of CBT Manager and CBT Client computers** for integrity, including the presence of remote control and other unauthorised software. In effect, a TeamViewer installation (or similar monitoring software) run by ETS would be able to examine the configuration of each machine and do so remotely from the United States.

(signed)

Richard Heighway

Peter Sommer

Christopher Stanbury

Written evidence submitted by Professor Peter Sommer

Summary:

The purpose of this submission is to give the Committee an insight into the quality of computer-based data relating to the test results supplied by ETS Global to the Home Office. Home Office officials used this information as the main basis for making decisions about individuals who had taken the tests as proof of their proficiency in English and as a necessary qualification to continue to be within the United Kingdom. The Home Office used ETS data to decide that some individuals had cheated by using proxies and for that reason alone should not be allowed to be in the United Kingdom. It appears that officials used this data exclusively and without notice to some of the applicants.

I was instructed as an expert witness on behalf of one applicant to review the available records, the administrative and computer-related framework within which the data inside them had been obtained and to identify the adequacy of the controls to meet the risks of various forms of abuse and fraud.

At the same time two other experts were instructed; one for another applicant and one on behalf of the Home Office. We agreed a joint statement which was used in proceedings before the Upper Tribunal Immigration and Asylum Chamber. A copy is being provided to the Committee by Bindmans LLP.

We concluded that the controls around the processes of registering applicants on to the computer system used for testing and the ways in which records of results were combined were unsatisfactory and inadequate. We had particular concerns for circumstances in which local testing centres might decide to falsify results for the benefit of applicants who had paid additional fees for them to do so. We identified a number of routes by which this could happen. We agreed that in any one testing session there could be a mix of genuine applicants and those who were paying for fraudulent results.

Looking at the records supplied by ETS to the Home Office in relation to the cases we concluded that there was an absence of cross-checking facilities to identify circumstances in which voice tests were mis-ascribed to individuals.

It seems reasonable to conclude that the 'ETS lists' are not a reliable indicator of whether or not a student in fact cheated.

My name is Peter Sommer. I am currently Professor of Digital Evidence at Birmingham City University and also a Visiting Professor at de Montfort University. Previously I have been a Visiting Senior Research Fellow and then Visiting Professor at the London School of Economics and have also held a Visiting Readership at the Open University. I combine academic work with consultancy and in particular expert evidence in the UK and international courts where the issues are around complex computer systems. Topics have included global hacking, state corruption, terrorism, fraud, defamation, indecent images of children and many other areas of crime and civil dispute. My public policy work has been, inter alia, for the National Audit Office, Cabinet Office, Home Office, United Nations and OECD. I have given evidence on previous occasions to the Home Affairs and other Select Committees and have acted as a Specialist Advisor, most recently to the Joint Select Committee on the Draft Investigatory Powers Bill. A full CV is available at http://www.pmsommer.com/PMSCV042015_leg.pdf

1. In June 2016 I was instructed by Bindmans LLP in respect of their client Mohammad Mohibullah. Mr Mohibullah had taken a TOEIC test at Synergy College in April 2012 and was bringing judicial review proceedings against the Secretary of State for the Home Department in respect of actions taken by her following the inclusion of Mr Mohibullah's name in a list of people who had been identified to have cheated in an English Language test.

2. Computer records produced by ETS Global, a company based in the US, appeared to show the form of cheating was by the use of a proxy to take a spoken English test. It was common ground that the voice recording held by ETS and which they said was of the person taking the test was not Mr Mohibullah. But Mr Mohibullah said that he had attended a test and that there were other tests[1] previously taken that would show his English to be at the required standard, and therefore, that he was very likely to pass.

3. My instructions were to examine the circumstances and accuracy of the records. The computer systems used for testing applicants were, by that time, unavailable but via my instructing solicitors I was able to acquire copies of various manuals used to operate the systems and also to see a number of statements from ETS staff and Home Office officials. I asked a series of questions, again via instructing solicitors, some but not all of which were answered by ETS/the Home Office. I prepared a statement/report which in due course was served on the Tribunal and on lawyers representing the Home Office.

4. A hearing had been set for the end of July 2016 and I understood that there would be one further applicant in a similar position to that of Mr Mohibullah. I also understood that the Home Office had commissioned a report to look at my work and that of an expert instructed on behalf of the other applicant. The Upper Tribunal ordered that a meeting of experts take place and a joint report setting out areas of agreement and

[1] Including the British Council's International English language test system or 'IELTS'

disagreement be prepared. That meeting took place and a report was agreed.

5. In fact there was very little disagreement and the reports of the three experts, all initially working separately, came to very similar conclusions.

6. A copy of the agreed report is being supplied to the Committee by Messrs Bindmans LLP. I understand that a few elements have been redacted for data protection reasons but for my part I am quite happy for the Committee to see the unredacted version and indeed other reports generated by me.

7. For convenience I will summarise the findings but Committee members are urged to read the full report for the detail and identification of sources:

8. ETS operated a decentralised process in which they have a preferred network of local third party distributors around the world ("the EPN") which provided a localised service for clients. In this model the EPN is responsible for the administrative tasks such as test registration and administration, customer service and recruitment and certification of test centres to administer the test on behalf of ETS. Under this model ETS, centrally in the USA, had responsibility for designing and developing the tests and developing new products. Whilst the local offices administered tests, the responsibility for marking the results and analysing the overall statistics and management information rests with ETS. Having produced a tests score, ETS will pass the results back to the relevant EPN office for them to report back to the test taker.

9. At each local centre a test room consisted of a bank of personal computers known as CBT Clients and which were used by candidates and a further PC known as the CBT Manager and which mediated the link with ETS. Actual arrangements varied over the period when ETS were carrying out tests and it was never clear how far test results were immediately transmitted to ETS while the candidates were present and how far they were held locally and transmitted later. The issue is important because delayed sending would give greater opportunities for post-test manipulation.

10. The supplied documentation showed that candidates were required to provide a unique identity number, usually based on a passport identity number, which was entered on to a system. The identity was usually supplied at the point at which a test was booked which would be several days before the actual test(s).

11. TOEIC required that there were two tests, to cover reading, writing and speaking. These did not all take place on the same day so that a candidate would have to make two visits to a test centre. The issue with which we were concerned was the speaking tests.

12. The supplied documentation explained in detail what was supposed to happen on each test day and in particular what records should be

generated. We saw some of these records. Again it became apparent that over the relevant period the actual procedures changed. One important feature was that each individual test acquired its own registration number; if a test was re-taken the new test would acquire a new registration number. There were also arrangements to take photos of candidates but here again the actual detail changed over the period. At the Tribunal hearing it became clear that the photo taken of the second applicant used a procedure different from that prescribed in any of the documentation supplied to us.

13. The supplied documentation also describes the roles of test centre staff, including "proctors" or invigilators.

14. But what is striking about these procedures is the extent to which they focus on malfeasance by individual candidates acting alone as opposed to malfeasance by test centre staff for the benefit of some candidates.

15. In effect it was test centre staff that oversaw the information supplied by candidates and who had the opportunity to fill in the various forms, print and electronic, required by ETS on the day of each test. Staff would usually have candidate information (including passport numbers) ahead of the test day and could also have candidate photographs ahead as well. A witness statement by one ETS employee explains the checks that did exist:

> Examples of the sorts of the irregularities that would lead to a score report to being withheld in relation to a Speaking and Writing test would include:
>
> - where there has been a repeat test and the voice of the test taker is different from the previous test;
> - where the voice of the test taker changes from one question to the next (this would suggest another person has been substituted during the test);
> - where it appears imposters were sitting the tests in place of the test taker;
> - where the recordings revealing a voice other than the test taker giving them assistance; or
> - where an answer is unusually similar to another test taker's answer

16. But he goes on to say:

> Markers and supervisors are encouraged (through training and day-to-day management messages) to be vigilant to detect these irregularities. However, the deliberately fractured nature of the marking process means that, to a large degree, irregularities of this sort would only be uncovered if one marker was able to recognise patterns across items that he/she was marking. The irregularity would need to occur with sufficient frequency within the responses being reviewed by a single marker to cause that marker to flag the issue to his/her supervisor

17. The other control was the unannounced audit visit. We had two reports of when this had occurred at Synergy College (in May 2012 and January 2013). Notably, both reports included information which was cause for concern but it appears that no action was taken by ETS in response.

18. As experts we postulated the following fraudulent methods as being feasible:

    a. Simple impersonation by a proxy, probably assisted by test centre staff to waive the required procedures

    b. Use of remote control software. This method had been discovered during Operation Façade, an investigation into another test centre, using a product called TeamViewer. The actual candidate might sit at his terminal in a test room but actual control was being exercised in another room by a proxy – the location of the other room could be anywhere in the world with an Internet connection.

    c. Misleading data input by test centre staff and/or associates; the computer systems work faultlessly but on fraudulent data. A variant of this was suggested by one of the witness statements we saw in which it was suggested that a fault was deliberately engineered to prevent the normal uploading of data to ETS so as to give an opportunity for 'massaged' data to be substituted.

    d. Another variant of the above is that the misleading data is the result of clumsiness by staff, not deliberate action. It will be recalled that at an individual test there are a mix of genuine candidates and those paying for fraudulent results, the overall aim is to ensure that eventually there will be successful passes – on this basis it might not matter to test centre staff whether actual tests and candidates are properly aligned for record purposes

    e. File manipulation – where computer records are changed by direct intervention by test centre staff and/or associates. There are two possibilities – on the client computers and on the management computer. Manipulation on the latter would be more productive. The result would be fraudulent information being supplied to ETS.

19. We were not convinced by a statement from ETS that: "The voice files in relation to that Registration Number would then be automatically linked to the personal details that were entered onto the computer prior to the start of the test…. the voice recordings are automatically linked to the personal details that are entered onto the computer at the start of the test and coded accordingly."

20. When we came to look at the data files produced by ETS and apparently used by the Home Office - statements from officials Adam Sewell and Richard Shury - we noticed that although there were records of voice files apparently associated with candidates, the candidates' identity number (as supplied at the start of the process and usually based on a passport number) was not present. The result was that an important cross-check was not available. We never did get definitive answers to questions about

what precisely ETS delivered to the Home Office; in the statements we have seen Home Office officials simply refer to retrieving data from folders (directories) on Home Office IT Systems which they then proceeded to examine.

21. We identified a number of relatively simple security precautions that could have been taken by ETS to reduce the risk of local test centre fraud: the use of live webcam verification, the use of a live video camera in the examination room and the arbitrary testing of the Client and Management computers for absence of modification.

22. It is important to stress that because of the lapse of time between the questioned events and our inquiries as experts a great deal of information, including that on computers at the test centres, was no longer available. Moreover we saw some resistance from ETS in supplying, via its London solicitors, information which we thought might exist.

23. I am not able to say, based on the information available to me, that any fraudulent behaviour definitely took place, still less to point to a precise method. However I understand that various forms of fraud including the use of proxies have been clearly established in a number of cases and that these involved activities by test centres. There seems to be every reason to suspect that other techniques including those computer-related ones referred to above could have occurred.

24. Although this a point for other submissions being made to the Committee, the fact that excluded candidates were given little or no opportunity to query their results – and indeed considerable pressure was being placed on the educational institutions at which a number were registered – meant that the Home Office never tested the reliability of the information supplied to them by ETS and upon which they made their decisions.

25. Had Home Office officials permitted querying and then instigated their own investigations I believe they would have come to similar conclusions of the three experts.

26. The sensible and low cost reaction would then have been to require candidates to take another TOEIC-like test, this time administered in a sound reliable manner.

I am happy to provide the committee with further information and to be available for oral testimony.

Peter Sommer

30 December 2016

Written evidence submitted by the National Union of Students

Home Affairs Select Committee English Language Testing Inquiry

6 June 2016

nus national union of students

Foreword

NUS has been actively engaged in supporting students affected by the ETS TOEIC scandal since the issues came to light in February 2014 and Home Office action commenced in June 2014. We welcome this inquiry into the actions of the Home Office, and the role of ETS, and appreciate the seriousness with which the Home Affairs Select Committee has considered our previous evidence.

This written submission aims to:

- illustrate the number of issues NUS raised since June 2014 which remain unanswered;
- share with the Committee the range and extent of the impacts upon students;
- raise questions about the fitness for purpose and fairness of the current immigration system which applies to international students.

A great number of international students have been treated unfairly, prioritising "looking tough on immigration" over upholding people's rights to a fair hearing.

Due to NUS' involvement in supporting students through the scandal we have had direct contact with many of those directly affected. Our case studies illustrate some of the grave consequences for the students impacted by the ETS TOEIC scandal.

We hope this evidence is useful and informative. We would be keen to give oral evidence if this would assist the committee.

Mostafa Rajaai, International Students' Officer, NUS

Headlines

The actions of the Home Office in relation to the ETS scandal have affected an enormous number of students, thousands of whom have never been implicated themselves.

The Home Office did not follow the practice established in 2012 to support international students during the London Metropolitan University case in which NUS intervened. This compounded the problems faced by students caught up in the scandal.

The Home Office denied support to many international students affected by its actions, even those who had no involvement in ETS fraud; in particular, students whose institutions' Tier 4 sponsorship licences were revoked after 24 June 2014.

The Sponsorship Working Group set up in July 2014 to support affected students was largely ineffectual. The Chair consistently failed to follow agreed actions and he refused to stand down despite concerns about a conflict of interest given his role at the Home Office.

Communications from the Home Office to affected students was consistently poor.

The National Union of Students (NUS) is a confederation of more than 600 students' unions, representing more than 95 per cent of all higher education and further education unions in the UK. Through our member students' unions, NUS represents the interests of more than seven million students.

We have worked closely with our legal partner Bindmans LLP to prepare this evidence, and throughout our response to the ETS scandal.

Contact information:
Alexander Lee, Public Affairs Officer

Background

In February 2014 a *BBC Panorama* programme revealed fraudulent activity at two English language test centers accredited by the company ETS to deliver its TOEIC test. At that time TOEIC tests were one of a small number of English language tests designated as 'Secure English Language Tests' by the Home Office, and as such could be used by visa applicants including international students to demonstrate English language proficiency.

The programme showed proxy test takers who sat TOEIC tests in place of those registered to take the tests. It also showed that packages could be bought including not only a proxy to sit the TOEIC but also fake bank statements which could be submitted to the Home Office to demonstrate the requisite level of savings in accordance with visa requirements.

The Home Office has since taken action that has impacted tens of thousands of students.

NUS understands that the Home Office did not investigate students directly except in cases where there was considered to be complicity in the criminal activity of delivering the fraud. Instead, ETS was tasked to investigate and identify those who had used proxies.

ETS quickly commenced an enormous exercise of analysing voice recordings from the speaking element of the TOEIC test, to identify which voices appeared several times, indicating that the voice belonged to a proxy test taker rather than the registered test taker.

ETS returned two lists of students: (1) those they were confident had not sat the TOEIC test themselves (i.e. the voice recordings were of someone whose voice appeared more than once across the analysis exercise), and (2) those in respect of whose TOEIC test ETS had 'limited confidence'. ETS would later clarify through the Home Office that people were included in the second group – referred to as the "questionable" group – where there was some "administrative irregularity" including that they had sat their TOEIC test at a test center where proxies had been used.
On 24 June 2014 the Immigration Minister announced that 29,000 students had been found to be guilty of fraud and 18,000 were in the "questionable" group. These numbers have since risen to 33,725 and 22,694 respectively.

Students whose names were on the 'ETS lists' were not given any opportunity to respond to the allegations. They were notified only in generic terms when the Home Office took action against them, which was usually in the form of cancelling their leave to remain and requiring them to leave the UK immediately and to bring any appeal from their home country.

The Home Office revoked the Tier 4 sponsorship licences from over 90 colleges across the UK, leaving thousands of students including those not on the 'ETS list' without a place to study.

Following pressure from the higher education sector, the Sponsorship Working Group (SWG) was established by the Home Office to coordinate support for affected students and to hear concerns from the sector about the wider impacts of the scandal and the Home Office action. NUS was a member of the SWG.

The aggressive Home Office action against students who were paying thousands of pounds to study in the UK has been widely reported in the international press.

This scandal has had an impact upon the reputation of UK's higher education system and the British economy. Education providers, and indeed many local communities, rely upon international students for financial stability and growth. With international student numbers in decline, government must carefully manage such situations as mistreatment of international students will affect the decisions of prospective students and the governments that fund them.

I certainly hope the students will be adequately compensated. However, I would not be surprised if they choose not to come back to the UK after the way they were disgracefully treated.

Harsev Bains, Indian Workers Association

Hindustan Times, 15 April 2015

Main report

Affected students

Four groups of students affected in different ways have emerged:

1. **Students in-country at the time of the Home Office action arising from the inclusion of their name on the 'ETS list'.**

The majority of these students had only an out-of-country right of appeal. Many left the UK and it is not known how many took up their appeals from home. However, out-of-country appeals are notoriously slow and difficult to conduct as compared with in-country appeals. The students had no access to support from NUS or other organisations.

Others stayed in the UK and attempted to challenge the absence of an in-country appeal by way of judicial review. To our knowledge, these cases were unsuccessful because in general the courts are bound to follow legislation as to rights of appeal.

Some case are still going through the courts and this position might change. However, it has been a long process for those students who remain here, and without any leave to remain or right to work.

2. **Students out-of-country at the time of the Home Office action arising from the inclusion of their name on the 'ETS list' who received the Home Office notices on their return to the UK.**

This group had a right of appeal from within the UK and many have vindicated themselves through the appeal process, usually following giving evidence to an immigration judge and being cross examined by a Home Office representative, to seek to prove their English language proficiency. However, it is understood by NUS that the Home Office has failed to give effect to successful court rulings.

3. **Students whose institution has had its licence revoked due to the ETS scandal (the Home Office took action against institutions whom it considered sponsored a high number of students on the 'ETS list').**

Over 90 colleges and three universities had action taken against them. Many students studying at these institutions were not implicated themselves of the revocation of the Tier 4 licence of their sponsor could not continue to study with their sponsor.

4. **Students who were withdrawn from study by their institution for reason of their name appearing on the 'ETS list', including where the Home Office instructed institutions to do so**.

These students had no right of appeal in immigration law as the action against them was ostensibly taken by their Tier 4 sponsor, and as such was not an 'immigration decision'. The Office of the Independent Adjudicator has dealt with several such cases.

Continuing action

According to Home Office figures (Temporary Permanent Migration Data) the Home Office has continued taking action in these cases, even following the decision of the Upper Tribunal in the case of *SM* and *Qadir* which in part prompted this inquiry. Figures released in May 2016 show that more than 28,608 refusal, curtailment and removal decisions related to ETS have been taken, an increase of around 300 since February 2016.

The role of ETS

It is not clear to NUS when ETS became aware of the extent of the fraud that was carried out by its accredited test centers. However, NUS understands that relevant information may emerge during a case which is due to be heard in the Upper Tribunal at the end of this month.

What is clear is that ETS has been reluctant to provide information to accused students, notably the voice recordings that were analysed in the investigation exercise. The Home Office has relied upon the 'ETS list' throughout and students have had little power to obtain further information.

NUS sought to assist students in assessing the evidence, by obtaining an expert report (from Dr Harrison of JP French Associates) which commented upon the investigation exercise carried out by ETS, as set out in the generic witness statements by Peter Millington and another civil servant, Rebecca Collings. Dr Harrison found that very many issues were not sufficiently explained by the Home Office to enable a high degree of confidence in the exercise.

Since then, NUS understands that ETS has provided answers to specific questions from the Home Office who have produced a further report from JP French Associates, which deals with some of the missing information.

However, as is explained above, the ETS exercise was in relation to the use of proxy test takers alone. NUS understands that there has been no investigation into the integrity of the computer systems and the process of file recording, storage, transmission etc. NUS is concerned about this aspect of the process which would have been in the hands of the individuals at the test centres who had carried out the fraud.

ETS was roundly criticised for this reason by the President of the Upper Tribunal in the case of *SM* and *Qadir*.

NUS is aware of only one student who has obtained the voice recordings in his case and this was only following several requests by his solicitors and an application to the Upper Tribunal. They were provided in April 2016.

The cost of obtaining an expert report analysing a voice clip is significant (approximate cost £1,500 - £2,500, plus VAT). This is not a cost that could be – or should be - shouldered by students who maintain their innocence.

A lack of support for students

On 24 June 2014 Immigration Minister, James Brokenshire MP, created the SWG as part of the announcement that the Home Office would take action against the licences of 57 private colleges and three universities. The original mandate of the SWG was to support the students affected by the decisions made by the Home Office in relation to the Tier 4 sponsorship licences of their educational institutions.

NUS was a member of the SWG throughout the process, and we sought to represent students suffering the effects of the decisions made by the Home Office. We have attached our notes of these meetings as Appendix 1.

A significant number of students who were affected by Tier 4 sponsor revocations were excluded from the assistance of the SWG. These include the students whose sponsorship had been withdrawn by their institutions at the request of the Home Office as well as some students with 'open' or 'pending' visa applications to attend a revoked institution.

Students attending institutions whose Tier 4 sponsor licences were revoked after the June 2014 initial announcement, were also not supported through the SWG.

None of the students whose names appeared on the 'ETS list' were supported by the group.

Students whose college or university had their Tier 4 sponsorship licence revoked would eventually receive a letter 'curtailing' their leave to remain. The letter informed students that they had 60 days to find a new place to study or leave the UK.

NUS' objective throughout the process was to achieve as much support as possible for the affected students, in line with the precedent set in 2012 by the 'Taskforce' set up to support London Metropolitan University students and agreed through the courts.

The SWG held its first meeting on 7 July 2014 and would meet infrequently until January 2015.

On 17 July 2014 NUS and other SWG members called for Home Office civil servant, Peter Millington, to stand down from his position as Chair. It was strongly felt by SWG members that a Chair held by the Home Office was untenable, particularly given Mr Millington's role in compliance and in taking action against accused students (notably, Mr Millington was one of two Home Office witnesses to provide generic witness statements which stood as evidence against all students whose names appeared on the 'ETS list').

This call was renewed when the Chair failed to implement actions agreed by the SWG, including writing to the Immigration Minister and the Minister for Business, Innovation and Skills. These actions were declined on the basis that it would have been "inappropriate" for a civil servant to undertake such actions. SWG members from the education sector offered to Chair the group to remove the conflict of interest but the offer was declined by the Home Office.

In NUS' view his conflicting role contributed to his refusals of requests from NUS and other members to extend support to students named in the 'questionable' group.

Finally, NUS asked for support to be extended to the 33 institutions that had their licences suspended or revoked after the 24 June. Both requests were refused.

NUS urged the Home Office to reconsider their decision as it left a great number of students without any support.

We believe the extent to which the SWG was successful in mitigating the negative impact on affected students was greatly compromised by the Home Office decision to refuse an impartial Chair.

The main support offered by the SWG was the creation of a Course Information Web-tool. Students were not informed of this tool until they received their curtailment letter, despite having been informed many weeks before that their institution had lost its licence.

The SWG agreed a number of actions with the aim of supporting students, including:

- The creation of a "Course Information Web-tool" to help students find a new course
- Supporting the existing UKCISA and NUS student advice lines
- The creation of a Home Office helpline
- Delaying curtailment letters for some students to better fit start dates
- Providing an 'immigration check' process for sponsors who participated in the Course Information Web-tool and who wished to check the status of students who are considered part of the cohort supported by the Working Group.

Unfortunately, a lack of direct communication from the Home Office to affected students seriously undermined the effectiveness of this support.

Finding another course

A sub-Working Group was formed in August 2014 to focus on a process to support students in finding alternative sponsors, and to agree a process for communication with students.

Chaired by another Home Office civil servant, the sub-group met between meetings of the main group, by teleconference. In late August 2014, over seven weeks after the first action had been taken against institutions, the sub-group agreed a strategy for providing a 'clearing house' web-tool for students whom the Home Office had identified as 'genuine' and would be included in those students who the Sponsorship Working Group would support.

Comparatively, in the 2012 case of London Metropolitan University students, the Taskforce completed this action and produced the web-tool within two weeks of the group being established.

The web-tool was completed in October 2014 but it was not released to students until 17 November 2014, 21 weeks after the commencement of action on 24 June 2014, and a good number of weeks after the start of term of most institutions. Between 24 June and 15 September, 24 of the 57 private colleges had their licences revoked, and four further had surrendered their licences.

Students at the majority of these institutions waited over two months for any assistance in finding a new course from the SWG. This delay also resulted in many students missing their desired September and October 2014 start dates for new courses. Many of these students contacted NUS.

NUS fully supported the establishment of a Course Information Web-tool. However, aside from the very real financial barrier to transferring to alternative institutions, finding a new course was made even harder by the Home Office's delays and lack of communication with students.

Many students whose institution's licences were revoked on 24 June 2014 left the UK, unclear what their options were and without the financial means to just wait and see what assistance, if any, would be offered. This was despite the fact that they were not implicated in any wrong doing.

NUS raised concerns as to the speed with which the support was reaching the students who needed it the most. **As the web-tool was issued so late into the process, we are keen to know how many engaged with it and how many students succeeding in using it to find alternative sponsors.**

Furthermore, many of those who did attempt to transfer were unsuccessful as their applications were viewed as too risky by some institutions.
NUS, Universities UK, Study UK, Million+ and UKCISA brought evidence to the Working Group demonstrating that many alternative institutions were refusing to accept any students from revoked institutions. Some had taken this position independently due to the perceived risk to their own Tier 4 licence, and others had been directed by the Home Office not to do so, for the same reason.

Many students reported to NUS that upon making enquiries to alternative institutions prior to the course information web-tool they were told that the institution would not accept students from revoked institutions, even if the student had never used a TOEIC certificate in connection with their visa application.

Communication with students

Affected students have had very little, if any, information to support them through this crisis. Students and providers were unaware of the results of the investigation being run by the Home Office or the action to be taken until the day of the Minister's announcement. The education sector was unable to act to contain the damage to its reputation abroad, despite the licencing of ETS and responsibility for its integrity resting solely with the Home Office. Over the course of the actions against students and sponsors this trend continued.

ETS was asked to inform students if their tests had been invalidated but no attempt was made to clarify what this meant for students. Many students obtained an alternative English language test and applied for a visa, only to have their visa refused on the grounds of the invalidated TOEIC test, wasting time and money.

Despite concerns raised by judges in the Upper Tribunal tribunal that students would be affected more than anyone else, and NUS offering to support communications to students inform them of court decisions which may affect them, with direction and support from the Home Office, this was not acted upon.

NUS made repeated requests for the Home Office to communicate directly with all affected students. However, this request repeatedly went unanswered. NUS took action to communicate with students through student meetings, our website, email where available and social media. We remained unable to contact the majority of students.

In the autumn of 2014 via a webform we asked students if they were aware as to whether their institution's Tier 4 licence had been suspended or revoked. Ninety per cent of the 191 students who responded confirmed they were aware of the action taken against their institution. However

only 22% of students felt they had enough information to understand how the action against their institution affected them. As it was gathered, we brought this information to the SWG but no further communication solutions were offered.

The Home Office cited resource constraints as prohibiting multiple mailings to individual students and as such the Course Information Web-tool and curtailment letters (in paper or electronic form) would be sent together. This meant students were not informed of the assistance available to them until they received their curtailment letters. For most students this was between eight and 21 weeks after the action against their institution.

NUS has asked what lessons have been learned about communicating with students to ensure a more efficient and less stressful support mechanism for students impacted by cases such as this.

Learning from this experience

The most important message we would like to share with the Select Committee is that a far wider group of students than just those whose names appeared on the 'ETS list' have had their lives and education disrupted; lost significant sums of money and been left entirely unsupported throughout the process. The damage to our international reputation cannot be understated.

NUS recommends that this inquiry considers appropriate redress for wrongly accused students including those who have already left the UK

International students are denied security to which home students have the benefit. They come to the UK, spend thousands of pounds and greatly enhance our education systems. However, they have very little protection from action by the Home Office or, indeed, their sponsors. There is an enormous imbalance of power between students and the Home Office. It is also important to recognise that colleges and universities are also at the whim of the Home Office, who have control of their sponsorship licences.

International students need a system which gives them the security to finish their courses. Students have no protection against the effects of the withdrawal by the Home Office of the licences of their Tier 4 sponsors. A number of students who were in contact with NUS had previously experienced this situation, even independent of the ETS scandal. We have heard regularly of students who have lost money when a Tier 4 sponsor has closed.

NUS recommends that international students have access to a protection scheme that includes:

- A hardship fund to support students in transferring to a new institution
- Independent advice and guidance for students wishing to change institution
- A guarantee that students already studying can continue their course until the end of their academic year
- A guarantee that any deposit or fee paid by the student for the coming academic year will be returned in full if the student decides not to continue at that institution or if the institution closes or loses its sponsorship licence

These were the basic support mechanisms established for students in 2012 in response to the suspension of London Metropolitan University's Tier 4 Licence. The Home Office has refused to apply these mechanisms to other students since then. This is despite the final two points being established with the support of the courts.

Most rights of appeal for students have been removed and replaced with a mechanism of 'Administrative Review' by a Home Office civil servant, and with the option only to bring a judicial review subsequently. Judicial review is an incredibly expensive process which would only be available to those who are incredibly wealthy or those who are very poor and so would qualify for legal aid. In order to mitigate against significant unfairness students must be given rights of appeal from within the UK, with proper oversight by immigration judges.

NUS recommends that consideration is given by the Committee an overall review of the Tier 4 sponsorship system

As set out above, NUS understands that the Home Office has refused to reinstate leave to remain for those vindicated through immigration appeals. Further, it appears that the Home Office is continuing to take action against individuals whose names appear on the 'ETS lists'.

NUS recommends that the Home Office is to give effect to successful appeals and suspend further action pending the outcome of the cases which are progressing through the courts and the outcome of this inquiry

Conclusions

As outlined in NUS' previous written evidence (Appendix 2) students whose names appear on the 'ETS list' were not given equal and fair opportunities to challenge actions taken against them. For many students, the limitations to an out-of-country appeal only would mean such a severe disruption to their study that they would be unable to complete their chosen course.

Students were not given access to enough information to understand how and why their immigration status was at risk.

To this day many students remain unaware that their name is on an 'ETS list' and that any future visa or other immigration application would likely be refused on this basis.

Despite repeated warnings by NUS and the education sector, the clear conflict of interest in the Home Office acting as both the enforcement body and chair of the SWG, not only delayed the eventual limited support, but greatly reduced the effectiveness of the communication and support the students received.

The activity of the SWG, which took four months to complete, took two weeks in the case of the Taskforce for London Metropolitan University students, chaired by an independent sector representative.

Not only was the Home Office inefficient, but they were actively obstructive when the education sector attempted to step in to help.

Students have been left at significant financial and personal loss and denied access to the opportunity to challenge or change the termination of their studies.

Many lives, as well as UK's reputation in education has been adversely affected so the Home Secretary can be seen as 'tough on immigration'. Home Office's politically motivated irrational

response to the 'ETS Scandal' has led to public confidence in the Home Office to evaporate. It is difficult for us to see how the Home Office can be trusted to deal with situations similar to this under its current leadership.

Case Studies

These case descriptions are informal interactions NUS has had with students since 24 June 2014. These were either telephone or email conversations or in held person.

John*

John was from rural Bangladesh. His father was a farmer who wanted his son to go to the UK to study as he felt it would give him the best chance to return home and start a business. His father sold their farm to give John the money for tuition and maintenance and moved his family into a tiny flat in the nearby city. John understood that it was expected he return home following his study and support his family as they no longer had any income through the farm.

John came to study at Blake Hall College, on a course taught in partnership with the University of Greenwich, which was just around the corner. At the start of his final semester he was informed the College had its licence to teach international students revoked.

Teaching was terminated immediately. John tried desperately to find a way to complete his final assessments to have them marked so he could get his degree. At the time of telling his story, no student had been able to submit final assessments as teaching of the final semester had not been completed. The College would close its doors the following week.

John asked NUS staff – "How do I go home and tell my father I have nothing? A degree in Bangladesh means financial security and he sold everything to give me and my family that. I have nothing to show for his sacrifice."

While we were unable to reach John after the meeting, to see what resolution he had found, the majority of students at Blake Hall College reported leaving with no degrees, no refunds and no recourse. Blake Hall College was unable to financially afford to challenge the revocation in court.

*The student gave his name as only "John".

Surita*

Surita came to the UK from Nepal in 2009 to study. In December 2010, her college had its licence revoked. Surita waited four months to receive her curtailment letter in order to apply to a new institution. In 2011 she applied for a new visa with a new college. In 2012 she extended her visa to complete a higher level of study in her Diploma.

However, in 2013 her college merged with another and Surita and her cohort transferred to the new college. This disruption to her studies created many difficulties for Surita and she struggled with some of the final assessments.

She was, however, keen to complete her course. She requested acceptance onto the course at a higher level, which would also allow her to re-sit papers she struggled with previously, whilst studying her new course.

She was granted this acceptance from North West College Reading, which she then transferred to. Surita provided her IELTS as the English language certificate at the time of her acceptance.

The licence for North West College Reading was then revoked.

Surita was surviving off a small regular income she received from a part-time job. The loss of her sponsor's licence also meant a loss of her job and was left with no income. Surita could not continue her studies by transferring to a new institution as she was approaching her 5 year cap. She fell afoul to the cap because of time wasted with revoked colleges.

She had dreams of completing an undergraduate degree through a top-up course, and to complete a Master's degree. Because the Home Office wouldn't change the cap she had to leave without completing her degree.

*This individual's name has been changed to Surita.

Aryan*

Aryan came to the UK form India in 2012 to study a BSc in Computing. In his second year the local currency dropped significantly and the money he had set aside for tuition and maintenance was no longer enough.

Instead of abandoning his degree he looked for a cheaper alternative and found that the third year top-up with Blake Hall and the University of Greenwich was affordable. He was offered a place to finish his BSc Computing there and transferred with his credits intact in April 2014. He was due to complete his course in November 2015.

Aryan had never taken a TOEIC test and was never implicated in the activity but was sent home without his degree none-the-less when Blake Hall has its licence revoked.

*This individual's name has been changed to Aryan.

There are many more examples and case studies such as these that NUS is aware of.

Appendix 1

NUS notes from the Sponsorship Working Group meetings.

These are not formal minutes of the meetings, but notes written by NUS for our own records. They have not been approved by other Group members.

NUS Notes on Sponsorship Working Group Meeting July 7th, 2014

This was the first meeting of the Sponsorship Working Group and sought to understand the situation which led to the announcement in Parliament on June 24th, 2014 and establish terms of reference for the group.

The Home Office compliance team outlined:

- The actions taken against 60 institutions to date.
- There would be further institutions with action taken against them
- There is in excess of 20,000 students involved in the institutions named.
- A student helpline has been established by the Home Office and students can call to obtain individual information of their circumstances.
- New institutions need to undertake their regular checks to accept any student transferring from an affected institution.

The Sponsorship Working Group members noted:

- A large number of students may not be aware of the current situation of their respective existing Tier 4 sponsor, as the institutions are not making students aware or providing the UKV&I helpline number.
- With further action planned, there will need to be assurance that students will not be switching from one institution who has been revoked to another which will be revoked.
- Communication with students needed to be timed appropriately given the September/October course start dates
- Some students have accessed loans to pay for their study, however they have no fee protection. This needs to be taken into account if they are studying at an institution that is suspended and revoked.
- Confirmation in relation to the level of courses the affected students are studying would be beneficial to the sector.
- UKV&I to provide a process for working with institutions once a licence has been suspended and/or revoked.
- The group were interested in the QAA review of London campuses and asked that where applicable QAA feed into this working group.
- Sponsorship Working Group to highlight concerns to external stakeholders such as JET and others, where necessary.

The Sponsorship Working Group agreed:

- UKV&I to invite Study UK, English UK, Million+ and University Alliance to the Sponsorship Working Group.

- Update the minutes to be circulated after the meeting.
- Update the 'Terms of Reference', taking into account the groups' comments to be circulated after the meeting.
- Next meeting to be held in London with video conferencing facilities.
- UKV&I to provide a report of the number of students affected.

NUS Notes on Sponsorship Working Group
Meeting – 17/07/2014

This was the second meeting of the Working Group and the first for many members added at the request of others at the previous meeting.

The Home Office outlined:

- Two licences had now been revoked and one sponsor had surrendered its licence.
- The Home Office confirmed that UKVI are unable to 'waive a fee' under Immigration Legislation. Therefore, students will need to pay a new visa fee if they chose to switch to a new institution. NUS clarified that the intention was not for the Home Office to waive a fee but for BIS and the Home Office to work together to provide financial assistance to reduce this fee to £0.
- The Home Office confirmed that the 5 year limit of study at undergraduate level is to be checked to confirm whether a student switching from one institution to another, following revocation of the sponsors licence, will have repeated years applied to this rule.
- The Home Office confirmed that any student studying for over 6 months would have an "established presence" when applying for a new visa.

The Working Group members noted:

- It was noted that some of the group feel the term 'genuine students' is not suitable. The Home Office discussed the direction of the SWG is to support genuine students and not assist students who have obtained leave in the UK by deception. It was suggested that the term 'affected students' was used. This was to be considered.
- BIS indicated that the Higher Education fund that was available for the LMU revocation is no longer available
- Working Group members stressed a process needs to be agreed early to help and support the students switching institutions.

The Working Group agreed:

- That the Home Office would write to the BIS Minister and ask for confirmation on the funding situation.
- The Home Office confirmed it would provide further advice on 'Zero CAS' as an option for action against sponsors.

NUS Notes on Sponsorship Working Group Meeting – 01/08/2014

The Home Office outlined:

- The Home Office confirmed that there are further revocations on the horizon.
- The Home Office re-iterated that there is no flexibility on the Tier 4 guidance in relation to 'established presence' and students from revoked institutions without 6 months of their current leave completed would not qualify for the reduced maintenance amount.
- They also confirmed that there is no flexibility on the Tier 4 guidance in relation to the '5 year limit'.

The Working Group members noted:

- NUS asked if the Home Office could permit students currently studying to complete their studies at revoked institutions until the completion of their course or 12 months' time, whichever sooner. The Home Office confirmed that UKVI are duty bound by processes and guidelines that stipulate they must respond and take certain action within certain timeframes.
- NUS asked if the process could be not to issue a curtailment letter until a response had been received from the institution and the students regarding their required support.
- It was noted that NUS were concerned about the letter sent to BIS not being shared with the SWG. NUS was also disappointed that the communication was sent to BIS staff and not to the Minister, as agreed at the meeting of 17th July 2014.
- NUS asked if UKVI could postpone issuing curtailment letters to students until all investigations had been completed as students are still worried about students experiencing "repeat revocations" after switching to a new sponsor who was also under investigation. The Home Office confirmed that they were unable to wait until all investigations are complete.
- NUS expressed we were unhappy with the reply to the document they sent to the Working Group containing 15 student concerns. The concerns were for the Working Group to address and not for the Home Office to respond that it was not their area of concern or by re-stating rules which were already identified as a barrier.
- NUS noted that the second NUS document of a further 11 students concerns had not been responded to by the Working Group. The Home Office requested a copy of the second NUS document containing a further 11 student concerns in order to respond. NUS reminded them that the concerns are for the Working Group, and not just the Home Office as a member of the Working Group, to respond to.
- NUS asked if there could be a letter sent directly to students that is somewhere in between the revocation and curtailment stage to outline the assistance that would be provided. The Home Office said they would consider this.

The Working Group agreed:

- The Chair agreed to circulate BIS's response to the Home Office's letter.
- The Chair agreed to write a letter to the Immigration Minister asking for immigration concessions which would be circulated to members prior to being sent.
- A sub-group would be set up to specifically action communication to students.

NUS Notes on Sponsorship Working Group Meeting – 19/08/2014

The Chair confirmed that the 'questionable' cohort of students from the ETS testing fraud will no longer be included in the SWG process or the data that UKVI will provide on student courses. Only the 'clear' cohort will be assisted by the SWG. NUS and other members of the working group disagreed with this judgment on the lack of any evidence against these students.

The Home Office outlined:

- There is no set timescale within the guidance on how long an institution can be assigned 'Zero CAS' status.
- The Home Office responded to NUS' request for a letter between 'revocation' and a student's leave being curtailed by saying there was a daily updated factsheet that students should be signposted to.
- The Home Office provided an update on the timeline of the remaining suspended institutions.
- The Home Office confirmed that UKVI's aim is about immigration and controlling borders. If the sector proposes a process to be used for future revocation, this would need to be put forward by the sector and not UKVI.

The Working Group members noted:

- Members had information that at least one institution had decided not to accept any more international students whom are already in the UK and currently studying at a private college. The Home Office that this is not a UKVI requirement and not something they had heard of.
- Members noted that it would be difficult for institutions to be confident they could assess the ability of a student to be awarded a visa given that the Home Office held information from ETS and from other sources which it would not share but would use in deciding on a students' visa. The Home Office confirmed they would consider this situation.
- NUS indicated students are reporting that they are being turned down by new institutions because they come from a revoked or suspended institution. NUS felt that the SWG should be encouraging new sponsors to take on these students.
- NUS suggested that there was a need to check if ETS have told the 'invalid' and 'questionable' students that their test has been withdrawn and they need to obtain a new CELT.
- NUS also suggested that the students requiring the most time to obtain a new CELT to apply for a new CAS are being given the least time to do so as their leave is being curtailed.
- NUS requested clarification of the process students can use to challenge the accusation of obtaining an English Language Test or a Visa by deception.

The Working Group agreed:

- The Home Office agreed to clarify how many students are in the 'invalid' cohort.
- The Home Office will also clarify what will happen to those students who have obtained a TOEIC certificate by deception, however have not used this as part of any application for leave to remain and therefore not obtained any leave to remain by deception.

NUS Notes on Sponsorship Working Group Meeting – 11th September 2014

The Home Office outlined:

- They are still looking into clarifying how many students are in the 'invalid' cohort.
- Students wishing to challenge the decision of an 'invalid' ETS certificate will be unable to do so because a Section 10 decision invalidates their leave to remain and there is no right of appeal against this decision.
- The Home Office confirmed that they have not advised any institutions to not accept students from suspended, revoked or private colleges. It is for the receiving institution to assess whether they should accept any student.
- Now 27 revoked and 4 suspended institutions
- The SWG was associated with assisting approximately 24,000 students, this has now reduced to approximately 11,000 following the latest re-instatements.

The Working Group members noted:

- Concerns were raised by the Working Group regarding problems with the factsheet and the fact that it was difficult to ascertain the changes from one version to the next.
- The new 10% HTS threshold will have an effect on the SWG's ability to help students, given that no concessions are currently in place for sponsors to mitigate against a visa revocation being held against this figure – The Home Office agreed this would be fed back to senior colleagues.
- There is a need for clarity around the courses students are taking to ensure there is an appropriate range of courses available to them if they wish or are required to transfer from an institution.

The Working Group Agreed:

- It was agreed that the Chair will confirm if financial support will be offered to affected students.
- It was agreed that a sub-group would be set up to specifically progress the HEFCE information exchange portal.

NUS Notes Sponsorship Working Group Meeting – 27th November 2014

The Home Office outlined:

- The Home Office stated they would hold off issuing curtailment letters to students.
- It was confirmed by the Home Office that the figure of 5,558 students the SWG would assist has reduced and will continue to reduce, as some of those affected will have undertaken steps to change their circumstances, for example having already found a new sponsor or departing from the UK.
- It was confirmed that the SWG cohort of students will not receive any priority processing of their applications.

The Working Group members noted:

- NUS again suggested that the Home Office writes a letter to students to clarify what is happening and how it impacts them.
- NUS reports that students are being told they require a curtailment letter to transfer to an alternative institution. NUS is concerned that students are being given incorrect and unhelpful advice by for-profit immigration advisors and solicitors. NUS asks the Home Office

to write a letter to students and sponsors to confirm that students do not require a curtailment letter to transfer institutions, as students are reportedly being turned away by new sponsors because they do not have their letters.

- NUS raised that they were disappointed that students will receive their letters at the start of the Christmas break when sponsors may have less availability to discuss course offers, although the CIT will continue to be available throughout Christmas.

- The working group noted some sponsors may not have a sufficient CAS allocation to support students by providing a place on a course. They asked that the CAS allocation requests of institutions on the CIT be give priority and processed quickly.

The Working Group agreed:

- In the absence of further opportunities to communicate with students the sooner information is shared with the second cohort regarding the course information web-tool, the better as there are no courses available to accommodate the numbers between February 2015 and September 2015, even if this means issuing these students with curtailment letters more quickly than others.

- Home Office would review information being given to students who call the helpline regarding curtailment letters.

- That UKVI will commence the start of the process for cohort 2 on Monday 1st December.

- We will now commence winding down the SWG.

Appendix 2: The mistreatment of international students

Initial evidence from NUS

nus national union of students

Contents

A call for urgent action

Action must be taken

The National Union of Students joins the calls for an inquiry into the actions of the Home Office following on from the revelations in February 2014 that a number of overseas students had cheated in their Test of English for International Communication (TOEIC). The now defunct TOEIC test was designated a 'Secure English Language Test' by the Home Office and it was provided by the Home Office's contractor, Educational Testing Services Limited (ETS).

There are serious questions that must be answered about the Home Office's response to the revelations, which led to the removal of thousands of students and the closure of around 100 educational institutions. All of these actions were taken on the basis of evidence that has since been thoroughly discredited by judges in the Upper Tribunal (Immigration and Asylum Chamber).

The Home Office must take urgent action in response to the findings of the Upper Tribunal, including:

- An immediate suspension of all Home Office action based upon ETS' findings, including reinstating leave to remain where necessary to enable students to continue studying and working pending the findings of an inquiry.
- A commitment by the Home Office to identify and review every case where ETS' findings have led to action being taken against individuals, including those who have left the UK.
- Calling a public inquiry into the situation.

Any public inquiry should:

- Consider the appropriateness of the 'remove first, appeal later' system which applied in most cases, and how to ensure in the future that international students are afforded a fair hearing
- Determine what went wrong with the Home Office's response to the revelations and why, including how an issue of such magnitude was dealt with by two civil servants without relevant qualifications, credentials or expertise
- Determine the necessary steps to redress the detriment caused to students and others
- Recommend action to be taken and lessons to be learned for the Home Office.

"The Home Office's handling of the whole saga has been a complete omni-shambles."

Mostafa Rajaai, International Students' Officer

Key Information

The ETS scandal

Background

A Panorama programme in February 2014 revealed fraudulent activity at two TOEIC test centres whereby proxy test sitters would sit the speaking and listening elements and invigilators read aloud the answers in reading and writing elements. These TOEIC certificates were then used to obtain student visas.

In response to the revelations, the Home Office commissioned ETS to investigate and identify the cheats. ETS ran tests on the voice recordings and identified two groups: (1) the cheats, and (2) the 'questionable' group (in respect of whose TOEIC test ETS had 'limited confidence'). ETS cancelled the TOEIC certificates for those in both groups.

A staggering number of individuals were identified very quickly: 33,000 supposed cheats were identified between March and June 2014. Subsequently, the number of supposed cheats has increased to 33,725 and the number of those with 'questionable' tests stands at 22,694.

On receiving ETS' findings the Home Office began taking action against students and educational institutions. On 24 June 2014 it was announced that the Tier 4 licences of 57 private colleges and three HEIs had been suspended. Since that date around a hundred private colleges lost their Tier 4 licences, affecting many thousands of students who were not linked to the TOEIC scandal in any way.

Students also began receiving notices under section 10 of the Immigration and Asylum Act 1999 informing them that they had been identified as cheats and telling them that they must leave the UK immediately with most being given only a right of appeal from their home country. Some were detained in dawn raids and removed. The Home Office's most recent Temporary and Permanent Migration Data (from February 2016) reports that, so far:

- 'More than' 28,297 refusal, curtailment and removal decisions have been made in respect of ETS-linked cases
- 'More than' 3,600 enforcement visits have been made
- 'More than' 1,400 individuals have been served with removal notices and detained.
- 'More than' 1000 have been removed from those encountered.
- 'More than' 4,600 total removals and departures have taken place in respect of ETS-linked cases.
- 176 private colleges' Tier 4 licences were suspended, of which 89 surrendered their licences, and 87 had their licences revoked (only 7 licences were reinstated, 2 remain suspended).

This aggressive action from the Home Office towards students who were paying thousands of pounds to study in the UK has been widely reported in the international press.

This not only has significant personal implications for the international students, who are unable to complete their education, but also to the British economy and the reputation of our higher education system. International student numbers are in decline. Most higher education providers rely on international student fees to keep them financially stable and this mistreatment of international students has not gone unnoticed by the global community discredited evidence and how the Home Office intends to rectify this.

This not only has significant personal implications for the international students, who are unable to complete their education, but also to the British economy and the reputation of our higher education system.

Legal Action

Judicial reviews

A series of legal challenges were brought by students with assistance from Bindmans LLP and other firms, with expert evidence and support provided by NUS.

The first judicial review case issued in the High Court was *R (Ali) v Secretary of State for the Home Department* [2014] EWHC 3967, concerning a student, Mr Ali who was represented by Mayfair Solicitors. Mr Ali had been given a 'section 10 notice' informing him that ETS had identified him to be a cheat and telling him to leave the UK immediately. By way of evidence, the Home Office provided witness statements from two civil servants explaining the TOEIC scandal and the Home Office's response to it (the same two generic witness statements were used by the Home Office against all supposed cheats). Mr Ali argued that he should not be subject to summary removal with only an appeal from his home country. However, he did not provide any evidence challenging the Home Office response as set out in the two witness statements. Mr Ali's case was unsuccessful in the High Court. The judgment was released in November 2014.

In May 2015 judgment was handed down in the case of *R (Gazi) v Secretary of State for the Home Department* [JR/12120/2014] which was heard by Mr Justice McCloskey, the President of the Upper Tribunal (Immigration and Asylum Chamber). Mr Gazi was a computing student, with only a semester left to complete his degree when he received a 'section 10 notice' from the Home Office informing him that he had been identified by ETS to be a cheat and that he should immediately leave the UK. He was told that he could only appeal from Bangladesh.

Mr Gazi brought judicial review proceedings in the Upper Tribunal in October 2014 challenging the Home Office decision, attacking the ETS evidence and the unfairness of having been deprived of any opportunity to respond to the allegations before action was taken against him. The Home Office provided the two generic witness statements as evidence against him. NUS funded the expert, Dr Harrison, to examine the Home Office's evidence. Dr Harrison was critical of ETS' approach in identifying supposed cheats. His report was served on the Home Office on 5 February 2015 and it was made widely available for use by students in their individual cases.

Giving judgment Mr Justice McCloskey expressed concerns about Dr Harrison's evidence but, critically, due to the procedural differences between judicial reviews and appeals, he considered that he was unable to enter into a 'fact finding' process in respect of the evidence. Mr Gazi's case was unsuccessful, with the conclusion that he should return to Bangladesh to bring his appeal. Mr Gazi sought permission to appeal to the Court of Appeal and this application.

In July 2015, Mr Ali's appeal was heard in the court of Appeal which in effect adopted the Mr Justice McCloskey's position in Gazi. This remains the position in respect of 'section 10 notice' cases, i.e. that these students must return to their home country to pursue an appeal. It remains to be seen what impact, if any, the recent case of Qadir will have on students who received 'section 10 notices' with only an appeal right from their home countries.

Immigration appeals

In contrast to Mr Ali and Mr Gazi some accused students were given appeal rights in the UK (the procedure is different for, amongst others, people accused on re-entering the UK, for example having been visiting home during the holidays). These 'port cases' have UK appeals which are heard in the First Tier Tribunal and subsequently the Upper Tribunal.

It is a feature of appeals that evidence is examined and conclusions are drawn on the facts. Many hundreds of students have been through the appeals process since the Home Office began taking action in 2014. They have instructed legal representatives at their own cost, presented evidence about their English capability including giving oral evidence to try to persuade the Tribunal that they did not cheat. It is understood that ETS provided the voice recordings in only a single case, following an order by the Tribunal.

Each appeal is considered and decided separately by an Immigration Judge on the evidence available. Some students' appeals were successful. Others were not. Where the First Tier Tribunal found that a student had not cheated, the Home Office appealed to the Upper Tribunal. Where the Upper Tribunal agreed that the student did not cheat, the Home Office had no further appeal. However, it is understood that Home Office policy has been to put these cases on hold and not to implement the decision of the Tribunal (i.e. by reinstating their leave to remain). It is understood that Home Office policy is 'to fight

ETS cases as far as possible'. **This is an abuse of power and a failure of justice.**

Recent legal development

Qadir v Secretary of State for the Home Department

On 23 March 2016 the Upper Tribunal gave judgment in an appeal case, brought by a student, Mr Qadir (Qadir v Secretary of State IA/36319/2016) who was represented by AWS Solicitors. Mr Qadir had also received a notice from the Home Office informing him that he had been identified by ETS to be a cheat. He was given a right of appeal in the UK.

The appeal case was heard over five days before Mr Justice McCloskey and Upper Tribunal Judge Saini. Since it was an appeal, a fact-finding process was undertaken and there was oral evidence and cross examination of witnesses. Dr Harrison appeared for Mr Qadir. The two Home Office civil servants appeared for the Home Office and in the course of cross examination it was admitted that neither had considered Dr Harrison's report until several days previously, despite it having been served a year previously.

The Upper Tribunal accepted Dr Harrison's expert evidence and conclusions without hesitation, and it was highly critical of the Home Office's approach to the February 2014 revelations. It found that the civil servants tasked with the Home Office response did not possess any relevant qualifications, credentials or expertise. The judgment was also critical of the fact that ETS did not provide any evidence.

Ultimately, it was found that the Home Office's evidence (the two generic witness statements that had been used to justify action against countless students) were not sufficient evidence of cheating. The summary judgment concluded:

"The legal burden of proof falling on Secretary of State has not been discharged."

Ongoing cases

A snapshot

Evidence of mistreatment

What follows is a small snapshot of evidence of the extensive mistreatment of international students throughout this saga.

Waqas Ahmed

Level 6 Higher Diploma in Management

Waqas was detained by the Home Office for more than three months at an Immigration Removal Centre, the Verne, Portland, Dorset. This was hundreds of miles away from his friends and family in Bradford, where he lived.

In April 2013, Waqas submitted a visa extension application to progress to a Level 6 Diploma. In September 2014 Waqas' College had its licence revoked. The Home Office wrote telling him to find a new institution or leave the UK. He had 90 days to do so.

In order to get a visa for a new course, Waqas needed to update his English Language test certificate. The Home Office requires any test centre to see original identification documents of every student. However, the Home Office still had all of Waqas' documents as they were still processing the visa application he made in April 2013. When Waqas phoned the Home Office to ask for their help, they said they could not assist by phone and that he must email them, which he did. When he phoned to check that his email had been seen, the Home Office denied having received it. Waqas phoned the Home Office to seek their help a total of six times. He booked three separate language tests, hoping the Home Office would return his passport in time.

Waqas was unable to comply with the Home Office's deadline to extend his visa because the Home Office refused to give him his passport, to sit the new English Language test that the Home Office required. Waqas had done nothing wrong, yet he found himself locked up in a detention centre. He was lucky to have support to challenge his detention in courts. There are many who have not been so lucky.

Mr Gazi

BSc (Hons) Applied Computing

Mr Gazi came to the UK in 2007. Before arriving he passed an International English Language Test, run by the British Council. Since then he has taken, and passed two more IELTS tests, a Person PTE English test and a 5 week pre-sessional English course. Needless to say, his English is excellent.

He was told by the Home Office in August 2014 that they had information from ETS that showed he had cheated on his test. Mr Gazi was not allowed to see the evidence against him.

Mr Gazi had dreams of studying a PhD in IT in the UK, before returning home to Bangladesh to work and look after his family. After spending thousands of pounds in the UK, he has nothing to show for it but a debt of £30,000. Nearly two years on, Mr Gazi remains in the UK, in limbo and trying to clear his name and return to his plans.

His first name is not used here because he is too ashamed and distressed to tell his parents in Bangladesh of these shameful allegations.

Mr Ahmed

BA Business Management

Mr Ahmed arrived in the UK in 2010. He took a 6 month English course before studying for a BTEC HND in Business. On completing these courses Mr Ahmed was accepted onto the BA Business Management course. He completed another pre-sessional English course in August 2013.

To extend his visa for the course, Mr Ahmed needed to update his English Language certificate. He took a TOIEC test in March 2013.

In addition to this, Mr Ahmed worked in a customer facing role at his local Tesco since 2010. He was promoted to a managerial position in 2013, managing and training around 50 staff. This role required extensive and high level English language skills. There is no reason at all to believe Mr Ahmed would need to cheat on an English test that he could easily pass himself.

In September 2014 Mr Ahmed was told by the university that he did not meet the requirements of the course. Eventually he was told that he had been identified as cheating on his TOIEC test.

Mr Ahmed was not given sight of any of the evidence against him and was given no opportunity to challenge the accusations or decisions. He was not directly contacted by the Home Office about their decision to remove him from the UK, despite having been at his current address since May 2014.

The personal cost to Mr Ahmed is high – both monetarily and emotionally. His parents have spent almost £20,000 on education in the UK and he faces being sent home with nothing. The stress and shame means Mr Ahmed has not told his parents of his terrible situation and this has taken its toll on his mental health. Mr Ahmed has been signed off by his GP with depression. His first name has not been used, to protect his identity.

Mohammad Mohibullah

BA (Hons) Business Studies

Mohammad came to the UK in 2009 to study a HND in Business. Since then he has steadily progressed up the educational ladder.

He completed and took the assessments for his top-up degree at a private college, which was due to finish in September 2014. However in August 2014, Mohammad was informed that despite having finished his teaching and his assessments, that he was being withdrawn from the course due to TOIEC fraud. He had only one exam remaining to obtain his degree.

The college's sponsor licence was subsequently revoked and it went out of business.

Between 2009-2014 Mohammed took and passed three English Language tests – two IELTS and one TOEIC. He used the IELTS certificates to apply for his visas, and only had the TOEIC because he had trouble finding an IELTS slot at the time he needed to make his application to the college for admission onto the course. By the time he made his visa application he had sat and passed a new IELTS.

Because he did not use his TOEIC test to obtain a visa the Home Office was unable to issue a 'section 10 notice' asking him to leave the UK. Instead, the Home Office instructed the college to withdraw sponsorship from Mohammad and others who had been identified by ETS to be cheats.

The effect of having his sponsorship withdrawn in this way was that Mohammed had no right of appeal whatsoever, not in the UK or from his home country. Therefore, Mohammad has no means of challenging the accusation other than by bringing judicial review proceedings.

Mohammad was given 90 days by the Home Office to find another institution but he has been turned down by every single institution he has approached. No institution will accept anyone who has been accused of TOEIC fraud. Now most institutions will also reject anyone who comes from a revoked college.

Mohammad's judicial review is ongoing. His case is of note because he had no appeal right of any kind. His case is that the Home Office bullied his college to withdraw him.

Like most, Mohammad has been left with nothing except significant debt.

Conclusion

This is only the tip of the iceberg of injustice for international students. There are thousands of other stories.

We hope this initial evidence is helpful to decision makers in government to identify a significant need for these issues to be investigated further.

International students are vital to the health and growth of our higher education sector, and we mistreat them at our peril. There is both an economic and moral imperative to resolve the mistakes that have been made to so many students. Our international reputation depends on being able to rectify these wrongs.

Further information

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national union of **students**

THE TOEIC SCANDAL

an ongoing injustice

NUSUK

May 2018

national union of students

1. Foreword from Yinbo Yu

The publication of this report is timely given the recent focus on the "Hostile Environment" policy developed by the Home Office. Ministers have been quick to point out that the policy was only ever designed to deter and deal with "illegal" immigration. Whilst that may have been their intention, the consequences were all too different as this report outlines. Thousands of students have had their dreams of international higher education in the UK shattered, many feel their integrity has been called into question, living, as they are, under the cloud of being a "cheat". Students can get caught up with institutions that lose their license, with little or no redress and more often than not they are left out of pocket.

In 2012 the post study work visa was removed from international students, a vital opportunity to gain valuable experience and money, to help offset exorbitant international student study fees. In recent years visa requirements have become more stringent, the ability to work (both for students and their dependents) has become more difficult. Upon arrival students are required to register with the police within seven days, pay a surcharge to the NHS and their landlords have to administer immigration checks. These bureaucratic barriers all add up to a hostile environment for students, one that is actively deterring students from studying in the UK.

It is clear to me that the conflation of general immigration policy in an attempt to play to the "will of the British people", and we should be wary of politicians who claim to be able to interpret a people's will, is damaging the reputation and quality of higher education in the UK. We are still recruiting and students report that they enjoy their experience, but we are not taking advantage of the current growth in international student numbers. We are losing out to competitors who can provide English language teaching. In a post Brexit environment, the UK is going to need as many internationally literate graduates as possible, this is achieve by enhancing not restricting outward mobility and encouraging not deterring inward mobility. The hostile environment policy and the decision to leave the European Union both threaten our continued success in their areas. NUS policy is clear we should remove international students from migration targets, as they have done in Australia, and create an open and welcome student experience that will enrich us all.

I would like to thank or staff team, partners such as Joy Elliott-Bowman for their work on this report. We have also worked closely with our legal partner Bindmans LLP to prepare this report, and throughout our response to the ETS scandal.

Yinbo Yu
International Students Officer 2017 – 2018

2. Introduction

NUS has been monitoring the TOEIC scandal closely since the Home Office action commenced in June 2014. This report follows our February 2015 interim report[1] and provides an update to our 6 June 2016 written submissions[2] to the Home Affairs Select Committee (in conjunction with both of which this report should be read). The landscape is complex for several reasons, including: the sheer numbers involved, the labyrinthine immigration legal framework (which has changed several times in the past four years alone), and the piecemeal evidence coming out of legal cases. We hope that by pulling the information together we can assist proper debate and investigation into this ongoing scandal.

The TOEIC scandal is unprecedented in terms of numbers: in 2014 ETS informed the Home Office that more than 56,000 people had cheated or may have cheated in the TOEIC English language test over the course of more than a three-year period. As at the end of 2016 the Home Office had taken action in a staggering 35,870 cases, and although the Home Office no longer reports on TOEIC cases in its transparency data figures[3] we are aware that further action has been taken by the Home Office since then.

Clearly there were cheats, initially exposed in the 2014 Panorama footage, and NUS does not condone any form of fraudulent activity, by international students or anyone else. However, it is also now clear beyond any doubt that a significant number of innocent people have been caught up in the scandal and an extremely serious injustice has been done to them. In very many cases, the injustice has still not been recognised or rectified. As we set out below, the impact on those falsely accused cannot be understated.

It is worth noting that there has been absolutely no willingness by the Home Office to consider representations or evidence put forward by students to explain their innocence. Students who came to the UK already with excellent English – in some cases fluent English – were accused. Students who whose tutors and lecturers gave glowing references attesting to their ability could not shake the Home Office's conclusion that they were guilty. Even those who have obtained Masters level degrees – and higher – taught in English in the UK have been unable to persuade the Home Office that they had no reason to cheat. It seems that there is nothing that students on the 'invalid' list can do to persuade the Home Office that they did not cheat. As a result of this approach, and the absence of a discrete process to deal with the individuals on the TOEIC list, a huge number of cases have been funnelled through the Courts and Tribunals.

It is astounding that the scandal has been brushed under the carpet by the Home Office, and further still, that this has been allowed to happen. ETS was a Home Office contractor, licensed to provide so called Secure English Language Tests on behalf of the Home Office. It is not in dispute that in each and every case where fraud occurred that fraud was orchestrated by the test centres that were sub-contracted by ETS to run the testing sessions. There remain very many unanswered questions and unpursued lines of inquiry. Until these have been investigated it is impossible for the Home Office to know who did and who did not cheat.

[1] http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/home-affairs-committee/english-language-testing/written/31779.pdf

[2] http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/home-affairs-committee/english-language-testing/written/34158.pdf

[3] https://www.gov.uk/government/publications/temporary-and-permanent-migration-data-february-2017

The TOEIC scandal is embarrassing for ETS and the Home Office. Both will want it to simply fade into the recesses of time. But this must not be allowed to happen. It is imperative that the TOEIC scandal be investigated by an independent and impartial body so steps can be taken to find out what happened and remedy the injustice caused to innocent students. And of course, in order that important lessons can be learned. As will be seen below, the Home Office is not impartial and frankly, it has demonstrated that it is not willing to conduct the necessary enquiries to get to the bottom of what happened.

The scandal should be of general interest from a number of different angles: not only because of the human cost but also due to the enormous amount of public resources that have been expended and continue to be expended, in legal fees paid by the Home Office to its lawyers (which are likely to run into the hundreds of thousands across all of the cases), in Court and Tribunal time and, for the few lucky individuals who qualify, in Legal Aid costs.

With the UK poised to leave the European Union, the Tier 4 visa system for international students will become increasingly important to the functioning of our higher education system. However, it is NUS' view that the Tier 4 system is broken. It is high time that a root and branch review is conducted. Students who come to the UK and find themselves subject to unfair treatment by the Home Office or their educational institution have no effective recourse to an independent body for an impartial adjudication. Rights of appeal to the Immigration Tribunal have been taken away from international students and replaced with an 'administrative review' within the Home Office to correct 'case-working errors'. This is no substitute for an appeal to an immigration judge. The Office of the Independent Adjudicator has no powers to stop immigration action being taken whilst complaints are investigated. The reputation of our higher education system is at stake.

Note on terminology

ETS returned two lists of students to the Home Office: (1) a list of 33,725 names of those whom ETS were confident had not sat the English language test themselves on the basis of the voice recognition tests that they ran (known as the 'invalid' list – because their English language certificates were invalidated as a result); and (2) a list of 22,694 names where ETS had 'limited confidence' in the test results (the validity of their tests was 'questionable').

Recommendations

1. **NUS call for an independent investigation into the scandal including: following up the unpursued lines of inquiry, recommending appropriate outcomes for successful students and making recommendations for redress**
2. **NUS asks that individuals seeking to prove their innocence be granted access to Legal Aid or a special legal assistance scheme for immigration advice and representation in the Immigration Tribunal**
3. **NUS recommends that in-country appeals are reinstated for international students**
4. **NUS recommends a root and branch review of the Tier 4 sponsorship system including an investigation of the effectiveness of complaints procedures and the OIA complaints scheme**
5. **NUS recommends that international students have access to a protection scheme which they may access where their Tier 4 sponsor loses its licence**
6. **NUS calls for international students to be removed from net migration targets**

Our recommendations are explained in detail on page 18 onwards.

3. Impact upon falsely accused individuals

It has now been four years since the TOEIC scandal broke. Yet for many falsely accused individuals there has been no resolution. Needless to say, an accusation of cheating by a foreign government is a very serious matter and the allegations are an ongoing source of extreme distress to a great many individuals. We are aware that depression, anxiety and sleep disturbance is almost universal amongst falsely accused individuals. Self-harming and suicidal thoughts are common. Many are in serious debt. Families have been separated and some have broken down.

The extremely serious impact was recognised by the then President of the Upper Tribunal, Mr Justice McCloskey, in the *Mohibullah* case in December 2016 (*R (Mohibullah) v Secretary of State for the Home Department* [2016] UKUT 00561 (IAC))[4]:

> *"(79) We do not identify in the [Home Office's] submissions […] any suggestion that the repercussions of the Secretary of State's decision were, for the Applicant, anything other than grave. In brief compass, this decision effectively branded the Applicant a fraudster, a person who had abused immigration laws and control; required him to leave the United Kingdom, where he had been established for several years; blighted his academic and career prospects; rendered null the substantial financial investment which he had made in his studies in the United Kingdom; and blacklisted him with regard to future immigration decisions."*

WV, a professional from southern Africa who came to the UK as a student and has since married a British national said:

> *"The effect of these allegations on our lives has been absolutely devastating… The idea of this allegation crushes me – it is deeply shameful. Only my husband and my close friends know about it. I cannot understand why this has happened to us. Our lives have stopped. We are really broken inside. My husband and I live in a constant state of worry and panic that something awful is going to happen. It feels like we have lost all control over our lives.*
>
> *I suffer badly from depression as a result of my situation… I take [anti-depressants] and my GP referred me for counselling. I also have other medical problems: I have unexplained pains in my arm and am awaiting the results of an MRI scan, and I am also suffering with memory problems… [My husband] is also suffering with depression… I blame myself for what he is going through and it feels so awful to see how it affects him."*

[4] *R (on the application of Mohibullah) v Secretary of State for the Home Department* (TOEIC – ETS – judicial review principles) [2016] UKUT 561 https://tribunalsdecisions.service.gov.uk/utiac/2016-ukut-261

KA, a Bangladeshi student said:

Because of what happened, my family are out of contact with me. They had a dream for their son, but now they will not talk to me or support me. They gave me money to study, but now that I am facing this cheating allegation they have lost all respect for me. This experience has destroyed my dreams and has been the biggest curse of my life...

I became very depressed as a result of what has happened. I did not know how we would survive. I thought the Home Office would come and get me. I was being treated like a criminal even though I did not do anything wrong… It is so full of unfairness and I cannot believe this is happening. I contracted viral hepatitis in July 2017. I was very ill with a really high temperature for months. I spent 2 days in hospital, and then had to attend hospital or my GP every day until September 2017. I think this was due to the stress and anxiety, it caused my body to get sick. My wife is now sick with stress and anxiety…

The strain on my relationship with my wife is also huge. I have been unable to support her and I feel so awful seeing her suffering because of me. I have lost all self-respect, and I am afraid that she will leave me. I often wish that my life would end, because I cannot bear this pain any more. I did not do anything wrong and my life has been ruined…"

HM, a Bangladeshi student (extract from GP letter):

"He has a history of anxiety and depression which was triggered by the [false accusation]. He has still not been able to complete his course or to apply to other universities to obtain a degree or complete his degree. He is also not able to travel home to see his family. He tells me his marriage has also dissolved as a result of the above stressors. He has had psychological intervention with our local psychologist.

He remains low in mood. He is not sleeping, has lost his appetite and has become forgetful as a result. He has negative thoughts about the future and has had thoughts that he would be better off if he was dead. He feels his future has been destroyed as he is not able to complete his course.

He remains on [antidepressants] due to persistent symptoms of anxiety and depression and we will continue to monitor him in primary care. He is very keen to complete his degree and we feel this would help his anxiety and depression symptoms as not completing his degree has been the main trigger for his symptoms."

4. Affected individuals

In our June 2016 report, four groups of affected students were outlined. Since then, the number of groups has increased. This is in part due to the complex and frequently changing immigration appeals framework. It is also because the Home Office has begun taking action against individuals who may have been students some years ago but who have since transferred into other immigration categories. In general, the groups can be categorised as follows:

1. **Students who were not directly implicated in any wrong doing but whose educational institution had its licence revoked due to the TOEIC scandal**

   - These students were treated with suspicion merely for having studied at an institution whose licence was revoked. There was no financial assistance whatsoever and only minimal, ineffective practical assistance to find new educational institutions. In any event, these students were effectively blacklisted as they were considered too 'risky' by alternative Tier 4 sponsors, having come from a 'revoked institution'.

   - The majority of these students returned to their countries of origin, having had their studies interrupted and curtailed, and without any financial redress or refund of course fees. These students were effectively collateral damage.

   - Some institutions' licences' were revoked merely for sponsoring a large number of students whose names appeared on the ETS lists.

2. **Students in the 'questionable' group**

   - Individuals were included in the 'questionable' group because ETS had 'limited confidence' in the validity of their TOEIC test because of 'administrative irregularity'. This group included students who sat their TOEIC test at a test centre where there was a high rate of 'invalid' TOEIC tests. This group numbered 22,694 individuals.

   - These students were permitted to sit a new Secure English Language Test (SELT). NUS understands, contrary to some reports, that the majority of these students were required to pay for the new tests. The outcomes for this group are not known.

3. **Students who were withdrawn from study by their institution for reason of their name appearing on the 'invalid' list, including where the Home Office instructed institutions to do so**

   - A number of students were dealt with outside of the usual immigration processes (whereby ordinarily, if a student's name appeared on the ETS list Home Office action would follow as a direct consequence).

   - Instead, in some cases the Home Office instructed the educational institution to withdraw the student from their course of study, and subsequently the student was told by the Home Office to find a new sponsoring institution within 60 days or leave the country. However, since the student was effectively 'blacklisted' from finding a new sponsor because their name is on the ETS list, invariably they would reach their 60 days without finding a new sponsor.

   - Since this was not Home Office action there was no right of appeal attached to it. Therefore, students in this group had **no right of appeal** whatsoever, in-country or out-of-country, because their cases were dealt with outside of the appropriate immigration processes. The Upper Tribunal found this approach to be unlawful in the *Mohibullah* case. NUS understands that the Home Office has not taken any steps to contact others in this category following the *Mohibullah* judgment to rectify this unlawfulness.

4. **Students on the 'invalid' list who were outside of the UK at the time of the Home Office action and who received the notices informing them of the allegation against them on their return to the UK (before 6 April 2015)**

   - This group mainly comprised students who had visited family in the summer holidays and on their return to the UK they were served with notices (usually at airports). Some were detained and some were interviewed by Immigration Officers.

   - These students had a right of appeal from within the UK but NUS understands that most were not permitted to continue their courses pending the appeal hearings. For many students this meant an end to their studies.

   - The Home Office has not released figures relating to the numbers of successful and unsuccessful appeals. However, NUS understands that in each and every case won by a student the Home Office appealed the outcome (to the Upper Tribunal or onwards to the Court of Appeal).

   - NUS understands also that where the appeals process was exhausted by the Home Office (i.e. where the student had ultimately succeeded on conclusion of the series of appeals) the Home Office has been slow to provide a remedy to the student (for example, reinstating leave to remain or deciding a new application for leave to remain) and in some cases, successful students remain in limbo.

5. **Students on the 'invalid' list who were in the UK at the time of the Home Office action (before 6 April 2015)**

   - Most of these students were served with 'section 10 notices' (under s.10 of the Immigration and Asylum Act 1999) informing them that the Home Office considered them to be cheats, that they should leave the UK immediately and, if they wished to appeal, to do so from their country of origin.

   - Many students in this group sought to appeal from within the UK, rather than returning to their countries of origin to pursue appeals due to concerns about the effectiveness of out-of-country appeals and a December 2017 Court of Appeal judgment (*Ahsan and others*) has vindicated their concerns.

   - Some of these students were not issued with 'section 10 notices' at the time, but have been refused further leave to remain at a later point on the basis of the TOEIC allegations. The experience of these students is the same as Group 7, below.

6. **Students on the 'invalid' list who were in the UK at the time of the Home Office action (from 6 April 2015)**

   - The Immigration Act 2014 removed rights of appeal from students and replaced them with an 'administrative review'. Therefore, students who received decisions after 6 April 2015 have **no right of appeal** (unless there are human rights arguments).[5]

   - Students might have human rights arguments, for example, if they have been in the UK for a number of years, they are part-way through an educational programme or if they family in the UK (e.g. a partner or if their children are at school). However, the Home Office can review the human rights arguments and determine that they are 'clearly unfounded' in which case the student can only appeal from their country of origin.

[5] The position is the same for other individuals in the UK under the Points Based System (Tier 1 entrepreneur, investors, highly skilled and exceptionally talented workers, Tier 2 skilled workers, Tier 5 (temporary skilled workers).

- Administrative Review is a review by a Home Office caseworker to correct 'case-working errors'. Importantly, however, there is no Administrative Review of removal decisions or decisions to cancel leave to remain (as distinct from a decision to refuse an application for leave to remain). Therefore, students receiving section 10 decisions from 6 April 2015 also have **no access to Administrative Review**.

- Where an individual's Administrative Review fails or if they have no entitlement to Administrative Review, presently their only option is to challenge the removal or cancellation decision by a claim for judicial review. However, judicial review is expensive, carries the risk of costs being awarded against the student and the legal hurdle in judicial reviews is high (the individual will succeed only if the decision was so unreasonable that no reasonable person acting reasonably could have made it – which is different to an appeal before an immigration). Further, the student would not ordinarily be permitted to give oral evidence in court.

7. Former students on the 'invalid' list who have made new applications for leave to remain

- Students who had completed their course of study did not generally receive section 10 notices. Instead, if and when they made subsequent applications for leave these were refused on the basis of the allegation of TOEIC fraud. These include people who have married British citizens and people who have had children in the United Kingdom, and who are therefore applying for leave on the basis of those relationships. Often they had no idea about the TOEIC allegations before they made their applications, and have established family lives in the United Kingdom.

- The Home Office has historically certified these applications as 'clearly unfounded', which means that the individual must go back to their country of origin to bring an appeal. As with Group 5 above, the recent judgment in *Ahsan and others* has shown that this approach was unlawful and that these people should generally be given an in-country appeal.

- There will be people in this category who still have no idea about the allegations against them, because they have not needed to make a new application for leave since the Home Office action began.

5. Court of Appeal case: Ahsan and others v Secretary of State for the Home Department [2017] EWCA Civ 2009

NUS has raised concerns from the outset of the TOEIC scandal about the inherent unfairness of a process which allowed the Home Office to remove individuals from the UK, interrupting their studies, without first giving them an opportunity to respond to the extremely serious allegations, and with only a right of appeal from their home country.

On 5 December 2017 the Court of Appeal handed down judgment in the case of *Ahsan and others*[6] which changes the picture significantly. The case concerned a number of students who had received 'section 10' decisions (Group 5 on page 8 above).

The judges decided unanimously that students who had lived and studied in the UK for a number of years should not be summarily removed from the UK with only an out-of-country appeal because the nature of the allegations necessitated oral evidence in response, so an out-of-country appeal would not provide a fair and effective process to challenge the section 10 decisions.

Notably, the judges in the *Ahsan* case lamented the "*very messy and unsatisfactory state of affairs*" caused by the fact that "*the basic route of challenge to a section 10 decision provided for by the legislation is by way of an out-of-country appeal, in circumstances where such an appeal does not, in cases like these, afford access to justice*" in combination with the many changes to the legislative framework over recent years (see paragraph 129).

Effect of the Ahsan judgment

NUS understands that Home Office lawyers (from the Government Legal Department) are presently working their way through the list of several hundred cases which have been placed on hold in the Court of Appeal, with a view to making proposals to the individuals as to how their cases should be dealt with (these proposals will need to be consistent with the reasoning in the *Ahsan* case).

NUS understands that the proposals will likely lead to a Court or Tribunal hearing (so a judge can decide whether - on the balance of probabilities - the individual cheated) for those individuals who have a pending Court of Appeal case and who were previously granted only an out-of-country appeal.

This approach could have been taken from the outset. It would have avoided significant expense (for the individuals and taxpayers alike) and of course the grave consequences for the falsely accused. The students who remain here to clear their names are generally now in financial difficulties and suffering from ill health as a direct result of the Home Office's unfair processes.

These individuals will require support from lawyers to prepare their cases, whether they are granted appeals or judicial reviews. NUS calls for a legal assistance scheme to be set up for affected students. NUS also calls for compensation for these students. The processes to determine these cases are likely to continue for several months if not years and they continue to suffer in the meantime.

What will be the practical outcome for students with Court of Appeal cases?

Whilst the *Ahsan* judgment is welcomed NUS is concerned that students who subsequently vindicate themselves by winning an appeal or judicial review (thereby demonstrating their innocence) will not necessarily be guaranteed a fair outcome leading to permission to continue studying.

[6] *Ahsan and others v The Secretary of State for the Home Department* (Rev 1) [2017] EWCA Civ 2009 http://www.bailii.org/ew/cases/EWCA/Civ/2017/2009.html

This is essentially because the Immigration Rules are hugely complex and very strictly applied. Where an international student succeeds in an appeal they will usually be given a standard letter by the Home Office, notifying them that they have 60 days to find another Tier 4 sponsor or leave the UK. This approach is riddled with unfairness, as NUS has pointed out since the scandal erupted.

For example, the Immigration Rules require an international student applying to the Home Office for permission to study at a new educational institution to have valid leave to remain at the date of their application *and* to make their application within 28 days of the course start date. It will be all but impossible, therefore, for student receiving a '60 day letter' in any month other than August to meet the necessary requirements, given the fact that most courses start in around the middle or end of September.

Further, it is unlikely that a student simply wishing to complete the final year or semester of the course that they were prevented from completing (and are likely already to have paid for) will succeed in this aim. Tier 4 institutions have a limited number 'Confirmation of Acceptance for Studies' to offer to international students each year and fees paid by international students are vital income. It is unrealistic to expect institutions to offer valuable Confirmation of Acceptance for Studies to students who may just need to complete a single semester.

In addition, any students needing to start their courses from scratch will also often encounter problems arising from the '5 year cap' which is the maximum period of time international students are allowed to study in the UK at degree level, also specified in the Immigration Rules. The rule operates to include all leave to remain granted to study, whether or not the student was studying for that period.

What about those who do not have cases pending in the Court of Appeal?

The "*difficulty and complexity of the law in this area*" - as it was put in the *Ahsan* judgment (paragraph 129) - is illustrated by the fact that the Home Office has still not adopted a consistent approach in these cases.

NUS has serious concerns about the fate of those who do not have cases on hold in the Court of Appeal (this is generally because their cases were dismissed at an earlier stage). The Home Office appears to be treating these cases differently and it is not applying the spirit of the *Ahsan* judgment. NUS is aware, for example, of some students who unsuccessfully attempted to obtain an in-country appeal in 2015 and 2016 who have approached the Home Office again following *Ahsan* only to be told that their cases will not be looked at again.

NUS is also extremely concerned about those who do not have legal representation and who are attempting to navigate the labyrinthine legal system themselves. For example, NUS is aware of a case where a student challenged a Home Office refusal by bringing a claim for judicial review, with the Home Office subsequently agreeing that it would reconsider its decision. In normal circumstances in judicial review claims, the loser (the Home Office) should pay the legal costs of the winner (the student). Although the student was not represented by solicitors, he had paid court fees and for legal submissions from a barrister. However, he was not informed that his legal fees ought to be paid and the order did not include provision for any payment to him, thereby unfairly depriving him of several hundreds of pounds.

6. What happened? Evidence in the public domain and findings of the Courts and the Immigration Tribunal

Since the scandal broke in 2014 there have been many legal cases where evidence has been produced and findings have been made by judges. Evidence has also been produced in connection with the Home Affairs Select Committee Inquiry. As a result, the factual picture has moved on significantly since our last report.

Voice clips

ETS has begun providing voice clips to individuals. NUS understands that in most instances the voice on the clips does not belong to the individual. This has led to the investigation of other avenues which might have resulted in a mismatch.

Voice recognition expert evidence

As indicated in our 2016 written submissions, NUS obtained a report from a forensic speech and acoustics consultant, Dr Philip Harrison of JP French Associates to examine what was known of the biometric voice analysis conducted by ETS. Dr Harrison considered the Home Office's explanation of ETS' processes and determined that the 'false positive' rate could be as high as 20% (false positives being those who were incorrectly implicated as cheats by the ETS voice testing process).

In response, the Home Office obtained a report, from Professor French, also of JP French Associates. Professor French was provided with additional information that was not available to Dr Harrison and he concluded, with the benefit of that additional information, that the rate of false positives would be relatively modest at around 1%.

However, since then important questions have been raised regarding the 'chain of custody' of the test data. Several of these questions remain unanswered. The TOEIC testing processes comprise a number of different events (over the course of two separate test dates), including: registration, sitting the test (in the speaking element, this involved speaking into a microphone at a computer terminal), uploading of the responses by the test centre employees in the UK to ETS in the US, downloading of the responses by ETS in the US onto its server for scoring and production of certificates.

In addition, there is the matter of storage of the test data by ETS in the US and then the production of the 6 short clips that were analysed by ETS in the US at the request of the Home Office in 2014. Subsequently, ETS provided results to the Home Office in the form of several spreadsheets, and finally the Home Office collated the ETS spreadsheets and added further biographical information from their own records to produce the searchable 'lookup tool' that is referred to in many cases.

Consequently, the voice recognition evidence is now of limited importance and the issues relating to IT have become more prominent. Importantly, this has been recognised by the Home Office whose leading counsel said in the Court of Appeal (in the *Majumder and Qadir* appeal) on 25 October 2016 that the voice recognition issues had 'fallen away' and that the IT issues were key.

IT expert evidence

Reports were prepared by IT experts in three cases heard together over several days in the first week of August 2016, by Mr Justice McCloskey, the President of the Upper Tribunal.

In each of the three cases, the voice clips had been obtained from ETS and in each case the voice did not belong to the individual. On receipt of the voice clips further investigations were conducted by the lawyers acting for the individuals. At the request of the lawyers, the Tribunal ordered ETS and the Home Office to produce materials such as ETS' testing processes manuals, test questions,

answer sheets, attendance sheets, audit reports relating to the test centres and details of the Home Office's investigations into the test centres in question.

The Home Office instructed Richard Heighway of Kroll Ontrack and the individuals instructed Professor Peter Sommer and Christopher Stanbury, all experts in IT. The reports were prepared in June and July 2016.

In a joint report[7] the experts agreed that in addition to the 'impersonation' (or proxy) explanation, there were several possible means by which an individual may have been wrongly implicated, including: the use of remote control software in test centres; replacement of files by test centre employees before uploading to ETS; and the use of hidden rooms where proxies sat the tests and unbeknownst to some students their computer was not in fact recording their responses.

The experts highlighted the fact that in each and every instance of fraud, the test centre staff were involved, yet materials relied upon by ETS and the Home Office in implicating students was provided by those criminal test centre employees. Serious questions arise as to the extent to which that material can be relied upon.

After judgment had been given in the case of *Mohibullah* Professor Sommer prepared a submission[8] to the Home Affairs Select Committee of Inquiry (dated 30 December 2016), which summarised the findings of the joint report as follows:

> *"We concluded that the controls around the processes of registering applicants on to the computer system used for testing and the ways in which records of results were combined were unsatisfactory and inadequate. We had particular concerns for circumstances in which local testing centres might decide to falsify results for the benefit of applicants who had paid additional fees for them to do so. We identified a number of routes by which this could happen. We agreed that in any one testing session there could be a mix of genuine applicants and those who were paying for fraudulent results.*
>
> *Looking at the records supplied by ETS to the Home Office in relation to the cases we concluded that there was an absence of cross-checking facilities to identify circumstances in which voice tests were mis-ascribed to individuals.*
>
> ***It seems reasonable to conclude that the 'ETS lists' are not a reliable indicator of whether or not a student in fact cheated."***

[7] See https://www.nus.org.uk/en/who-we-are/how-we-work/international-students/

[8] http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/home-affairs-committee/english-language-testing/written/44911.pdf

7. Observations on the present position

The Home Office's approach to the evidence: a lack of inquiry

The allegations against individuals are based upon the *absence* of their voice on the clips that were analysed by ETS (and in its place, the presence of a voice which appeared more than once across ETS' database of voice clips – and so assumed by ETS to belong to a proxy).

To the knowledge of NUS there is no *positive* evidence against the vast majority of the students accused of using proxies. Yet the Home Office has proceeded upon the assumption that the absence of a person's voice on the clips is conclusive evidence that they cheated (for example, in his 6 May 2016 letter[9] to the Home Affairs Select Committee, James Brokenshire, the then Immigration Minister equated 'invalid' with "*clear evidence of cheating*", Q.58).

The Home Office has had the IT evidence in its possession for almost two years. Yet instead of reviewing its position the Home Office has expressed its apparent frustration that accused students are investigating other lines of inquiry. For example, in his 17 August 2016 letter[10] to the Home Affairs Select Committee from Mike Wells (COO UKVI) said:

> *"… it is also worth noting that when voice recordings have been provided and … it is not that of the alleged test taker this has not settled matters but led to other claims about the evidence".* (Q.106).

Unlike the implicated students, it seems that the Home Office is not concerned to find out what actually happened.

Students' access to evidence

It has been extremely difficult for individuals to obtain information and evidence from ETS and the Home Office. To the knowledge of NUS the first voice clips (i.e. the short audio files that were subject to testing by ETS in 2014) were released by ETS to solicitors acting on behalf of students in 2015 and 2016 (in the three linked cases referred to above). Prior to this ETS resisted providing voice clips. The President of the Upper Tribunal commented in *Majumder and Qadir* (paragraph 63(vii)):[11]

> *"Almost remarkably, ETS provided no evidence, directly or indirectly, to this Tribunal. Its refusal to provide the voice recordings of these two Appellants in particular is mildly astonishing".*

Subsequently, it appears that ETS have begun to provide voice clips more readily, but we understand that they only provide the clips to students via their solicitors (and not to unrepresented students). NUS is also aware that ETS' lawyers have referred to an agreement with the Home Office's lawyers (Government Legal Department) that it will provide copies of the voice clips only where the Home Office consents. There is no legal basis for requiring such and the official Home Office's position is that individuals should approach ETS for the voice clips (e.g. 17 August 2016 letter, Q. 106).

NUS understands also that ETS has not released the full-length speaking test recordings to any individual, and that ETS generally refuses requests for additional materials (for example, attendance lists, score sheets and audit reports). In *Mohibullah* (paragraph 19) the President of the Upper Tribunal explained ETS' reticence on "*self-incrimination grounds*". NUS is aware that

[9] http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/home-affairs-committee/english-language-testing/written/33662.pdf

[10] http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/home-affairs-committee/english-language-testing/written/36543.pdf

[11] *SM and Qadir v Secretary of State for the Home Department* (ETS – Evidence – Burden of Proof) [2016] UKUT 00229 (IAC) https://tribunalsdecisions.service.gov.uk/utiac/2016-ukut-229 (see paragraphs 63-65)

ETS has relied upon this ongoing criminal investigation as being a reason not to provide materials on request by solicitors representing students.

It is not clear whether ETS in fact remains under criminal investigation or indeed whether that is good reason to withhold the materials sought by students. Mr Brokenshire's 21 June 2016 letter[12] refers to an investigation against ETS having commenced on 7 May 2014 that being ongoing (Qs. 80 and C1). There is also reference in the 17 August 2016 letter (Q. 100) to the Home Office having conducted "*extensive criminal investigations*" resulting in "*115 organisers (college directors, test centre administrators, agents and proxy test takers) having been arrested and or interviewed*". However, the falsely accused students continue to scrabble around for potentially vindicatory evidence. This is not a fair process.

In *Mohibullah* ETS and the Home Office were ordered to provide additional materials by the President of the Upper Tribunal as a result of persistent and detailed applications made for the evidence by Mr Mohibullah's legal team. The evidence provided was helpful to Mr Mohibullah's case. Mr Mohibullah was lucky to have the benefit of Legal Aid to bring his application for judicial review as the costs of making requests for disclosure and applications against the Home Office and ETS' lawyers, and then arguing them before the Tribunal, was significant. It is simply not feasible for most individuals to do so.

Cherry picking evidence

The Home Office submitted written evidence to the Home Affairs Select Committee on 17 August 2016 and 15 December 2016[13] (Mike Wells and Robert Goodwill MP respectively). Importantly, the written evidence post-dated the IT expert reports referred to above, and the joint expert report of 26 July 2016. It is of serious concern to NUS that the Home Office has ignored the expert reports of Professor Sommer and Christopher Stanbury, and the joint report of all three experts (including Mr Heighway of Kroll Ontrack) in its evidence to the Home Affairs Select Committee.

It is also of concern that the IT expert evidence has not been referred to in legal cases where students and others are challenging allegations of fraud, including in judicial review cases where both sides have a 'duty of candour' to disclose relevant material, whether helpful or unhelpful to their own case. This duty would extend to materials relating to investigations of test centres where the student claimant sat their tests.

Holes in the evidence

There appears to be an unwillingness on the part of the Home Office to investigate all available lines of inquiry: the Home Office seemingly considers it 'job done', having taken immigration action against 'the cheats'.

However, there is a great deal of missing information which is extremely important to those who have been wrongly accused and which could assist them to demonstrate their innocence. The vast majority of the missing information is in the control of either the Home Office or ETS. Our lawyers have sought to obtain answers to some of these questions. For example, requests were submitted to the Home Office last summer under the Freedom of Information Act 2000 but they were all rejected.[14] Further, ETS' solicitors have rejected requests for materials other than the voice clips.[15]

[12] http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/home-affairs-committee/english-language-testing/written/36541.pdf

[13] http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/home-affairs-committee/english-language-testing/written/44492.pdf

[14] FOIA correspondence See https://www.nus.org.uk/en/who-we-are/how-we-work/international-students/

[15] Jones Day correspondence See https://www.nus.org.uk/en/who-we-are/how-we-work/international-students/

The missing evidence and unpursued lines of inquiry include the following:

1. As referred to above on page 14, NUS understands that ETS has not released the full-length speaking test recordings to any individual, and that ETS refuses requests for additional materials (for example, attendance lists, score sheets and audit reports). It has only provided this evidence when required to by a Court Order.

2. NUS understands that due to delay and inaction on the part of the Home Office an extremely limited number of computers were seized from a small number of test centres, and no CCTV footage was recovered at all. This is a serious impediment to wrongly accused individuals as the computers are likely to have contained information that would assist them to demonstrate their innocence. In his 17 August 2016 letter Mr Wells said (Q.82, and see Q.84) *"whilst there have been suggestions of other methods of fraud [other than impersonation], no evidence has been uncovered during the course of the criminal investigation".* This is hardly surprising as the key evidence which would have uncovered other methods of fraud was not gathered.

3. It is not accurate to say, as Mr Wells did in his 17 August 2016 submission (Q.83), that the metadata attached to the voice clips does not contain any information regarding when the clips were recorded. To the knowledge of NUS ETS has provided *no* files containing metadata. Where voice clips have been provided they are not in the original format and no metadata is associated with those files. This is not to say that the metadata does not exist in respect of the original files in their original format; it is almost certain that there is metadata associated with the recordings that are stored by ETS in the US.

4. It is not accurate to say, as Mr Wells did in his 17 August 2016 submission (Q.84), that the recordings "*were submitted back to ETS at the end of the speaking tests*". It is correct that ETS procedures required the recordings to be submitted to ETS at the end of the test, but this is one of the matters of concern raised by the IT experts: there is some evidence that delays were created which could have been used by test centre staff to tamper with or replace data which was then uploaded (see joint expert report, page 208).

5. Disclosure ordered by the Upper Tribunal in *Mohibullah* revealed that the computer room at the test centre (Synergy College) could not have physically accommodated the number of tests that were said to be sat that day (the room capacity was around a maximum of 38 but the Home Office's 'lookup tool' showed more than 71 results in the testing session that Mr Mohibullah attended). This strongly indicates a method of fraud other than impersonation by a proxy. Mr Mohibullah's legal team raised this anomaly at the hearing in August 2016 but NUS understands that there has been no follow-up by the Home Office.

6. In *Mohibullah* two audit reports were provided documenting audits carried out by ETS of Synergy College on 15 May 2012 and 16 January 2013. The earlier audit report recorded that *"[no test takers] had their ID except some people who came to see me at the end of the test. I couldn't check the other people's ID because they left without notice"* and that the test takers were *"too close they could see each other's screens"*. It concluded that he had *"doubt about this centre because they let the people leave without telling me"*. The January 2013 audit recorded *"all test takers in the room were proxy test takers with the passports of real the test takers with them"*. ETS terminated the agreement with Synergy following the January 2013 audit. It is not clear what, if any, action was taken following the May 2012 audit. It is also not clear whether ETS informed the Home Office of the January 2013 audit findings. It is possible that other audit reports contain information that might assist students to demonstrate their innocence.

Inequality of arms

There is a very significant inequality of arms in TOEIC cases. These students have been accused by a foreign government of what amounts to a criminal offence. The effect has usually been the immediate termination of their studies and cancellation of their leave to remain. They have not been provided with potentially relevant information which might assist their case and in most cases they are not entitled to free legal assistance (there is Legal Aid for judicial review subject to the student having very low means, but no Legal Aid for immigration appeals).

The inequality of arms is compounded by the fact that the Home Office is effectively investigating itself and seemingly accepts whatever ETS says without question. Yet the Home Office is not impartial: it has an interest to cover its back (and not open itself up to complaints about its earlier actions in this scandal) and also to be seen to be taking a hard line on 'the cheats', in particular given the rhetoric following the scandal in 2014.

Judicial criticism of the Home Office

It is not just NUS that has raised concerns about the approach of the Home Office in these cases. There have been many legal challenges and some serious criticisms of the Home Office's response to the TOEIC scandal, including for example:

- Criticism of a senior civil servant who gave evidence in the Upper Tribunal about the evidence against students;[16]
- Criticism of the evidence of a senior civil servant who was questioned about whether a student's educational establishment had been coerced into withdrawing the student from his course;[17]
- Criticism of the deprivation from a student of his right of appeal "*We conclude that these various factors combine to yield the conclusion that the Secretary of State's decision was so unfair and unreasonable as to amount to an abuse of power*";[18]
- Criticism of the failure to comply with the duty of candour in judicial review.[19]

In NUS' view this all underscores the urgent need for an independent investigation.

[16] *SM and Qadir v Secretary of State for the Home Department* (see paragraphs 63-65)

[17] *Mohibullah* (fn. iv) (paragraphs 27-31)

[18] Ibid (paragraph 73)

[19] *R (on the application of Saha and Another) v Secretary of State for the Home Department* (Secretary of State's duty of candour) [2017] UKUT 17 https://tribunalsdecisions.service.gov.uk/utiac/2017-ukut-17 (paragraphs 45-51)

8. What next? NUS' Recommendations

1. **NUS calls for an independent investigation into the scandal including: following up the unpursued lines of inquiry, recommending appropriate outcomes for successful students and making recommendations for redress**

Lives have been ruined and there are very many unanswered questions before there can be any certainty about what actually happened. On page 16 above we have listed some of the missing evidence that is impeding the efforts of wrongly accused students to prove their innocence. There is very likely more.

Some affected students are still without their voice clips and no students have received the full recordings of their speaking tests. Most students are unable to access potentially valuable materials obtained by or on behalf of the Home Office. Further, ETS has valuable information which it refuses to provide, unless forced to do so by a judge.

There are affected individuals at all levels of the Court and Tribunal processes, some with representation and some without. NUS is concerned that a fair process should be adopted for successful students. We have explained on page 11 above why the standard outcome (the '60 day letter') will not provide a fair resolution. It is our view that successful students should be given a period of leave to remain, outside of the restraints of the usual Tier 4 system, to enable them to complete their studies, as well as access to a scheme for financial redress.

It is vitally important that the work begun by the Home Affairs Select Committee is followed through to its conclusion, whether by the Committee itself, the Parliamentary Commissioner for Standards or an Independent Inquiry.

2. **NUS asks that individuals seeking to prove their innocence be granted access to Legal Aid or a special legal assistance scheme for immigration advice and representation in the Immigration Tribunal**

Affected individuals will require support from lawyers to prepare their cases, whether appeals or judicial reviews. Whilst there is Legal Aid for judicial review there is no Legal Aid for immigration appeals and urgent steps must be taken to provide the necessary access to appropriate professional advice and representation.

3. **NUS recommends that in-country appeals are reinstated for international students**

In 2015 the Home Office has removed rights of appeal altogether from international students. This is in the context of an overall 50% success rate in appeals in the Immigration Tribunal, which demonstrates the extremely poor quality of many Home Office decisions. A 50:50 chance of a lawful decision and no access to a judicial determination is pitiful and an embarrassment to our reputation around the world. It is absolutely clear that immigration appeals are a vital safeguard and they must be reinstated for Tier 4 students.

4. **NUS recommends a root and branch review of the Tier 4 sponsorship system including an investigation of the effectiveness of complaints procedures and the OIA complaints scheme**

International students spend thousands of pounds in the UK and greatly enhance our education system. However, they are viewed with suspicion from the moment they arrive here and they have very little protection when things go wrong, whether that is a dispute with their Tier 4 sponsor or with the Home office. It is extremely rare for the Home Office to allow any flexibility in relation to the labyrinthine Tier 4 rules (the guidance alone is 98 pages), even where the rules produce obviously unfair results.

There is an enormous imbalance of power between students and the Home Office/Tier 4 sponsors. Add into the mix the fact that colleges and universities are now pseudo border guards, and are themselves at the whim of the Home Office who have control of their sponsorship licences, and the balance is yet further skewed against students.

In many (if not all) cases involving international students, the Office of the Independent Adjudicator (OIA) does not provide an effective remedy in disputes with universities because the OIA has no powers in relation to immigration laws (and it cannot look at disputes with private colleges). Where international students are involved in a dispute with their Tier 4 sponsor, the Tier 4 sponsor can circumvent the complaints process by withdrawing sponsorship and notifying the Home Office. This sets in train an immigration process, which usually leads to the student being required to leave the UK. By the time the OIA comes to make a decision the student will usually have left the UK and will be in no position to be reinstated onto his or her course, even if their complaint is subsequently upheld.

The present system puts international students at a very serious disadvantage as compared with their Tier 4 sponsor and the Home Office. NUS calls for a system whereby the immigration process can be put on hold to enable the usual complaints procedures to be followed.

5. NUS recommends that international students have access to a protection scheme where their Tier 4 sponsor loses its licence

NUS has heard regularly of extreme hardship caused to students whose Tier 4 sponsor has ceased operating. NUS is aware of students who have had the misfortune of studying at more than one institution whose licence has been revoked by the Home Office, in each case losing significant sums of money and wasting valuable time which all counts towards the period they are permitted to study in the UK (such as the '5 year cap' on studying at degree level).

This is extremely unfair: not all international students who come to the UK are wealthy; often their parents will spend life savings to send them here to obtain a degree and often the lower fees offered by private institutions make them an attractive option. However, unbeknownst to the students and their parents private institutions have proven to be a risky option as they are far more likely to have their licences revoked than universities.

NUS recommends the creation of a protection scheme that includes:

- A hardship fund to support students in transferring to a new institution;
- Independent advice and guidance for students wishing to change institution;
- A guarantee that students already studying can continue their course until the end of their academic year or that they will be assisted to transfer mid-year to another similar course;
- A guarantee that any deposit or fee paid by the student for the coming academic year will be returned in full if the student decides not to continue at that institution or if the institution loses its sponsorship licence or otherwise closes.

6. NUS calls for international students to be removed from net migration targets

For the first time in 30 years the numbers of international student coming to the UK is in decline, at a time when the international education market is experiencing growth of around 8% per annum.[20] A report from Exporting Education UK and Parthenon – EY *"Supporting international education in the UK"* published in 2016, estimated that the UK was losing as much as £9m because of declining numbers of international students, with approaches to the UK student visa system

[20] http://www.exeduk.com/resources/publications/supporting-international-education-in-the-uk (Accessed 25 January 2018)

being a key barrier. One of the key growth areas in international recruitment are below-degree pathways and vocational training and it is precisely these programmes that have been hardest hit. The EdExUK report calls for a strong, consistent and clear offer for international students if government ambitions to increase education exports to £30Bn by 2020 are to be realised.

Whilst declining numbers is due to a complex set of factors, there is no doubt to us that there is an impact from the current UK immigration policy. Student recruitment has formed part of the drive to reduce immigration to the "tens of thousands" and has therefore formed part of the "hostile environment" policy pursued by the current Government. For EU students there is uncertainty as to their rights to study and work in a post Brexit UK. For non- EEA students these changes have made it harder for genuine students to come to study in the UK and when here to have an equal student experience to that of home students**.** An NUSUK survey in 2014 found that:

51% of respondents said that they did not feel the UK government was welcoming to international students. A further 38% would not recommend studying in the UK to a friend or family member. Many of the responses to the survey referred to the perceived instability in the UK education system, with regular changes to the Immigration Rules and the sponsorship system being identified as sources of concern.

In 2012-13, there was a 25% reduction in the number of Indian students recruited to the UK compared with 2011-12, with many choosing Canada and Australia instead. NUS believes that keeping our universities competitive is intrinsically linked to keeping the UK competitive. Highly effective graduates who have experience of living and working abroad are much prized by employers. Making it easier for students to do this can only benefit the UK in the future as our country forges a new set of global relationships and partnerships. By the same token encouraging and not deterring international students from studying within the UK would seem to be a better strategy to develop strong international partnerships for the future. The Higher Education Policy Institute (HEPI) report on "*The costs and benefits of international students by parliamentary constituency"* demonstrates that the total net impact of international students on the UK economy was estimated to be £20.3bn, with £4.06bn of this net impact generated by EU-domiciled students, and £16.3bn of net impact generated by non-EU domiciled students.[21]

It is clear that the way in which the UK welcomes and monitors international students from arrival to departure will have a profound effect on future international research projects, educational and trade relationships. To enhance recruitment NUS believes it is critical that International students should not form part of the calculation for **net migration targets.** We take the view that there should be no overall target to reduce immigration based on net migration targets and that it would be a more helpful policy to calculate the net migration of international students separately as the tertiary education sector relies on growth in these areas and it makes sense to track it separately. Outside of universities, the arrival and departure of international students is very difficult to monitor as the International Passenger Survey is not aimed at their arrival and departure periods and no one, other than HESA, collects a central database of enrolments and graduations.

Removing students from net migration targets, as they have done in Australia, will help to restore the UK as a leading destination for international study, as would re-instating the post study work visa, a streamlined easy to understand immigration regime with rules that don't reduce the overall experience of UKHE and the country itself, reducing costs and making re-payment easier.

In particular programmes for international students to study English should be adequately supported to ensure that international students can fully engage in UK study programmes and can

[21] http://www.hepi.ac.uk/2018/01/11/new-figures-show-international-students-worth-22-7-billion-uk-cost-2-3-billion-net-gain-31-million-per-constituency-310-per-uk-resident/ (Accessed 2 February 2018)

be empowered to integrate within local communities. Allowing students to study academic subjects alongside ESOL will broaden their learning and application of language.

The situation that has arisen with the TOEIC scandal, and the evidence presented in this report is, we believe, part of an overall tone of some government announcements concerning migration and linking it to international study, which have the impact of making the UK appear to not be a welcoming and supportive environment in which to study. We would suggest that the atmosphere in the post referendum environment has exacerbated such feelings. NUSUK suggests that there should be a clear government international education strategy that prevents a conflation between government approaches to abuse of the migration system, and international students who come to the UK through the Tier 4 or short-term study system. Currently there is a poor balance in the government's approach. Without a clear strategy to support international education, messages will continue to be negative.

We all benefit from the contribution made by international student to academic life in the UK; we also, of course, benefit from the large fees that universities can charge, but ultimately, we benefit in terms of our international reputation and the potential this carries for future partnerships. Following the Windrush revelations, it is hoped that the Home Office and other government departments will reflect on how its messages are received and will bear in mind the potentially negative impact on our future economy and society. Our campuses, our courses, our communal life is made considerably more relevant and positive through the experience of sharing it with people from all over the world.

“I want my future back.”

The international students treated as guilty until proven innocent.

A report by Migrant Voice

“I want my future back”

The international students found guilty until proven innocent

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Report by Migrant Voice July 2018

About Migrant Voice

We are a migrant-led organisation working with migrants from all around the world with all kinds of status, including refugees and asylum seekers. We develop the media skills and confidence of migrants with the aim of strengthening their voices in the media and civil society in order to counter xenophobia and build support for our rights.

Established in 2010, Migrant Voice provides a platform for its members from migrant communities, especially those whose voices are not usually heard, and encourages them to express their views on issues affecting them as migrants.

We aim to address negative stereotypes and limited understanding of migrants and migration, and facilitate a more constructive and positive public debate, and believe that empowering those most affected by an issue to speak about it is a key part of this process. Migrant Voice has regional hubs in London, the West Midlands and Glasgow. Membership is open to all migrants and non-migrants wanting to engage in creating positive change. To get involved in the UK Migrant Voices for Change network, or to find out more about our work please email info@migrantvoice.org or visit our website at www.migrantvoice.org

Acknowledgements

Migrant Voice wishes to thank the students for putting their trust in us and for bringing the issue to our attention. In particular we would like to thank Waqar H and Sheikh Shariful Amin who have worked tirelessly with us throughout the whole process leading to the production of the report and launching the campaign.

Many have volunteered their expertise and time towards this report and we thank them all. We thank Anna Marsden in particular for conducting the interviews, analysis and her invaluable role in writing the report.

We also wish to thank Garden Court Chambers for their support.

Key definitions

Ahsan: The case of ***Ahsan v The Secretary of State for the Home Department*** **([2017] EWCA Civ 2009)**

ETS: A US non-profit organisation contracted by the Home Office to provide secure English language tests on behalf of the Home Office. ETS offers several products and services including English language tests such as TOEFL® and TOEIC® (defined below).

In-Country Right of Appeal: An appeal registered in the UK where the individual can attend and give evidence in person.

Judicial Review: An aggrieved party/ individual may apply to the courts to exercise its powers for review of the decisions of governmental departments or bodies acting in governmental capacities. The court's powers of review are limited to very few situations and can only be applied where the applicant has exhausted other statutory rights. A judicial review considers the lawfulness and/ or reasonableness of a decision taken by the government department or official. It does not re-assess the decision generally.

Out-of-Country Appeal Right: An appeal that can only be made when the person appealing has been removed from the UK.

Section 10 Notice: A notice by the UK Home Office with instructions for the removal of a person from the UK and as issued under section 10 of the Immigration and Asylum Act 1999, which includes removals of persons who have used deception in seeking to obtain permission to stay in the UK.

Students: In this report we will be referring to all individuals affected by the allegation of cheating on the TOEIC English language test as '*students' or 'international students'*. Not all were students – some took the test to apply for an entrepreneurial visa, for example, or other visas after graduating from colleges and universities.

TOEIC: Stands for the Test of English for International Communication. It is a form of English language test consisting of a written and spoken sections. It is provided by the ETS (above). ETS states that "The TOEIC® Speaking and Writing tests provide an accurate assessment of an individual's ability to communicate in spoken and written English in the workplace."

Executive summary

This research was sparked by a group of university students who contacted Migrant Voice and asked us for help in their ongoing campaign for justice. We learned that some years ago, the Home Office had accused these students of cheating in an English-language test. With no proper right to challenge the decision, they were summarily told that their studies had been terminated and that they had no right to stay in the United Kingdom.

Overnight, lives were turned upside down. Some of the students were taken straight to immigration detention, some were deported, and some returned to their home countries to appeal against the allegation. Others remained and worked desperately to clear their names, knowing that going home with such a slur hanging over them would have destroyed their reputations and barred them from jobs – and in some cases, destroyed their familial relationships.

Those who took up the challenge had come to study a wide range of subjects, but rapidly found themselves “students of law” – and in the context of a system that regarded them guilty until proven innocent, that refused to engage with their evidence, and that failed to make key evidence available to them, it was a steep learning curve. Almost all their lives were thrown into turmoil. Stress, frustration and anxiety caused health problems, tens of thousands of pounds were spent on legal and living costs, families were divided, and marriages were derailed.

Their desperate plight, the urgency of their situation and constraints on our own resources did not allow Migrant Voice to conduct extensive research. Our conclusions are based on a collection of significant case studies that have highlighted the disruptive impact of this policy on every aspect of the lives of these international students, which we know from a history of previous legal challenges and reportage are representative of a far larger group. We have attempted to highlight the impact Home Office decision-making has had on these students and point to the absence of and inconsistencies in the evidence presented by the Home Office.

Our respondents arrived in the UK between 2004 and 2011. Most sat the Test of English for International Communication (TOEIC) as a prerequisite to taking up their places (one of our case studies had never sat this test though he was accused of cheating during it). In 2014 and 2015 alone the Home Office revoked visas of tens of thousands of international students and often detained and removed them, based on evidence which was later described by a court as suffering from ‘multiple frailties and shortcomings.’

Since then, the students affected have suffered from a range of external difficulties far beyond the immediate disruption to their studies and employment. The knock-on effect has derailed careers and long-term aspirations. It has pushed people out of work and into poverty and debt. It has forced people out of accommodation. It has had severe impacts on physical and mental health, and family and community relationships.

This report outlines some of these cases and aims to offer solutions so that policymakers may look again, seriously, at this issue and work to redress the injustice that thousands of international students have suffered.

Background

Some UK visa applicants are required to pass a test of proficiency in written and spoken English. One of the approved tests is the "Test of English for International Communication" (commonly referred to as "TOEIC"). It is provided by a US organisation called Educational Testing Service ("ETS"). ETS's TOEIC tests have been available at a large number of test centres in Britain. The spoken English part of the test involves the candidate being recorded reading a text, with the recording then being sent to an ETS assessor for marking.

In February 2014, BBC's *Panorama* programme reported that some cheating on tests had occurred at a number of ETS test centres. In particular, though not in all cases, the fraud entailed the use of proxies to take the spoken English part of the test. In response to this, the Home Office instructed ETS to use voice recognition software to check test recordings from centres in question.

On the basis of ETS' information, which has since been called into question by experts, the Home Office accused tens of thousands of people of cheating in their English language tests and took various actions including but not limited to the following:

- Refused or cancelled over 40,000 people's visas in 2014 and 2015 alone. The National Union of Students estimates that over 56,000 individuals were affected.
- Issued some of those affected with instructions to leave the UK immediately under section 10 of the Immigration and Asylum Act 1999, which meant one could only appeal the Home Office's decision from outside the UK (after leaving the country).
- Informed universities that students' visas had been cancelled resulting in students being withdrawn from universities.
- Detained students at border checks or in their homes, some of whom were removed from the UK following these detentions.
- Black-listed other individuals who only came to learn of the Home Office allegations following refusal of subsequent visa applications in some cases several years after they had taken the English language test.
- Denied students real and effective access to the courts and a fair hearing or opportunity to defend themselves.

Right to fair trial and access to the courts

Two established principles of English (Common) law are that an accuser bears the burden of proving the charges they make against someone and that the accused person must be given fair opportunity to consider and respond to the charges should they wish to do so.

The Home Office has taken several actions to frustrate students' efforts to challenge its decisions including:

- Refusing to provide students in a timely manner with evidence critical to their defence.
- Relying on "evidence that has been highly criticised by the Courts. The court has established that the evidence relied on by the Home Office was only "just" sufficient to make allegations. The Court in addition to criticising the evidence upon which the Home Office relied referred to the procedures to uphold these decision as being 'stumbling'. Effectively, this means tens of thousands of people were removed from or forced to leave the UK or had their immigration status negatively affected based on unsatisfactory evidence and without the opportunity to respond.
- Preventing students from appealing or proceeding with other judicial actions either directly through its decisions or by supporting legislation to take away important appeal rights. For example, students accused of fraud routinely had their appeal rights removed simply by a Home Office assertion that their claim was 'clearly unfounded'. Changes to immigration rules and laws have made it more difficult for migrants to challenge Home Office decisions. The Immigration Act 2014 ensures most migrants have no appeal rights either in- or out-of country.

Given that the 2014 Immigration Act denies students an automatic in-country right of appeal, the students' remedies for legal relief have been severely limited. Their options have mainly been to apply for an out-of-country appeal (option open to the majority), in-country appeal (in very limited cases) or seek judicial review.

The students have been forced to seek political redress because most of them have been excluded from effective legal remedy. For others the legal remedies took too long or came at significant financial and emotional costs or may not have put them in positions similar to what they enjoyed before the Home Office's allegations. No action has been taken to address the many individuals who were removed or refused entry when they were in fact entirely innocent.

Even if the first group was offered in-country appeals, this would be a remedy that is too little and too late as well as being emotionally and financially costly for some of the students. In the present circumstances, justice delayed is justice denied.

As Mr Justice Green commented in respect to allegations of dishonesty by the Home Office as having had "catastrophic consequences" for many of those accused. The absence of proper independent review has led to individuals of good character having their reputations and livelihoods ruined without any remedy having been made available to them.

This has been unquestionably another example of the hostile environment that has been unnecessarily created for individuals who were in the UK lawfully and making a significant contribution to the UK economy and cultural life.

Introduction to our research

This research was sparked by the demand from a group of international university students and victims of the TOEIC allegations who asked Migrant Voice for help in their fight for justice.

The Home Office had accused them of cheating in an English-language test and told them their studies had been terminated and that they had no right to stay in the United Kingdom.

Some of the students were detained, some were supported, and some returned to their home countries to appeal against the allegation, some remained to clear their names because going home with such a slur hanging over them would have destroyed their reputations and barred them from jobs – and in some cases, from their families. Their task proved virtually unattainable. They were blocked at every turn, and found that a basic tenet of British justice was turned on its head: they were presumed guilty until proved innocent, and the evidence of their innocence – the analysis of the test results – was not made available to them. Almost all their lives were thrown into turmoil. Stress, frustration and anxiety caused health problems, tens of thousands of pounds were spent on legal and living costs, families were divided, marriages were derailed.

Their desperate plight, the urgency of their situation and our own lack of funding did not allow us to conduct extensive research. Our conclusions are not based on the weight of sample size, but on a collection of significant case studies that have highlighted the disruptive impact of the government policy on every aspect of the lives of these international students, and the absence of and inconsistencies of the evidence behind the allegation of cheating.

Methodology

The research has been conducted through:

- Eight in-depth interviews: four with students still living in the UK, four with students who were deported or convinced by the Home Office to go back to their countries. Each interview lasted from between one hour and three-and-a-half hours.
- A short questionnaire, asking respondents: age and country of birth; year of arrival in the UK; original plans, courses in which they enrolled, reasons for studying in the UK; when they took the TOEIC test; when and how they found out that the test results had been declared invalid; whether they were personally accused of cheating and the consequence; the intention to take any action about subsequent government actions; and about support for a campaign. The questionnaire included 15 open questions and was filled out by 18 respondents. A copy of the questionnaire is available upon request.
- Close cooperation with a group of organised international students and continuous discussion with two of the students, Amin and Waqar, who are included in our case studies and helped in the research, distributing the questionnaire and recruiting research participants for the interviews as well as the planning of the whole campaign.

Key findings

The key findings were grouped under the following headings:

- **Justice and dignity**

In all the cases included in this research the Home Office failed to give any evidence of its allegations. Some students were accused of cheating at the Test of English for International Communication (TOEIC) test in a city or place they have never visited, or of taking the test on a date on which they did not take it. One student who has never ever taken the test was among those accused.

These students (and many others) were served with a section 10 Removal Notice (Home Office instruction to leave the UK immediately) and were told either that they had no right to appeal or that they could appeal only if they left the UK. They were forced to spend large amounts of money on legal procedures to defend themselves from the false allegation, or to manage all the legal procedures by themselves (with great difficulties) if they could not afford to pay a lawyer.

Most of the students and other victims have not only experienced a tsunami of troubles, and sometimes long periods of detention, but have lost their dignity and reputations in the UK and in their own countries, with further serious consequences. Despite all the money spent and the difficulties encountered in trying to prove their innocence, all are still waiting for justice.

- **Education**

The international students came to the UK with the aim of achieving good academic qualification on which to form the basis of successful careers in their own countries. They spent a lot of money to achieve this goal but were stopped from completing their studies - even in cases where they won the appeal and cleared their names.

Despite all the hardships experienced since the allegation was made, some of the research participants highlighted that obtaining their academic qualification is still their main goal, though they have many other serious problems that need resolving. This was clearly stated by one of the interviewees who declared, “They can take everything from us, but not our education. I came here to get a degree and I’m not going anywhere without it.”

- **Job and financial troubles**

All the research participants were served with mandatory instruction to leave the UK immediately and left without rights in the UK. They cannot work or access any benefits. They lost their job or were denied access to a job, spent all their savings, and have been living for years borrowing money from families and friends. Debts have mounted and they are unable to give the money back.

- **Housing**

Having only temporary admission in the UK, these people do not have the right to rent accommodation. Since the allegation, they have been living with friends or family members, sometimes in temple property or in a community centre, often moving from one

place to another. They can be deported at any moment. The people who host them also suffer stress because the immigration officers can arrive to their homes anytime.

- **Health**

Although all the research participants were young and healthy when they arrived in the UK, most have started to experience health troubles since the allegation, in some cases during or after a period of detention. The large majority of participants have mental health conditions for which they are being treated. Sometimes even their family members experience the same difficulties. Stress impacts on health in a variety of ways and a number of the students have started suffering from heart troubles, hyperthyroidism, and other diseases. Some even have suicidal thoughts.

- **Family conditions and relationships**

Some respondents are married and have family in the UK who have been affected by the difficulties, including similar health complications to those faced by respondents. In a few cases family members have accused the students of being responsible for the desperate situation they are in. Some families have been separated by the Home Office: for example, Mohammed[1], who was deported in a matter of hours, leaving behind his British, disabled, wife.

Students who went back to their countries often found little help from their families because the families could not understand, or did not believe, what happened in Britain. Their families think that the UK is a fair and democratic country where such things cannot occur, and that their children must be guilty - as happened with Naveed, who was rejected by his family.

- **Hopeless future in the UK and abroad**

The research respondents arrived in the UK between 2004 and 2011. All were young, full of energy and hope for the future. Their time in the UK was their “golden age,” as one of the participants called his youth, and they lost not only years of life, money, education, jobs and health, but also their dignity. They cannot go anywhere, nobody will give them a job (in the UK, in their countries, or elsewhere) because they are seen as criminals, and even their families and fellow nationals don’t respect them anymore.

They need to have their names cleared and their lives back.

[1] The name has been altered

Our analysis

The research clearly shows how the Home Office policy towards the international students who sat the TOEIC test between 2011 and 2014 has had a devastating impact on all aspects of their lives and their families, within and outside the UK. Although we were able to contact only a limited number of affected individuals, their experiences offer graphic examples of the impact of the unproved allegation of cheating. They arrived here attracted by the high reputation of Britain's educational system in order to establish a foundation for successful careers in their own countries but were denied their education and their rights: they lost everything.

They spent tens of thousands of pounds on university fees, living costs, and legal procedures, and the only result was that their lives were destroyed.

All the students we have been in touch with speak good English, and they generally had had part of or all their education in British language schools and universities before their alleged crime of cheating in the language test.

All the research participants highlighted how the Home Office failed to provide any evidence of the allegation against them. They could not, therefore, contest the evidence — a basic tenet of any system of justice.

In some cases even the general accusation, that cheating had occurred in a particular place on a particular date, was found to be erroneous because the students concerned had not been in the named city at the alleged time.

One of the students, Om for example, never sat a TOEIC test but was accused of cheating at it. It cost him three years and about £10,000 in legal costs to clear his name, only to be told that the university was refusing to allow him to continue his studies and complete his degree.

Also astonishing and unjust are the cases of Amin and Abdul[2]. Amin took the TOEIC test in London but was accused of having cheated at a test in Leicester, a city he has never visited. He has also proved that he was in London on the test day. Abdul was accused of cheating in the test on a date different from his actual test date.

Despite the lack of any evidence of fraud, these students have been punished and criminalised. They were declared guilty by the Home Office, not by a tribunal, and were not allowed to defend themselves in the UK. Most were given an out-of-country appeal right, with all the consequent costs, difficulties and inconvenience. Some found they had no right of appeal at all.

Many research participants denounce how they did not receive a notification letter about the allegation but became aware of it while dealing with another matter, or when the enforcement officers suddenly arrived at their home to arrest and detain them.

[2] The name has been altered

Several such incidents are described in the eight case studies reported in this report. Take the cases of Amin and Abdul.

Take the cases of Amin and Abdul.

One morning, in February 2015 a dozen officials arrived at Amin's home and arrested him. It was only at that moment that he discovered he had been accused of cheating. The officials did not give him anything in writing, but only accused him verbally. Later, Amin discovered that the allegation had been made months before (in October 2014), but neither he nor his solicitor had received any notice of it.

Similar, in October 2014 Abdul, who had recently married and found a job as a business development manager, was waiting for his working visa. He assumed it was a straightforward administrative matter because he had not been made aware of any problem. At 6 am he and his wife were woken by enforcement officers who had broken the flat door and entered their bedroom. They accused him of having cheated at the TOEIC test and arrested him.

Other interviewees discovered the accusation made against them while applying for or renewing a visa. Their application was denied because of the allegation, often after a long wait and sometimes after a previous refusal for a different reason.

In some cases students were made aware of the allegation through the university. Waqar asked the university administration for information about his last semester of studies and was told that he had been withdrawn because of the allegation. Later on he received a notification letter from the university and, after a month, a letter from the Home Office notifying him of the cancellation of his visa.

Waqar, like the other students, received no help from his university about dealing with the situation and defending himself. The university told him it was simply following Home Office instructions. He was left shocked, with no knowledge of the legal system in the UK and no money to pay a solicitor. He tried to learn the necessary procedures and managed to take legal steps, with a little help from a family friend, but to no avail. A few months ago, he was finally able to get legal aid and found a solicitor.

Many other students spent a fortune on legal challenges, with no better results. Some had already paid legal expenses for previous visas refused for different reasons unrelated to the English test, but in those cases they had an in-country appeal right and were able to win the case, although spending thousands of pounds (£2,000 in the case of Amin, £4,000 in the case of Ronak).

For these and other reasons, defending themselves against the allegation has proved virtually impossible. Even after spending large amounts of money, they have not had justice. Naveed spent about £30,000 on legal procedures before going back to Bangladesh, from where he is still fighting for justice thanks to his solicitor in the UK who is acting for free because Naveed has run out of money.

Not all students were able to appeal against the Home Office decision. Many didn't have the money or the ability to deal with the complicated legal procedures. Some, like Shammi, believed assurances by immigration officials that all the students against whom allegations had been made had to leave the UK but that she could easily re-apply for a visa and return after a year. After going back to Bangladesh and finding the officer's words were untrue, she felt cheated.

As well as students who left because they believed that this was the simplest way to complete their studies later on or who ran out of money, there were some, like Naveed and Ronak, who were exhausted by trying to understand and fight the injustice that had occurred in the UK.. Many others have been deported, sometimes instantaneously and with no notice - even leaving their family behind in the UK. That's what happened to Mohammed. At midday on 22 November 2016 he was arrested, detained, and at 9 pm was deported to Bangladesh. He wasn't even allowed to see or speak with his British, disabled, wife before being forced on the airplane. Since then, both Mohammed and his wife have started to suffer from mental health problems, like many other victims of the allegations.

All the research participants arrived in the UK young and healthy, but most started to experience health problems shortly after the cheating allegation was made. The most common diagnosis has been depression and other mental health conditions. For some students desperation and hopelessness have caused suicidal feelings. Heart troubles, hyperthyroidism and other illnesses, often stress-related have also been diagnosed.

Detention has been a common trigger for ill-health, which has often been exacerbated by poor treatment, as in Shehbaz's case. He had panic attacks during his two-month detention, during which he was once left on the floor for nearly three hours before an ambulance was called.

All research participants who are still in the UK are barred from working or from access to any public support and have no right to rent a place to stay. For several years they have been living with the help of friends or family members, often moving from one place to another, borrowing money from everyone and accumulating debts to survive and try to defend themselves from the false allegation.

Many students have not told their families, because of the stigma of an allegation of cheating., Families keep asking them when they will return to their countries. The students answer "soon," but they have no idea when they will be able to clear their names, complete their studies and go back home with dignity.

Those who (whether by force or "voluntarily") returned to their home countries without having had their name cleared and with other problems unresolved, have been experiencing an even a more difficult situation than those who remained in the UK because of the allegation. None has found a job, and they are generally perceived as criminals by fellow citizens, including their own families. People there believe that the UK is a democratic country, "the father of democracy and justice," in Amin's words, so cannot believe that the accused students are innocent.

Naveed was so stressed by his situation in the UK (where he had mental therapy for more than one year) that he returned to Pakistan. But his life has become even worse, and he is now desperate. His family rejected him for bringing shame on them. He left his home village and has been moving from one community centre to another, looking for temporary shelter in places where no-one knows him. He was in hospital for three months and continues to suffer from mental health problems.

Mohammed also started to experience mental health difficulties after his return to Bangladesh, where everyone asks why he has been deported. Ronak, back in India, where people know he was detained for nine months and regard him as a criminal, describes his life there as “hell”. Shammi describes her life in Bangladesh as a “torture”.

These stories show how the Home Office policy of criminalising thousands of people with an unproved allegation has had an impact on people’s lives well beyond the UK national borders.

Responses to the questionnaire

The questionnaire was completed by 18 students. They arrived in the UK between 2004 and 2011, mostly from Bangladesh, Pakistan and Nepal, but also from India and Sri Lanka. Most of them are now in their 30s, and a large majority took undergraduate or postgraduate courses in business studies, apart from a few who studied computing, engineering and law.

The high reputation of the British education system attracted them, as emphasised one of the respondents: “it’s very renowned all over the world.” They came here with the idea to gain knowledge, experience and a highly regarded academic qualification that would provide the basis of a successful career in their home countries.

When answering the question about what they intended to do after completing their studies in the UK, none mentioned the intention of settling in the UK.

They had to take a recognised English test in order to obtain or renew their student visa and generally chose the TOEIC test because this was the most widely used and more than sixty per cent of respondents said because there was a long waiting time for other tests. A couple of students said they would have preferred the IELTS test as they had already taken it in their countries.

Respondents took the TOEIC test between 2011 and 2014, with one significant exception: Om, a 36-year-old Nepali, who studied at the West London University. He never sat the TOEIC, but in 2015 he was withdrawn by his university because his (non-existent) “TOEIC certificate was invalid.” He spent three years and £10,000 on legal procedures before finally having his name cleared, but the university did not allow him to continue his studies and complete the degree.

Five students have been detained one or more times for several months. Their experiences in the detention centre were horrible, as described Mohsin, the 29-year-old Pakistani, said: “I was mentally tortured in the detention centre, where you have to share the room and the wings with criminals. I couldn’t sleep, had no proper food, and it was difficult to get medicines, even paracetamol. I was mistreated like a slave.”

Detention also had a strong impact on their health. Shehbaz, a 30-year-old Indian, who was detained for about two months in 2016, said: “My experience was so horrific that I had panic attacks. Once I was left on the floor for nearly three hours because they believed I was acting. Then an ambulance was called and I was taken to Hillingdon hospital. I was completely broken mentally and physically with weakness. I felt like I was a criminal.”

Respondents who were not detained were required to sign regularly at a reporting centre, which has also has been an unpleasant and sometimes traumatic experience. “Appalling” and “horrible” are among the words used to describe the way they were treated there. Roni, a 30-year-old Indian man who has been reporting to Becket House in London since October 2014 (he is also included in our case studies), commented: “The environment of the reporting centre is horrible and I routinely get humiliated by the officers, they threaten

all the time to expel me from the country… They just behave with me like if I was a criminal."

The impact of the unproved allegation has been devastating on all aspects of the students' lives. Nearly 80 per cent of our respondents declared health, particularly mental health, problems. Ahmed, a 29-year-old Bangladeshi, wrote: "My world has completely changed since this baseless allegation. I have lost my job, have no more money, and I'm borrowing to challenge the decision. I cannot accept this false allegation -it has a very negative effect on my social life and mental health. I'm completely depressed, and even getting mental health support from specialists. I came here to study and learn. I want to leave the country with pride." Shayane, 36, from Pakistan, declared: "I am in too much stress, and many times I luckily saved myself from accidents while crossing roads.

Health troubles almost inevitably lead to financial troubles, as most of the students have no access to the NHS. Rabi, a 29-year-old Nepali, was refused maternity service for his wife by the NHS and was charged £5,500.

The allegation doesn't impact only on the students, but on their families as well, and this contributes to increased stress and depression. Shehbaz wrote: "All my personal and academic life is affected. My career is damaged. My courage is broken. I lost confidence in myself. My family is affected. I'm scared of seeing myself in a mirror." Rassel, 40 from Bangladesh, explained: "I feel guilty as all my family members and kids, who were counting on me, are now suffering because of me. They all are blaming me as if it was my fault to have taken that stigmatic TOEIC test."

All respondents have been fighting the Home Office decision, trying to prove their innocence, to clear their names, and return to their studies and normal lives. They have spent large sums of money and time on legal procedures, to no avail, apart from a couple of cases: that of Om, already mentioned, and that of Piragalathan, a 32-year-old Sri Lankan, who wrote: "I appealed against their decision and won the appeal on 13 April 2015 but until today I haven't heard from the Home Office."

Even the only two respondents who won their appeals are still struggling and waiting for justice. They agree with all the other respondents that further action is needed to resolve the situation.

All the students in the questionnaire denounced the Home Office's failure to provide any evidence about the allegation and stressed the unfairness of not being given even a chance to defend themselves and prove their innocence in the UK. None of the respondents was given an in-country appeal right. Some highlighted as a further injustice the different treatment given to the same certificate holders: the majority had an out-of-country appeal right, others no appeal right at all, and others an in-country appeal right.

Some students, such as Ahmad, added a more general comment on UK immigration policy: "I was treated like an animal. It was completely unjust and unfair. I did not commit any deception, neither did I take part in any fraudulent activity in my entire life. … This was

a Home office deliberate abuse of power in order to reduce the number of immigrants in this country."

Several students defined the treatment they received in the UK as "unfair" and "inhumane", denounced the deprivation of their human rights, and said that the UK is a "dangerous zone" for foreign students.

Broken lives: Case studies in alphabetical order

Abdul's story[3]

Accused of cheating in the English test – on a day he didn't take the test

Abdul, a 34-year-old Bangladeshi, moved to the UK in 2009 to study at the University of Sunderland. He took an extended diploma in management and leadership and a masters in business administration, successfully completing his studies in 2013.

In 2012 he took the TOEIC test on 15 June (listening and reading) and 20 June (speaking and writing): the Home Office has accused him of cheating, but refer to the test date as 26 June.

"I woke up and found they were in my room."

Abdul did not need to take the TOEIC test, as he had already taken the IELTS (another recognised English test) to extend his student visa but he was not satisfied with his results. He had obtained a score of 6 in speaking and, for his personal satisfaction, wanted to get a higher mark. So he decided to sit another test: he took the TOEIC (and obtained the same result). He could not imagine that this choice would ruin his future a couple of years later.

His life in the UK was going well. In June 2014 he married a Pakistani woman and found a job as a business development manager. He immediately applied for a work visa sponsored by his company.

On 9 October 2014, while waiting for his new visa, he was suddenly arrested. At 6am he and his wife were asleep. They did not hear knocking at the door. Immigration officers broke the door and entered in their bedroom.

"I woke up and found they were in my room," he recalls. "I had no idea why they were there. They said: 'You have no legal right to live in this country because you cheated on your English test… We accuse you of having had somebody else take the test for you. So we need to deport you'. It was something shocking. We never expected, we never thought, that such a thing could happen. My wife didn't know what to do."

The officers also questioned his wife, but she had no further trouble. Abdul was given just a few minutes to go to the lavatory to wash and dress before being taken in a van to Becket House Reporting Centre. They stopped in a couple of places to collect other people and arrived there at about 10am. He spent several hours there (during which he was fingerprinted and photographed), and at about 5 or 6 pm he was forced back into the van and moved to Dover detention centre, a couple of hours away. Only at that point was he able to call his wife.

[3] The name has been altered

She had spent all day calling everyone she knew for help, but nobody was able to help without knowing exactly what the situation was. After, she contacted a solicitor, and Abdul sent him all the relevant documents from the detention centre. The Home Office notification letter accused him of cheating but cited no evidence: even the date on which the cheating was alleged to have taken place was not the date on which Abdul took the TOEIC test. “So, you can imagine that they just didn’t have any proof,” he says. “They used the same statement for everyone: ‘We believe someone else took the test instead of you’.”

On receipt of the letter Abdul immediately applied for judicial review and to be released on bail; his wife and the director of the company for which he was working were ready to act as guarantors. The bail process was not necessary, as he was released after 13 days with temporary admission and on condition that he signed in at the Home Office reporting centre every fortnight.

His freedom from the detention centre did not last long. On 18 March 2015 he went to the Home Office reporting centre to sign, and was arrested again because his judicial review application had been refused. No notice of the refusal had been sent to him or his solicitor.

Abdul was detained, this time for 57 days, first in Tinsley House detention centre, then in Brook House detention centre, where he was suddenly transferred a couple of weeks later while he was having his hair cut. “They didn’t allow me even a few minutes to complete the cut,” he says. “They immediately took me to Brook House. That was horrible - you cannot imagine! In the room there was a window but you could not open it, and the toilet had no door. At 6pm they lock the door till 8am, then lock it again at 11 am ….. You get only a few hours outside the room. It’s a horrible feeling to be locked in.”

While Abdul was detained, his wife, a qualified nurse, found a job in a hospital and obtained a 3-year work visa. Abdul applied for a family and private life visa, to no avail. He was released on bail (with his wife and company director acting as guarantors) on 13 May 2015.

“How much had I gone through!” he says. “Then I applied for a new visa as a dependent of my wife, but they also refused this application (in March 2016), again because of the [cheating] allegation … I wrote so many times to the Home Office saying: ‘The date you wrote is wrong’… I asked to re-take the test, but they never gave me any opportunity to go to the Court or re-sit the exam… They would only say: ‘You will be removed very soon or, if you want to leave voluntarily, we will arrange everything’.”

Since the allegation, Abdul has been fighting to prove his innocence.

His mother has been asking him why he does not visit her in Bangladesh, but he does not want to tell her what has happened to him: “She is old and I don’t want to stress her.”

Abdul’s wife works and supports him. That is why “I’m still alive,” he comments. “It’s three and a half years I cannot work. My wife pays the rent, so I’m just allowed to stay under her name, you can say. The landlord doesn’t know I have all this pending, otherwise I would have problems.”

Despite all his suffering and repeated refusals to hear his appeals and visa applications - that have cost him more than £35,000 - Abdul is convinced that he will be able, one day, to prove his innocence and regain control of his life. He is fighting not only for himself, but also for his one-year-old daughter, who he cannot offer the life he would like.

His old job is still open for him, but he has other plans for the future, though not in the UK where he has suffered so much. One year ago he applied to go to Canada, but could not provide all the required documents without having his name cleared. The allegation of cheating in the UK blocks his life not only in this country, but everywhere in the world.

He still plans to go to Canada, after the cheating allegation has been withdrawn. In the last years he has taken two English tests, for his own satisfaction, with good results. He simply wants to have his name cleared so he can leave the UK.

Sheikh Shariful Amin's story

Accused of cheating somewhere he has never been

Sheikh Shariful Amin (who goes by Amin) speaks fluent English and has two degrees, one from the Manarat International University (with the whole course of studies in English) in his native Bangladesh, and a business administration degree from the University of East London where he studied from 2008 to 2010.

In 2012 he took the Toeic English language test at the Blue Moon Academy in East London. The Home Office has subsequently claimed that he took it, and cheated, at Colwell College in Leicester, although he has never been there and has proof that he was in London on the test day.

After graduating from the University of East London, he obtained a PSW (post study work) visa but couldn't find a good job, so decided to start his own business. In 2012 he applied for a tier 1 entrepreneur visa as he had sufficient funds to start a business (£50,000 personal and family savings) and met all the required criteria. The visa was refused because of a missing phone number in a third party company letter that formed part of the application. The letter was from a company that was just moving to new premises at the time and didn't have its new phone number. Amin appealed, and in 2014 the court ruled in his favour.

By February 2015, after some difficult times and legal costs of about £2,000 for the appeal, things were finally settling. Amin had started his business, had two British employees and was busy and excited working at his first assignement.

But on 5 February 2015 everything changed: "At 8:05 in the morning ten or twelve officials came to my home. They said 'We are here to arrest you because you did fraudulent

activities with your English test exam. We have evidence from ETS (the company running the test) you used someone for your speaking test. We are going to deport you tonight.' They didn't give me a notification letter, they just accused me verbally. They immediately took my passport, money and mobile, without allowing me to call anyone. On the same day my bank account was temporarily frozen and I lost every right in the UK because of section 10 [notice to remove a person from the UK under section 10 of the Immigration and Asylum Act 1999].

This decision had been taken in October 2014 but I had not received any previous notice. The Home Office never sent a letter to me or my solicitor before that morning."

That was the start of what seemed like the longest day of Amin's life and the beginning of innumerable troubles that still need to be resolved.

"The officers gave me just five minutes to go to the toilet –without allowing me to shut the door that was just in front of a lady officer – before taking me to their van," says Amin. "It was cold and there was no heating in the van. They took me to the Becket House Reporting Centre, near London Bridge, put me in a locked room together with three other detainees, without saying anything. I was hungry and asked the officials to buy some food with my money, but they refused and said 'You are only allowed to drink water.' I remained in that room for about one-and-a-half hours before being allowed to call three numbers. I then phoned some friends and asked them for help and to contact my solicitor."

Amin was then forced back into the van, with other detainees. They stopped at a couple of detention centres to collect other detainees before arriving at Brook House Detention Centre, at 9:30pm. He was given only water and a few biscuits, after a whole day without food.

"My family would not be able to accept me while I was accused of such wrongdoing."

He was tired, hungry, and shocked. He describes Brook House "as a proper massive prison. They allocated me a room, with no window and an automatic door. There was another detainee and we had to share a toilet with no door. The smell was all over the room."

Amin was held there for a few days before being granted temporary admission and asked to report to Becket House in person once a month. Since then he has been fighting to prove his innocence, while his troubles have increased.

Having been given a section 10 removal notice , Amin has practically no rights in Britain. He cannot work, cannot study, cannot rent accommodation, cannot even drive as his licence was revoked at the time of his arrest.

Like most of the individuals affected he can only appeal against the allegation made against him from outside the country. He applied several times for judicial review [A court considers the lawfulness of a decision taken by the government department or official.],

always adding new documents to support his case, but twice he failed to get permission for a judicial review and is now waiting for the result of his third application.

“The law did not help me,” he says. “Because of the Home Office decision I lost everything in one night. Since 2015 I have spent about £15,000 on this litigation process, but until now haven’t received any answer or been given any opportunity.

“I have never been convicted by the court but the Home Office punished me taking all my human rights.

“I came to this country as a genuine student, and then applied as a genuine businessman. At this point in my life I have lost everything: my money, my reputation, my time, especially my time: I came in 2008, we are now in 2018. What have I achieved? My golden time is nearly finished.

“Right now my question is: Why have they taken this decision against me? Until now the Home Office has failed to show any single piece of valid evidence ... What I have lost I’ll never have back.… My savings are gone, my business is gone, my health is gone. Right now I’m a heavily ill person, physically and mentally. I’m on medication and sometimes I cannot even buy medicine because I have no money.”

Since the allegation, Amin has survived with the help of family and friends. He has borrowed money from many people and is unable to pay it back. Because of the anxiety and tension caused by the situation, he hardly sleeps more than four hours and has developed hyperthyroidism and heart and mental health problems. He always carries a lot of medicines.

He lives with friends, but the Home Office could arrive at any moment to arrest or deport him. So the friends, too, suffer from tension.

His parents have helped him but cannot do so any longer. They have been told that he has been struggling with immigration procedures, but do not know about the cheating allegation and the ensuing problems, and they do not understand why his life has not progressed in the last three years.

They have high regard for Britain. It was Amin’s father who convinced him to study in the UK (he wanted to go to the US or Canada) because of the quality and prestige of Britain’s education system. “How could I tell them that I was detained?” says Amin. “How could they believe that the UK does something like this? They would not be ready to accept me while I am being accused of such wrongdoing.”

Since 2015 Amin has been fighting against this allegation that has ruined his life. He contacted his local MP, Stephen Timms, who was quite supportive, and linked up with other Toeic victims because “you cannot fight the disaster alone, you have to group.” He could be deported at any time.

Despite all his efforts, Amin is still waiting for justice and is losing hope for the future. The unproved allegation has ruined his life not only in the UK but also in Bangladesh, where

his family would not accept him and where he tried to apply for a job that was withdrawn as soon as he had to declare the allegation.

Amin has spent more than £50,000 in the UK on legal and university fees and other expenses, and ten years of his life that should had marked the start of his career. In return he experienced, in a country that he and his family considered to be "the father of democracy and justice," the cancellation of his human rights and professional opportunities, both in the UK and abroad.

Mohammed's story[4]

Detained and deported in one day, unable even to say goodbye to his wife

Mohammed moved from Bangladesh to the UK as an international student in 2010. He arrived full of hope for his future, and his first years in the UK were positive. In 2012 he took a diploma in IT at the London School of Technology, then sat the TOEIC English language test (at the London School of Technology) and continued his studies for a higher diploma at the same school.

In 2014 he married a British woman, and they were happy to start their new life together.

"I asked to see my wife a last time...they didn't allow me."

But when he applied for a spousal visa he discovered he was one of the many people accused of cheating at the TOEIC test. In 2015, after a six-month wait, his visa was refused because of the allegation, and his life was suddenly disrupted. He started reporting every fortnight and his life became a nightmare.

"Every day was devastating," he says. "I couldn't stay calm, I was mad. I never missed any reporting date and every time I wondered if that was the last one, if that would be my last day in the UK with my wife".

Mohammed's solicitor wrote a reconsideration letter to the Home Office, but he did not receive a reply. Then he applied for judicial review [where a court considers the lawfulness of a decision taken by the government department or official.], which was refused in February 2016. On 22 November 2016, Mohammed was detained and deported within a few hours. He was not even allowed to say goodbye to his wife before being forced into the airplane back to Bangladesh.

"When I went to the reporting centre, at noon, they detained me, and at 9 pm I was deported. I asked to see my wife a last time, but they didn't allow me to see her," Mohammed recalls. "They immediately took my mobile and all my personal belongings and I wasn't even able to call her. All the time, all the time, I asked to contact her. They

[4] Name has been altered

brought me home, but she wasn't there. It was devastating! I cannot explain… it broke my heart! … I left everything behind and didn't see my wife."

Since his return to Bangladesh, Mohammed has been trying to obtain a spousal visa and get back his family life, but so far with no result. Twice he applied for a new spousal visa and appealed against its refusal. The unproved allegation blocks him from moving on in his life, and he feels lonely and desperate.

"I didn't do anything wrong. I'm an honest person, not a criminal," he says. "I speak English, I didn't need a proxy... The Home Office failed to show any proof of the allegation… I asked ETS (Educational Testing Service) to give me the details of my exam but they replied that they didn't have anything. … The previous Home Secretary, now Prime Minister, is responsible for the deportation of thousands of students from the UK, including me. There are so many students who haven't had a chance to prove their innocence in court! I want everyone to know what happened to the students who have been deported, to know what's going on."

Mohammed desperately loves his wife and misses her terribly. "My life with her was very comfortable. Every day we loved one another, every day we talked, every day we went out. Every day was very nice, but the Home Office action ruined my life."

Now, even communicating with his wife is quite difficult because she is deaf and they use sign language to communicate. Sometimes they write to each other or use video-link but it's unsatisfactory: "It's like talking with a robot," he says, "you have to deal with something else, with an object. That's nothing! It's nice to live as husband and wife."

Mohammed faces enormous difficulties in Bangladesh. He has no job, has exhausted all his savings, and is looked at with suspicion: "There is no life for me because I have been deported. My life is gone, I have lost my reputation in the UK and here. Everyone asks me: 'Why have you been deported? What have you done in the UK?' People think I committed some crime and look at me with suspicion. It's difficult to find a job, employers treat me like a criminal."

Fortunately, Mohammed's family and friends are supportive. They do not believe that he cheated in the English language test, but they don't understand what happened. He doesn't know what to do. HIs health has deteriorated: "I can't sleep. When I close my eyes I start thinking about what happened to me. Every time I go to the doctor I get tablets to sleep, but they don't work."

Similarly, Mohammed's wife left behind in the UK, has health problems. She now has an eating disorder and is being treated for severe stress.

Mohammed feels ashamed and devastated. He emphasises that he will never recommend to any Bangladeshi student to come and study in the UK. Most of the victims of these allegations, as far as he knows, are from South Asia**,** so he thinks that students from the region are particularly badly treated and discriminated against in the UK. He wants his name, and that of all the students, to be cleared. He says he will keep fighting for this, and he insists that everybody must know how the students were treated in the UK.

Mohammed says that if he wins his most recent appeal he will re-join his wife in the UK and that if he loses he will appeal again and keep fighting to get his life and family back.

Naveed's story

Stolen dignity – the stigma follows him like a shadow

Naveed is a young Pakistani who came to study in the UK in 2007. He spent five years at Kensington College in London, where he took a pre-degree course followed by a business studies degree in 2012. After graduation, he was given a post-study work visa and worked as an assistant manager in a company for two years. In September 2014 he applied for an entrepreneur visa - but then his upward trajectory was halted in its tracks.

In 2011 Naveed had taken the TOEIC English language test in order to extend his student visa, and in February 2014 the Home Office accused him of having cheated at the test.

Overnight he lost his job, his house, and all his rights in the UK. He was obliged to report to the Home Office reporting centre every week, while fighting to prove his innocence. His solicitor's application for judicial review [where a court considers the lawfulness of a decision taken by the government department or official] was refused, as was a subsequent application to the Court of Appeal.

Naveed was pushed into a precarious existence. Without a place to live, he stayed with friends, cousins or in a community centre. Soon he started to develop mental health problems.

"I was suffering a lot," he says. "No job, no house. I was mentally very ill, I couldn't sleep, my mind was not present. I didn't remember what people said and didn't understand what they were talking about. I was hospitalised for a few days. Then I had mental therapy for more than a year, every week. At the final stage, doctors advised me to leave the country. My solicitor gave me the same advice. In June 2017 I left the UK."

Immediately after Naveed's departure, his solicitor lodged an out of country appeal. He did so out of a sense of solidarity because Naveed had no more money to pay him, having spent about £ 30,000 on legal procedures and another £ 20,000 on his studies in the UK.

Since his return to Pakistan, Naveed's life has proved even worse than in the UK because of the stigma of the allegation of cheating. His family rejected him. They believe that the UK is a fair and democratic country, where injustices as those experienced by these students cannot exist. They assume Naveed must be guilty and brought shame on the family. "My dad believes in the UK authorities instead of believing in me," Naveed says, "and he doesn't accept me at home. He said 'I sent you to the UK to study, and you

brought this allegation, you did wrong!' All family members consider me guilty and no one is helping me."

"I couldn't sleep...my mind was not present."

A few months after his return to Pakistan, Naveed left his home village and since then has been on the move, going from one community centre to another, looking for temporary shelter in places where no one knows him. He spends a couple of days here, a couple of days there, with no job, no money, and no hope for the future.

"I don't see any brightness for the future, it stays in the dark," he says. "I have spent ten years and two months in the UK and my future has been ruined. I have lost my dignity in the UK. I have gone from the top to the bottom."

Naveed's health has not improved since his return to Pakistan. Despite a three month stay in hospital he continues to have mental health problems and can hardly sleep.

He left Pakistan in 2007 as a young, healthy man, full of hope for his future, highly respected by his family and local community. Ten years later he returned ill, with large debts, his dignity stolen by the hostile environment policy of the Home Office, and rejected by his family and local community, who consider him a criminal.

He feels alone. In the UK he had friends who were living through the same terrible experience. Together they fought for justice. In Pakistan he is isolated, and nobody understands what he has experienced. He wants his dignity back.

"I have to regain respect," he emphasises. "I'm suffering a lot presently. I have to show to my mum, to my dad that I was innocent. I have no contacts with them anymore. I write them letters but they don't reply. Once my parents allow me home again, and look after me, I'll be able to recover and get a job."

Naveed is still fighting to prove his innocence, with the help of his solicitor in the UK, but appealing from abroad and in such a situation is difficult. Sometimes even the simplest matters, such as communicating with his solicitor, become complex. Often Naveed has no money to buy credit for his mobile and they cannot speak on the phone or communicate through the Internet.

Furthermore, Naveed feels embarrassed about asking for information from his solicitor because the solicitor is not charging him a fee, but without the solicitor's help, Naveed cannot clear his name.

Despite all these difficulties, and having waited for a long time, Naveed was finally supposed to have an out of country hearing on his case in June, but the hearing did not take place because the Home Office failed to provide the video link facilities in court.

Ronak’s story

Detained for months in the UK, then back to India where life has become hell

Ronak is a young Indian who came to the UK in 2007 on a working holiday maker visa (a special visa for Commonwealth citizens that was replaced by the Tier 5 youth mobility scheme in 2008). He worked as an accountant in an estate agency in London, returned to India, and then decided to continue his studies in the UK. In 2009 he enrolled at the University of Wales, where he obtained a post graduate degree in business management.

In 2011 he took the TOEIC English language test at Ethames College in London and enrolled for a three-year accountancy course at the Trans-Atlantic College in London. After a year, however, the Home Office ordered the College's closure.

The Home Office didn’t send a letter to the Trans-Atlantic College’s students to advise them to look for a new sponsor, but the college administration recommended Ronak to do so. Ronak was accepted by Interlink College in London to continue his course.

Obtaining a new visa, under Interlink College sponsorship proved to be a long and expensive process that eventually led to the breakdown of his family union.

The Home Office refused his visa application, on the grounds that he did not apply within 60 days of the date of the Home Office’s letter informing students that the college was going to be closed and that they had 60 days to find a new sponsor. Yet Ronak did not receive such a letter and neither, as far as he knows, did any of the other students.

Ronak appealed against the decision. It took him about one year and £4,000 in legal expenses to win the case and finally obtain the visa in July 2013.

It had been a hard year, full of difficulties. His wife was worried about her future and that of their daughter and pressed him to return to India, but he wanted first to complete his studies in order to ensure good professional opportunities when he finally went back. He told her: “Let me first finish my studies, otherwise what could I do in India?” She wasn't convinced and in May 2013 his wife left him and returned to India with their daughter.

To make matters worse, in September 2014 his visa was cancelled, because the Home Office accused Ronak of cheating in the TOEIC test. Immediately Ronak contacted his solicitor again, who wrote a letter supporting him to the Home Office. Ronak was served with a removal notice [under section 10 or the Immigration and Asylum Act 1999] and was required to go sign at the Home Office every fortnight. But he did not do so because “reporting centres are for “illegal” people while I was a genuine student.”

Ronak missed three reporting dates, and on 9 December 2014 immigration officers arrived at his home to arrest him. “I saw them arriving,” he says, “if I had wanted to run away I could have, but I didn’t because I’m a genuine student. Why should I run away? I didn’t commit any fraud, any crime. I opened the door and showed them my passport. They took it and said they were going to take me to the Dover detention centre.”.

They took him to Barking Police station, where he remained for more than fifteen hours, then to Dover detention centre, where he remained for 58 days. “It was a horrible experience,” he recalls. “Every day they torture you, they come into your room and say ‘you have to go back to your country’.” Ronak’s solicitor was able to block his deportation through judicial review [where a court considers the lawfulness of a decision taken by the government department or official]. On the 2 February 2015 Ronak was released with temporary admission on condition that he signed in every fortnight. It was during this period that he started to have mental health and heart problems.

Life was tough. He couldn’t work, couldn’t study, couldn’t do anything, as he had no rights in this country. Ronak lived in a property owned by a Hindu temple, with the help of friends. In India his wife applied for divorce, and his father underwent two operations.

He regularly went to sign, but on 2 December 2016 he was arrested again. When he went to the reporting centre that morning, the official called him to the office.

“I thought maybe they wanted to check my English,” he says, “but they just asked me my name and personal details, took a picture, and left me in the room for a couple of hours. Then they told me: ‘We’ll take you to Brook House detention centre and deport you in one week’.”

Ronak stayed two months in Brook House, before being moved to Colnbrook detention centre, where he spent another seven months. “I wrote to my local MP, Stephen Timms, and he wrote the Home Office a letter asking them to release me, but they replied they weren’t going to release me anyhow. I also sent the Home Office many letters, explaining that I’m a genuine student, I have a master’s degree, I haven’t done any crime and have been regularly reporting for two years. I asked them: ‘Please let me finish my studies and I’ll go back to my country’.”

In March 2017, Ronak applied for asylum; he didn’t want to, but he needed to gain time to avoid deportation and resolve the situation. His application was refused in May.

“Please let me finish my studies and I’ll go back to my country.”

When he was finally released on 24 August 2017 he was exhausted. On 10 January 2018 he went back to India: “I wanted to fight for justice, but lastly I gave up.” “Mentally, physically, financially, family wise, I was tired and I decided to return.” Ronak appealed again from India, to no avail.

He spent £24,000 in the UK for his studies and £6,000 on legal fees. He stood up to the Home Office and fought for justice in the UK for more than five years, experienced long periods of detention and every sort of difficulty, lost his family, all to achieve his aim: to go back to India and have a successful career there.

Currently he is struggling to get a job in India, and his family is upset about what happened in the UK. “We lost our reputation here in India,” he says. “Everyone knows that I was in detention for nine months. Here people think that I have committed fraud or a crime of some sort. Life became hell in India.”

Roni Mandal's story

"I came here clean and I want to go back clean -

Just let me finish my degree"

Roni Mandal always dreamed of completing his studies abroad in order to help create a career for himself in India. His father, a much-travelled businessman, encouraged him to study in the UK because of the high reputation of the educational system. His cousin, who had already left India to study abroad, and a London friend also encouraged him, and in 2011 he moved to the UK to study business management at the London Guildhall College.

In 2012 he completed his course, took the TOEIC English language test at Colwell College, and applied to the Sinclair Adamson Business College for a more advanced course. Unfortunately, the college lost its Tier 4 licence and was nolonger allowed by the Home Office to have international students. Therefore Roni shifted to St. Andrews College, where he started an accountancy course before deciding to go to the university to study business management instead.

In 2014 he was admitted at the Trinity Saint Davis University of Wales, London campus, and was granted a 43-month university visa. He didn't realise that he needed to notify St. Andrews College, and that led to his first troubles. The college informed the Home Office that he was not studying there, and the Home Office wrote to Roni giving him 60 days to find a new sponsor, without considering that he already had a regular visa under the Trinity Saint Davis University's sponsorship. Roni showed the letter to the university and was told not to worry because he already had a visa. Later, Roni received a second letter from the Home Office, asking him again to look for a new sponsor. This time the university contacted the Home Office asking the reason for this, and it turned out that there was an allegation against him of cheating on the TOEIC test.

In October 2014 Roni's visa was cancelled by the Home Office because of the cheatingallegation. "They just said I cheated, but failed to provide any proof of evidence," explains Roni, "I didn't need to cheat! I took the IELTS (another recognised English test) in India and had no problems to take the TOEIC after I had been studying in the UK. My university didn't help me in any way; they didn't even write a letter to confirm that I was a regular student. The university just withdrew me, they said they had specific directions from the Home Office and were only following them."

Roni lost the £5,000 he had paid for his first year of university and since 2014 has been fighting the Home Office decision. He appealed several times and spent about £10,000 on legal procedures, to no avail.

Having been served with a section 10 removal notice [under section 10 of the Immigration and Asylum Act 1999], and out of country appeal rights, Roni is left with no rights in this country and it is difficult for him to prove his innocence.

“Some people have been given in-country appeal rights. They can directly go the court and prove their innocence,” he says. “How can they give some people in-country appeal rights, some people out of country appeal righta, and some people no appeal righta at all, with no reason or evidence? I feel that they are discriminating against us, and this concerns a large number of students.

“The government wants to kick out all the students. They can do with us whatever they want, because we are from non-EU-countries! We are not criminals, there was no investigation, no evidence provided, and then they put us under section 10. I know somebody who won the appeal from abroad but the government still refused to give a student visa, they said ‘apply for a visitor visa and then change it in the UK.’ But I know that once I leave the UK I will not be able to return.”

“We are not criminals...there was no evidence provided.”

Roni also contacted his MP, Stephen Timms, who was very supportive and wrote a letter to the former Home Secretary Amber Rudd, but with no positive result. Together with other students, he went to parliament in 2016 and spoke to the former chairman of the Home Office select committee, Keith Vaz. He too was supportive but later stepped down and couldn’t help the students any more.

Roni hasn’t given up and is still fighting for justice, while struggling to survive in a country where he doesn’t have any rights. Since 2014, he has been living with the help of his family and friends. He lives with a friend, who pays the rent and all the expenses, and his family send him some money every month, but life is difficult in such a situation.

“I’m stuck with nothing to do, sitting at home,” he says. “Every day I wake up and wonder what my future is going to be. It’s in the darkness! I came to study, I had ambition, I had hope, but now my hope is destroyed and I don’t know what to do. I cannot sleep at night, I keep thinking ‘what can I do?’ I have lost so many things: money, time, even my girlfriend in India, who left me and got married. I should have finished my degree by now, I should be back home, in India, working with a career. I look at many friends who were studying with me: they finished their degrees and went back to India. I am still here!”

Roni’s family don’t know what happened to him. They think that he is still studying and everything is going well. “I haven’t told them because I don’t want to shock them” he explains, “My mum is ill and I don’t want that something happens to her. She keeps asking me when I’ll go back to India, and I keep telling her 'Soon'. I’m missing my family a lot; I haven’t seen them for seven years. I don’t want to disappoint them.”

Recently Roni found a new solicitor. In April, she wrote to the Home Office, but has not received any reply. Roni is still waiting. He wants to clear his name, finish his studies and go back to India: “Just let me finish my degree and the next day I’ll go back to my country. India is a big country, there are lots of opportunities. I want a manager position in a multinational company, but I need my degree, and I need to go back clean.

“I came here clean, without any allegation [against me], and I want to go back clean. Otherwise I will not have any opportunity in India, or anywhere else.”

Shammi Aktar’s story

Cheated by the immigration officer into voluntarily returning to Bangladesh

Shammi, a 34-year-old Bangladeshi woman, arrived in the UK in 2009 to study at Manchuria College, in Manchester, where she obtained a post graduate diploma in management in 2011. She married a fellow countryman and they later had a son.

In 2012 she took the TOEIC English language test and applied for an entrepreneur visa, which was refused without any reason in 2014.

“They didn’t refuse me the visa because of TOEIC, but because they didn’t believe that I was a real businesswoman, although they wouldn’t provide any reason,” she says. “My money was ok, my papers were ok, but they didn’t want to give me the visa. In the appeal hearing they just told me ‘We don’t believe that you are a real businesswoman’ and they didn’t say anything else.”

Shammi was given a chance to submit a fresh application in a different role. She applied for a student visa, which remained pending with the Home Office for a long period before finally being refused in 2015. She found out about the refusal only when her solicitor called the Home Office to ask how the application was proceeding. She was told she had been refused and had to sign in at the Dallas Court immigration reporting centre in Manchester.

There she was handed the refusal letter (based on the allegation of cheating in the TOEIC test). She recalls: “They told me it wasn’t just me. They said: ‘Lots of students, everyone, should go. You have no right to live here.’ I asked what I could do, and the lady officer said: ‘You have no appeal right. If you go back willingly to Bangladesh, then you can re-apply after one year. You have no right to stay. If I detain you, you will be banned from coming back to the UK’.”

“Since I came back to my country I have been suffering a lot.”

Shammi argued that she had not cheated in the test and asked why she had to leave the country if she had not committed a crime. The only answer she was given was: “This is the law now, you have to leave the country. This is the system. You can come back after one year.” The officer didn’t explain whether the allegation would be dropped if she returned to Bangladesh.

Shammi “accepted their rule,” as she puts it, and went back to Bangladesh. She didn’t want to settle in the UK, she simply wanted to establish herself educationally and in

business, and to create a better future for her and her family in Bangladesh. She was tired, stressed, and in financial trouble; she thought that going to Bangladesh and coming back to the UK after one year was the simplest and quickest solution.

However, her solicitor advised her that if she left the UK she could not come back, while if she remained she could obtain a visa through her son who had been born in the UK. The law allows parents to obtain a visa in this way but the child must be seven years old, and there was a long time to wait. She thought going to Bangladesh and returning after a year was better.

“I didn’t want to stay in England illegally,” says Shammi. “My son was three-and-a-half years old. I would have had to stay another three-and-a half years illegally. How could I do that? It was a big risk! I thought it would be better for us if I could apply after one year. One year is nothing. I believed the immigration officer and trusted her one hundred per cent.”

One year after her return to Bangladesh, Shammi contacted her solicitor and learned that she could not return. “I didn’t want to stay there illegally” she comments, “but since I came back to my country I have been suffering a lot. I wish I had stayed in the UK illegally. I respected their rules and decisions, but now I feel cheated by the government decision”.

“We came back to Bangladesh to stay with my in-laws,” she says. “When they realised we had no money, they started treating us as a burden because we were three people. Living here is a torture, my mother-in-law hates me because we have no money.” She funded Shammi’s studies and wanted her to remain in the UK and send money back. She thinks there are opportunities in the UK and doesn’t believe Shammi’s account of what happened.

Shammi says that one member of the family is violent and has hit her. She says finding a job is difficult because only people under 30 can access government employment in Bangladesh, and to get a private job you need to bribe or to have an influential reference. She doesn’t work: she spends all the day looking after her in-laws’ household and her own family. Her husband suffers from depression and diabetes. He started a small bike-selling business, but it doesn’t make enough money to enable them to move.

Shammi spent about £40,000 on legal procedures, college fees and other expenses in the UK. She wants to be compensated and wants her name cleared, but she doesn’t have any money to pay for further legal action.

“If had I invested in another country, I would be established by now. I will not suggest to anyone to study in the UK,” she says. The number of Bangladeshi students going to the UK has fallen because “they are treated very badly in the UK.”

Waqar H.’s story

Accused of cheating at the TOEIC test after studying in British schools since he was a child

Waqar, a 28-year-old man, did all his studies under the British curriculum in Bangladesh, his native country. His family spent a fortune to allow him to attend first a Canadian primary school, then a private, well known, British school from the secondary to the A levels.

He is an only child and his parents wanted a good academic qualification for him, with his higher education to be completed in the UK.

So in 2010 Waqar moved to London under the sponsorship of Whitechapel College, where he obtained a Higher National Diploma in technical subjects. He needed a third year of education to get a bachelor’s degree, after which he planned to return to Bangladesh with a good CV and start a successful career.

In 2013 he took the TOEIC English language test and enrolled on a computer science course at Glyndwr University. The university asked him to take an internal English test, which, not surprisingly, since his whole education had been in English, he passed with high scores. A successful student, he also worked as a part-time maths and computer science teacher to A level and GCSE students.

In 2014 he heard that some students were in trouble because of allegations of cheating in TOEIC tests and, as an active member of the National Union of Students for his University Computer Science Department, was defending them against the Home Office’s allegations. It never occurred to him that he would experience something similar.

“I didn’t expect to have any problem, because I studied in English schools in Bangladesh, received my diploma in the UK, and was accepted at the university on the basis of an internal English exam because the university’s policy was not to accept TOEIC certificates.”

“One day I went to the university to ask for information about the last semester of my bachelor course and I was told that I had been withdrawn. It was a shock! … I didn’t have any reason to cheat at the TOEIC test - that’s a very simple test.”

On 9 September 2014, Waqar received a letter from the university notifying him that he had been withdrawn, and on 4 October a Home Office letter notified him that his visa had been cancelled because of the allegation of cheating in the TOEIC test. He was served with section 10 removal notice [under section 10 of the Immigration and Asylum Act 1999] and out of country appeal rights.

Since then, he has been fighting to prove his innocence, while regularly reporting to Becket House reporting centre and struggling to survive with no money and no right to remain in the UK.

He couldn't afford to pay a solicitor and his experience is an example of how difficult it is for an individual to defend himself through legal procedures.

"The proceedings are complex...you can't get help anywhere."

His first action was to contest the Home Office decision through pre-action protocol - "This is a letter, normally written by a solicitor, that states the Home Office decision was wrong and the client didn't cheat," he explains. "I did with some advice from a lawyer who is a friend of my uncle and his firm represented me in the pre-action. It wasn't very forceful (because no practising barrister was involved) and it was refused.

"Then I applied for judicial review [where a court considers the lawfulness of a decision taken by the government department or official] with no better results. This is a very difficult procedure and you need a good solicitor, but I applied by myself as my uncle's friend's firm was not a solicitors firm. Many students didn't even apply for it, because they had no money and didn't understand the procedure. We didn't receive good guidance from our universities. Glyndwr University told me to go back to Bangladesh and finish my course there. I asked them to write a letter stating that I could complete the course at distance, but they refused. I didn't trust that they would allow me to do so, because they had already taken me out of the course without even telling me before or scrutinising me."

Waqar lost the judicial review because he was required to send additional documents within seven days. Howe er, the letter notifying him of this was sent by second-class post and was delivered when the deadline had already passed. He sent the documents anyway, but the review was refused because he was "out of time."

He appealed against the decision to the Upper Tribunal, but this appeal was also refused because the Tribunal confirmed that he was "out of time."

"I should have taken other steps" Waqar says, "Now I understand that I should have challenged the point of being out of time and tell the court, 'No, I wasn't out of time. I was late because I received the letter late' but I couldn't do that because I didn't have enough guidance and I didn't know about legal aid at that time. I'm a student, I came to study computer science. The court proceedings are so complex, and you can't get help anywhere."

Despite the difficulties, Waqar continued in his legal battle and went to the Court of Appeal, where he was eligible for legal support through the Royal Court of Justice Bureau. But he didn't get it because the Court didn't allow him enough time for each stage of his process for the pro bono legal support to take him on, as they require a minimum of six weeks. Once again, Waqar had to do all the procedure by himself. His application was not

complete nor well prepared, the court was supposed to give him a final deadline to present further arguments, but they didn't. While Waqar was preparing new documents to submit to the court, he received a letter notifying him that his case had been dismissed.

In 2018 he was finally able to get legal aid after repetitive failures and found a solicitor. He appealed again to the Court of Appeal and is waiting for a hearing.

"You need to be a lawyer to come to this country," he says. "International students have no rights here. The UK is good in marketing its education system. They attract international students, but then they destroy their lives.

"The education system in other countries is less approachable but is much better than in the UK because there is protection for international students. Here I went to the university to ask when my classes would take place, and I was answered: 'Get out of the country!' It was such a shock. I got mad in that period, I couldn't sleep. Every night I thought the Home Office officers might be just outside my door, I was always afraid of finishing in a detention centre.

"Since 2015 I have suffered from mental health problems, and I'm still in therapy. I still cannot sleep, during the night I hit myself against the wall and I wake up because I'm hurting myself. Many times I thought to commit suicide, but I cannot because of my family, I'm an only child."

Since the allegation, Waqar has lived with different uncles and aunts in London, moving from one place to another, and borrowing money. He is determined to remain in the UK until he obtains his bachelor degree, but even clearing his name of the cheating allegation won't be enough: "I know some students who won the appeal, but they weren't able to complete their education because the universities didn't accept them back. They weren't given any clarification letter to show their innocence, and had only a 60-day discretionary leave to make a new visa application. In these conditions, no university will accept us. We need to show that we have enough money in our bank accounts, but that's impossible after years of increasing debts to survive and paying all the legal expenses.

"We need to be put back where we were taken from four years ago. The Home Office, that previously forced the universities to withdraw us, should now give universities clear instructions to take us back. We should be allowed to re-sit the English test and, once having passed it and having had our names cleared, receive a clarification letter and a six-month/one-year discretionary leave to complete our education.

"At present the Home Office is spending a lot of public money to contest our appeals that could be better spent in public services; while even students who won the appeal are unable to go back to their studies. We want our education. You can take everything from us but not our education. I came here to study and I'm not going anywhere till I obtain my certificate."

In 2014, when he was accused of the allegation of cheating, Waqar was only two modules away from completing his education. He should have been back in Bangladesh in 2015, and starting a good career there. But he is still here, waiting to get his degree.

Legal background

By Sonali Naik QC, Barrister, & Patrick Lewis, Barrister - Garden Court Chambers

Foreign students must pass a test of proficiency in written and spoken English. One of the businesses conducting tests was Educational Testing Service (ETS), which provided the Test of English for International Communication (TOEIC). In the spoken English part of the exam candidates read a text, recordings of which were sent to an ETS assessor for marking.

In February 2014 a BBC *Panorama* programme reported that some staff employed by ETS had engaged in widespread fraud and that cheating had occurred at a number of centres, in particular by the use of proxies taking the spoken English part of the test. In response to the allegation, the Home office asked ETS to use voice recognition software on recordings to try to identify cases in which it appeared that the same person had spoken in multiple tests and could thus be assumed to be a professional proxy.

Using ETS findings, in 2014 and 2015 alone the Home Secretary cancelled or refused the visas of over 40,000 people who were said to have obtained leave to remain on the basis of cheating in the TOEIC test. This meant that students mid-course had their leave to remain terminated and were required to leave the UK immediately. Some were detained and removed. The National Union of Students estimates that more than 56,000 individuals were affected.

It is the Home Office's responsibility to prove such an allegation but until relatively recently the actual voice recordings on which the allegation was based were not disclosed to the individual. In a series of appeals the courts found that the evidence relied on by the Home Office to make the accusation that someone had used a proxy was only "just" sufficient to found such a claim. It is of note that even the Home Office has accepted that much of the evidence on which it relied "in the early stages" to make many thousands of allegations was "shaky" and that its initial approach was "stumbling".

It is then open to the individual to produce evidence to counter the allegation of cheating against them. Given the difficulty of obtaining the actual voice recordings, such evidence would include the quality of the individual's English, whether they were of good character, and whether they had any incentive to cheat.

Thereafter, it is for the Home Office to respond to that evidence.

In a case in which dishonesty was alleged, Mr Justice Green held:

"At the end of the day the SSHD [Secretary of State for the Home Department] bears the burden of proof. This is a proposition which is uncontroversial and has been confirmed on many occasions … Where the appellant's evidence is not met, a Tribunal should be slow indeed to find dishonesty, particularly without hearing evidence and submissions on the point from the Appellant and/or the SSHD. It must be recorded that a finding of dishonesty

can have catastrophic consequences for the applicant in social and economic terms. It is not to be found lightly."

The problem for the vast majority of individuals accused of cheating by having used a proxy is that they were served with a removal notice (instruction to leave the country) under Section 10 of the Immigration and Asylum Act 1999. This gave no right of an in-country right of appeal to challenge the decision even though the accusation was so serious.

There are other groups of students who had slightly different situations with regard to appeal rights and how they found out about the allegations against them. For example, some students were informed by their universities that they had been withdrawn from study; some who were out of the UK on holiday were informed and detained at the airport; some found out when they applied for an entrepreneur visa, or married a British Citizen and were denied visas. Later, as legislation was passed (in the Immigration Act 2014) to make it more difficult for migrants to challenge Home Office decisions, those accused had no right to appeal either in- or out-of-country.

Those served with Removal Notices were not given disclosure of the evidence on which the allegation was made and were only granted an out-of-country right of appeal (that is, an appeal that can only be made when the person appealing has been removed from the UK) but afforded no in-country remedy — that is, an appeal registered in the UK which the individual can attend and give evidence in person.

Individuals were left with no alternative but to try to challenge this decision through judicial review, a process by which decisions of government departments may be subjected to review by the courts. However, this is allowed only where there is no 'alternative remedy'. Many of the students were not entitled to legal aid and had to pay privately to bring such challenges to try and clear their names, without at that time access to the evidence said to be held against them. They also risked having to pay the Home Office's costs if they lost.

The Home Office argued that the existence of an out-of-country right of appeal was an "alternative remedy" and that therefore applications for judicial review should be dismissed. The courts consistently ruled that the out-of-country procedure was indeed an adequate alternative remedy, as a result of which judicial reviews were dismissed almost automatically.

This was then considered once again by the Court of Appeal in a case called Ahsan v The Secretary of State for the Home Office, when the court held that, because of the nature of the allegations, the necessity of oral evidence to defend them and the fact that adequate facilities did not exist for evidence to be given by someone outside of the country an out-of-country appeal was not an adequate alternative remedy. Therefore people should be allowed to bring judicial review claims in the UK. It concluded that in-country tribunal appeals remain the more appropriate place for resolving deception cases.

Students accused of fraud routinely had their appeal rights removed simply by a Home Office assertion that their claim was ‘clearly unfounded’. However, the Court of Appeal stated that where this was asserted a human rights claim the Home Secretary must justify why there is no prospect that a person’s oral evidence may rebut the allegation of deception.

In addition, the Court of Appeal held that for those who have brought out-of-country appeals and won, “*the Secretary of State ought to take whatever steps were possible to restore successful out-of-country appellants to the position that they would have been in but for the impugned decision*.” That includes the grant of Entry Clearance to allow them to return to the UK. In practice this has not in fact allowed such students to return to resume their courses. Aside from the damage to their reputation they have lost a huge amount: course fees which they may never recover, incurrring high legal costs (some of which they may never recover), huge delay of years whilst their cases were being resolved during which time they were not allowed to work or study but still needed money to survive here, and no prospect so far of any compensation for the losses suffered, let alone recognition of the impact on them.

The Home Secretary has reluctantly begun to grant individuals in-country right of appeal, but this has not been granted universally. Nor has any action been taken to address the many innocent individuals who were removed or refused entry when they were in fact entirely innocent. As Mr Justice Green commented, allegations of dishonesty have had “catastrophic consequences” for many of those accused. The absence of proper independent review has led to individuals of good character having their reputations and livelihoods ruined without any remedy having been made available to them.

This has been unquestionably another example of the hostile environment that has been created entirely unnecessarily for individuals who were in the UK lawfully and making a significant contribution to the UK economy and cultural life.

Concluding remarks

As a charity that works across the full spectrum of migration issues, we are used to witnessing and documenting the consequences of both punitive public policy and divisive public debate.

Still, the cases of the wrongly-accused students stand out. During the process of compiling these reports we have heard too many stories of how people who came to this country to learn, to contribute and to fulfil a dream found their hopes shattered, their reputations shattered and their lives overturned through no fault of their own. Worse, we know that the cross-section of stories we have heard are reflective of thousands more whose careers, studies, housing, mental health and basic sense of dignity have been dealt a blow by this rash, ill-considered act of collective punishment.

The scandalous treatment of the “Windrush generation” shone a light into the corners of the immigration system, where successive governments’ desire to be seen as ‘tough’ has led to an out-of-control, unaccountable system that is blind to the human impact of its decision-making. And the outpouring of sympathy over Windrush shows that most British people do want the management of migration to be fair, decent and humane.

But this moment means little if those in power do not engage in genuine self-reflection, and learn from past mistakes. The cases of these students would be a simple place to start – the Home Office has the power to take a serious step towards redressing a burning injustice, and putting the lives of people like Roni and Naveed back on track.

Our recommendations are outlined in full below. But the main ask is clear: for those who were caught out by a callous set of blanket accusations to be permitted to sit a new test in secure conditions, and resume their studies. The clock cannot be turned back – but it can at least be partially reset.

There is a unique opportunity here to demonstrate our common commitment to a basic sense of fair play, and to the principles and values of our justice system. The students we have spoken to during the process of compiling this report only want to get on with their lives.

This four-year failure must end now: Give the students their future back.

Recommendations

Migrant Voices' recommendations developed together with the students:

Immediate actions for the students and other victims whether Tier4 students, Tier1 (entrepreneur) or Tier2 (skilled migrants) who are still residing in the UK:

1- Offer academic scrutiny through a new English language test and/or interview to establish the individual's proficiency in English and to re-instate their former immigration status
2- Clear students' names and remove the criminal allegation made against them
3- Put an immediate stop to detention and deportation until a decision is made and a process is implemented
4- Issue clear instructions to universities to re-instate/re-admit students and allow them to complete their studies without the need to re-submit financial and other evidence for a new visa

Future actions to prevent a similar situation:

1- Give the universities power to decide on student admissions including the type or accredited/recognised English test used; the government should not be involved in this process
2- Universities should develop their own processes, including using Skype and/or other technology, to interview students before leaving their countries to ascertain level of English in lieu of English Language testing
3- Issue a students' protective rights Bill to protect the rights of students in the event of a university shutting down or of a test centre failing or shutting down
4- Change students visa sponsorship so that students get a visa to the UK to study for a particular university, but can transfer that student visa if they need to/wish to move to another university (and are accepted there)
5- Remove students from the cap on net migration

For the students who were already deported or have left the UK:

1- The opportunity to re-sit the test in their country and for their names to be removed from the allegation list so they can get on with their lives, go back to study, take up employment and regain their dignity
2- Allow the students who were deported or left the UK the option to return to the UK to complete their studies/work/entrepreneurial activity following the above process

Neutral Citation Number: [2017] EWCA Civ 2009

Case No: C2/2016/3726
C8/2016/2333
C8/2016/1072
C8/2016/2209

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM the Upper Tribunal (Immigration and Asylum Chamber)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/12/2017

Before:

LORD JUSTICE UNDERHILL
LORD JUSTICE FLOYD
and
LORD JUSTICE IRWIN

- -

Between:

NABEEL AHSAN	**Appellant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**
HARWINDER KAUR	**Appellant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**
RAJWANT KAUR	**Appellant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**
ATAULLAH FARUK	**Appellant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Mr Stephen Knafler QC and **Mr Greg Ó Ceallaigh** (instructed by **M & K Solicitors**) for **Nabeel Ahsan**
Mr Stephen Knafler QC and **Mr Rowan Pennington Benton** (instructed by **Farani Javid Taylor Solicitors**) for **Harwinder Kaur**
Mr Michael Biggs (instructed by **Mayfair Solicitors**) for **Rajwant Kaur**
Mr Zane Malik (instructed by **Universal Solicitors**) for **Ataullah Faruk**
Lisa Giovannetti QC and **Colin Thomann** (instructed by **the Treasury Solicitor**) for the **Respondent**

Hearing dates: 19-21 September 2017

- -

Approved Judgment

Lord Justice Underhill

INTRODUCTION

1. The background to the four appeals before us can be summarised, in bare outline, as follows. The Immigration Rules require applicants for leave to remain in some circumstances to pass a test of proficiency in written and spoken English. The principal form of approved test is the "Test of English for International Communication" ("TOEIC") provided by a US business called Educational Testing Service ("ETS"). ETS's TOEIC tests have been available at a large number of test centres in Britain. The spoken English part of the test involves the candidate being recorded reading a text, with the recording then being sent to an ETS assessor for marking. In February 2014 the BBC *Panorama* programme revealed that there was widespread cheating at a number of centres, in particular – though not only – by the use of proxies to take the spoken English part of the test. In response to the scandal, ETS at the request of the Home Office employed voice recognition software to go back over the recordings at the centres in question and try to identify cases in which it appeared that the same person had spoken in multiple tests and could thus be assumed to be a professional proxy. In reliance on ETS's findings the Secretary of State in 2014 and 2015 made decisions in over 40,000 cases cancelling or refusing leave to remain for persons who were said to have obtained leave on the basis of cheating in the TOEIC test.

2. Although it seems clear that cheating took place on a huge scale, it does not follow that every person who took the TOEIC test in any centre was guilty of it. Large numbers of claims have been brought, either in the First-tier or Upper Tribunals ("FTT" and "UT") or in the High Court, by individuals who say that the Home Office's decision in their case was wrong: this has become known as the TOEIC litigation. There have already been many decisions on both procedural and substantive questions. Criticisms have been advanced of the way in which the Home Office approached the task of identifying individuals who had cheated, and some challenges have succeeded. It is the Secretary of State's case that the proportion of the impugned decisions that was wrong or unfair is very small indeed; but even if that turns out to be the case the individuals affected by those decisions will have suffered a serious injustice.

3. All four Appellants are the subject of decisions taken by the Secretary of State on the basis (or, in one case, partly on the basis) that they had cheated in TOEIC tests. All of them deny that allegation. The primary question raised by these appeals is whether they can challenge the Secretary of State's decision (whether by judicial review or appeal) from within the UK or whether they can only do so by an appeal brought after they have left the country – a so-called "out-of-country appeal". However the route by which that question arises is not the same in all four cases. They fall into two categories.

   (A) *The Section 10 cases*. Harwinder Kaur ("HK"), Rajwant Kaur ("RK"), and Ataullah Faruk ("AF")[1] – who are from India, Pakistan and Bangladesh

[1] I refer to the Appellants by their initials without any disrespect and as a matter of convenience only, particularly because two of them are Sikh women and so both have the same surname.

respectively – all came to this country on student visas and were subsequently granted extensions of their leave to remain. Each has been served with a notice that they are liable to removal under section 10 of the Immigration and Asylum Act 1999 (so-called "administrative removal") on the basis that they used deception in obtaining those extensions by using a proxy for the spoken part of their TOEIC tests. Each denies doing so and has sought permission from the UT to apply for judicial review of the section 10 decision. Permission was in each case refused on the basis that they have an appropriate alternative remedy in the form of an out-of-country appeal; but permission has been given to appeal to this Court against that refusal. The primary issue raised by the appeals is whether an out-of-country appeal is indeed an appropriate remedy in their cases and others like them. They rely in particular on the recent decision of the Supreme Court in *R (Kiarie and Byndloss) v Secretary of State for the Home Department* [2017] UKSC 42, [2017] 1 WLR 2380, in which it was held that an out-of-country appeal was not a fair or effective procedure in the (different) context of challenging a deportation order.

(B) *Mr Ahsan's case.* Nabeel Ahsan ("NA") is a national of Pakistan who made an application for leave to remain on human rights grounds, which was refused by the Secretary of State partly on the basis that he had cheated in a TOEIC test. Other things being equal, he would be entitled to an in-country appeal against that decision; but the Secretary of State has certified that his human rights claim is clearly unfounded, which has the effect that any appeal can only be pursued from outside the UK. Permission to apply for judicial review of the certification has been refused by the UT; but permission has been given to appeal to this Court.

4. HK and NA were represented before us by Mr Stephen Knafler QC, leading Mr Rowan Pennington-Benton in HK's case and Mr Greg Ó Ceallaigh in NA's case. RK was represented by Mr Michael Biggs and AF by Mr Zane Malik. The Secretary of State was represented in all four cases by Ms Lisa Giovannetti QC, leading Mr Colin Thomann. The appeals were expedited because of the number of pending cases potentially affected by them, and that led to some regrettable hiccups in the preparation of the papers; but the quality of the oral submissions from all counsel has been very high. For convenience, and with apologies to their respective juniors, I will sometimes in this judgment refer to Ms Giovannetti's and Mr Knafler's skeleton arguments and written submissions as if they were their sole authors, which I am sure is far from being the case.

5. I will deal separately with the two categories of appeal identified at para. 3 above, but it will be convenient by way of preliminary (1) to set out the relevant statutory provisions, which to some extent overlap between the two, and (2) to give a short overview of the TOEIC litigation to date.

(1) THE STATUTORY PROVISIONS

6. Both section 10 of the 1999 Act and the appeal regime relating to decisions made under it were replaced by changes introduced by the Immigration Act 2014. There are complicated commencement and transitional provisions under which the relevant provisions of the Act came into force at different dates, depending on the circumstances, between 20 October 2014 and 6 April 2015. All three of the section

10 appeals fall to be determined primarily by reference to the old regime; but for reasons which will appear we will have to consider also some aspects of the position under the 2014 Act regime (which remains in force today).

The Pre-2014 Act Regime

Section 10 of the 1999 Act

7. The version of section 10 of the 1999 Act which was in force immediately prior to the 2014 Act read (so far as material) as follows:

> "(1) A person who is not a British citizen may be removed from the United Kingdom, in accordance with directions given by an immigration officer, if—
>
> (a) having only a limited leave to enter or remain, he does not observe a condition attached to the leave or remains beyond the time limited by the leave;
>
> (b) he uses deception in seeking (whether successfully or not) leave to remain;
>
> (ba) his indefinite leave to enter or remain has been revoked under section 76(3) of the Nationality, Immigration and Asylum Act 2002 (person ceasing to be refugee) …; or
>
> (c) directions have been given for the removal, under this section, of a person to whose family he belongs.
>
> (2)-(7) …
>
> (8) When a person is notified that a decision has been made to remove him in accordance with this section, the notification invalidates any leave to enter or remain in the United Kingdom previously given to him."

8. We are in these appeals concerned only with head (b) under section 10 (1) – since submitting a TOEIC test result obtained by cheating plainly constitutes deception – but I have set out the other heads because it should be borne in mind that the issues in these appeals do not affect the entirety of the operation of section 10: head (a) in particular was very commonly employed against overstayers and persons in breach of the conditions of their leave (typically restrictions on the right to work) in circumstances that did not involve any element of deception.

9. The effect of a decision under section 10 was, as appears from sub-section (8), that the subject and any dependants no longer had any leave to remain in the UK. The absence of leave to remain has a number of consequences, most notably that any one remaining without leave

(a) is committing a criminal offence – see section 24 (1) (b) of the Immigration Act 1971;

(b) is not entitled to work;

(c) (with effect from the coming into force of Part 3 of the Immigration Act 2014) is subject to the restrictions imposed by that Part as regards, in particular, the right to occupy premises under a residential tenancy agreement, access to NHS services, the right to open a current account and the right to a driving licence.

Appeal Rights

10. Section 82 (1) of the Nationality, Immigration and Asylum Act 2002 provided that:

> "Where an immigration decision is made in respect of a person he may appeal to the Tribunal [i.e. the First-tier Tribunal]."

"Immigration decision" is defined in sub-section (2). It includes, at (g),

> "a decision that a person is to be removed from the United Kingdom by way of directions under section 10 (1) … (b) … of the Immigration and Asylum Act 1999".

11. Section 92 of the 2002 Act regulated the question whether an appellant was entitled to remain in the UK in order to exercise his or her right of appeal. The basic rule stated in sub-section (1) was that "a person may not appeal under section 82 (1) while he is in the United Kingdom unless his appeal is of a kind to which this section applies". The following sub-sections identified the types of appeal to which section 92 applied. These included some specified categories of immigration decision, which did not include appeals against a decision taken under section 10 (1) of the 1999 Act, and appeals arising in some other circumstances which are immaterial for our purposes. However, sub-section (4) read (so far as material):

> "This section also applies to an appeal against an immigration decision if the appellant—
>
> (a) has made … a human rights claim … while in the United Kingdom, or
>
> (b) ..."

The term "human rights claim" was defined in section 113 (1) of the 2002 Act as

> "a claim made by a person to the Secretary of State at a place designated by the Secretary of State that to remove the person from or require him to leave the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 (c. 42) (public authority not to act contrary to Convention) as being incompatible with his Convention rights".

In *R (Nirula) v First-Tier Tribunal* [2012] EWCA Civ 1436, [2013] 1 WLR 1090, Longmore LJ described the purpose of section 92 (4) as being to provide an "orderly process" by which "the Secretary of State … [is given] … the opportunity to give a decision on any human rights claim before the appeal is determined so that her decision on that question can become part of any appeal" – see para. 17 of his judgment (p. 1096 C-D).

12. The effect of section 92 (4) was qualified by section 94 of the Act. Sub-sections (1) and (2) read as follows:

> "(1) This section applies to an appeal under section 82(1) where the appellant has made an asylum claim or a human rights claim (or both).
>
> (1A) …
>
> (2) A person may not bring an appeal to which this section applies in reliance on section 92(4)(a) if the Secretary of State certifies that the claim or claims mentioned in subsection (1) is or are clearly unfounded."

The upshot of sections 92 (4) and 94 (2) taken together was that a person in whose case a removal decision was made under section 10 (1) could only pursue his or her appeal from inside the UK if they had made a human rights claim and that claim had not been certified under section 94 (2) as clearly unfounded.

13. I should make two particular points about the operation of section 92 (4) which are relevant to the issues which I will have to consider later.

14. The first concerns the procedural element of a human rights "claim" for the purpose of section 113 and thus of section 92 (4). Although it appeared from her initial correspondence that the Secretary of State's position might be something different, Ms Giovannetti accepted before us that in order to fall within the terms of section 113 a "claim" does not require to be made in the form of a fee-paid application under the Immigration Rules. She made it clear that it is still the Secretary of State's position that a human rights claim ought to be made by a formal application, in the interests of orderly decision-making, and that priority may be given to claims so made; but she acknowledged that that was not a statutory requirement and she said that even if a claim was made in some other form a claimant would not be removed from the UK until it had been considered.

15. The second concerns the point at which a human rights claim has to have been made in order to attract the operation of section 92 (4). In the first instance decision in *Nirula* [2011] EWHC 3336 (Admin) (I have referred above to the decision in this Court) Mr Mark Ockelton, sitting as a deputy High Court Judge, held that, in order for section 92 (4) to apply, the human rights claim in question had to have been made before the decision being appealed against was taken: see paras. 32-38 of his judgment. In this Court it was thought unnecessary to go further than holding that the claim had to have been made before the lodging of the appeal to the FTT: see paras. 17-22 of the judgment of Longmore LJ (pp. 1096-7). However in *Munir v Secretary of State for the Home Department* JR/4207/2015 (unreported 25.11.16) the UT

followed the decision of Mr Ockelton: see paras. 39-51 of the judgment of Judge Kekic. All parties proceeded before us on the basis that those decisions were correct.

The 2014 Act Regime

16. The new section 10 (1) of the 1999 Act is in wholly different terms from its predecessor. It provides simply that:

> "A person may be removed from the United Kingdom under the authority of the Secretary of State or an immigration officer if the person requires leave to enter or remain in the United Kingdom but does not have it."

17. So far as concerns rights of appeal, the new section 82 of the 2002 Act no longer specifies categories of appealable "immigration decision". Instead, sub-section (1) provides that:

> "A person ('P') may appeal to the Tribunal where—
>
> (a) the Secretary of State has decided to refuse a protection claim made by P,
>
> (b) the Secretary of State has decided to refuse a human rights claim made by P, or
>
> (c) the Secretary of State has decided to revoke P's protection status."

For present purposes we are concerned with (b): the definition of human rights claim in section 113 (1) is not materially altered. Those are the only appeal rights granted. There is thus no right of appeal against a removal decision as such, but only in so far as that decision involves the refusal of a human rights claim. I will refer to an appeal brought under head (b) of the new section 82 (1) as a human rights appeal.

18. The provisions governing where a human rights appeal can be exercised from are distributed between sections 92 and 94 of the amended 2002 Act. Section 92 (3) provides that an appeal against the refusal of a human rights claim must be brought from within the UK unless (so far as relevant) it has been certified under section 94 (1), in which case it must be brought from outside the UK. Section 94 (1) reads as follows:

> "The Secretary of State may certify a protection claim or human rights claim as clearly unfounded."

19. It is important to appreciate that the role that the human rights claim plays in determining whether an appeal may be brought in-country is quite different under the two regimes. Under the old regime the fact that a human rights claim has been made is the trigger which permits the appeal against the immigration decision to be brought in-country (unless certified); but that decision remains the subject of the appeal. Under the new regime, by contrast, the *making* of a human rights claim is in itself of no significance; but if the claim is *refused* the refusal generates a right of appeal, which will be in-country (again, unless certified).

The Effect of a Finding of Deception

20. It was common ground before us that a finding of "deception" such as was made by the Secretary of State against the Appellants in these cases would prejudice their chances of obtaining leave to enter in the future, if and when they eventually left the UK, but there was initially some disagreement about the nature and extent of the prejudice. We were taken to paragraph 320 of the Immigration Rules, from which it is clear that the position is somewhat nuanced. I need not set out the full details. It is sufficient to say that where a person has previously used deception in order (broadly) to obtain leave there will be a mandatory ban on the grant of leave to enter or remain for a period of between one and ten years, the length of the period depending on whether they left the UK voluntarily and at their own expense. Even in circumstances which do not attract a mandatory ban, leave to enter or remain will "normally" not be granted where there has been such deception and there are aggravating circumstances. And, quite apart from the particular provisions of paragraph 320, the fact that an applicant has used deception will also be relevant in the assessment of the suitability criteria prescribed in Appendix FM.

21. More generally, it is self-evident that an official finding – albeit not made by a court or tribunal – that a person has cheated in the way alleged in these cases may become known to others, in which case it is likely to be a source of shame and to injure their reputation.

(2) THE TOEIC LITIGATION TO DATE

22. I shall refer at a later stage to decisions in the TOEIC litigation which directly address the issue of the availability of an in-country appeal. But that issue does not arise in every TOEIC case. In some the substantive question whether a person has cheated arises in the context of a challenge to a decision other than under section 10 of the 1999 Act and has to be resolved in-country, whether by appeal or judicial review. Some out-of-country appeals have also been brought. There have now been a number of such cases: we were referred, I think, to the decisions in all those which have been decided in the High Court or in the UT, though there have been others in the FTT. It is unnecessary to give a detailed account of what has happened in all these cases, but some of the arguments raised before us involve reference to some of them, and I should give a brief overview here.

23. The evidence supplied by the Secretary of State in the substantive TOEIC cases has developed over the course of the litigation. In the earlier cases she sought to rely essentially on (a) generic evidence, given by two Home Office officials, Rebecca Collings and Peter Millington, about the reports received from ETS identifying results as "invalid" or "questionable", and the methodology underlying those reports; and (b) the use of an "ETS Look Up Tool" to marry up those reports with the case of the individual appellant. These cases were not always well-prepared, and in some the look-up tool evidence was not provided at all, or was provided so late that it was not admitted. In more recent cases, however, the Secretary of State has supplemented that evidence by a report from another Home Office official, Adam Sewell, who has analysed the test results from a number of test centres in London. On the basis of his evidence the Home Office case now is that certain centres were "fraud factories" and that all test results from those centres, generally or on certain dates, are bogus. The

centres in question include Elizabeth College, which has also been the result of a criminal investigation, under the name Project Façade.

24. The evidence adduced by individual appellants in rebuttal will obviously vary from case to case. At a minimum they can be expected to give evidence that they did indeed attend the centre on the day recorded and took the spoken English test in person. But that may be supplemented by supporting evidence of various kinds: a frequent theme is that it is said to be demonstrable from other evidence that their spoken English was very good and that they thus had no motive to cheat.

25. One other development that I should mention is that it in due course became known that ETS has retained copies of the individual voice recordings which it has identified as showing the use of a proxy, and that a copy can be obtained (without charge) on application. This will allow the person concerned to listen for themselves to check if the recorded voice is their own. If they believe it is, they can seek confirmation from an independent expert: the Secretary of State's practice is to agree in such a case to the instruction of a joint expert. However, even where the voice appears to be someone else's that is not necessarily accepted by applicants/appellants as conclusive. There have been challenges to the accuracy of the system for storing and retrieving the relevant file; and it has been argued that even if a test centre submitted a batch of recordings made by a proxy that was done in its own interests and without the knowledge of the person taking the test.

26. Although there were some earlier decisions of the UT, the first to which I need refer is the decision of McCloskey P and UTJ Saini in *SM*[2] *and Qadir v Secretary of State for the Home Department* [2016] UKUT 229 (IAC), which was promulgated on 31 March 2016. The Secretary of State had cancelled the appellants' leave to remain on the basis that they had cheated in their TOEIC tests by the use of proxy test-takers. Those decisions attracted a right to an appeal in-country. The appellants' appeals failed in the FTT, but in both cases the FTT's decision was set aside and the decision fell to be re-made by the UT. The UT said that the correct approach was (I paraphrase in the interests of brevity) to consider first whether the Secretary of State's evidence – at that stage consisting essentially of the evidence of Ms Collings and Mr Middleton, together with the look-up tool – established a *prima facie* case that the appellant had cheated; and then, if it did, to decide whether that case was sufficiently answered by his or her evidence. The evidence of Ms Collings and Mr Middleton was criticised by the UT as displaying "multiple frailties", which left open the possibility that false positive results might have arisen. Nevertheless it was held to be (just) sufficient to transfer the evidential burden to the appellants to show that they had not cheated. Having heard oral evidence from both appellants, which recounted with some circumstantiality how they took the test and other matters relevant to their credibility, the UT upheld both appeals. It did so partly on the basis of its assessment of the oral evidence – that of SM requiring quite a nuanced assessment, while that of Mr Qadir was described as "impressive in its entirety" – and partly on the frailties of the generic evidence. At para. 102 of its judgment it "re-emphasise[d] that every case belonging to the ETS/TOEIC stable will inevitably be fact sensitive".

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[2] SM's name was de-anonymised on the subsequent appeal to this Court (see below).

27. On 29 June 2016 this Court gave judgment in two cases where the FTT had found in statutory appeals that the Secretary of State had failed to prove that the appellants had cheated and those decisions had been upheld in the UT – *Secretary of State for the Home Department v Shehzad and Chowdhury* [2016] EWCA Civ 615. The appeal in Mr Chowdhury's case (brought from out of country) was allowed because the FTT had wrongly held that the Secretary of State's evidence did not establish a *prima facie* case, and the appeal was remitted for a hearing to consider Mr Chowdhury's evidence in answer. (The question whether that should include oral evidence, and if so how that evidence could be given from abroad, was not raised.) The appeal in Mr Shehzad's case was allowed on jurisdictional grounds, although Beatson LJ, who gave the leading judgment, expressed doubt about whether in his case, unlike Mr Chowdhury's, the Secretary of State's evidence even raised a case to answer.

28. In the meantime the Secretary of State had appealed to this Court against the decision in *SM and Qadir*. On the eve of the hearing she sought to withdraw both appeals. The Court insisted on the hearing proceeding: see *Majumder and Qadir v Secretary of State for the Home Department* [2016] EWCA Civ 1167 (25 October 2016). The judgment of Beatson LJ gives a very helpful account of the state of the litigation at that date but I need not summarise it here. I need note only two points:

    (1) He endorsed the UT's observation that every TOEIC case was fact-sensitive: see para. 27.

    (2) He noted that the Secretary of State was in more recent cases seeking to add to and improve the quality of her generic evidence, and that one such case (*MA* – see below) had already been decided in the UT: see para. 28.

29. On 16 September 2016 the UT (McCloskey P and UTJ Rintoul) promulgated its judgment in *MA v Secretary of State for the Home Department* [2016] UKUT 450 (IAC). This was another statutory appeal where the decision of the FTT was set aside and fell to be re-made by the UT. The available evidence was fuller than in *SM and Qadir*. In particular, what was said by ETS to be the voice-file recording the test as taken by the appellant had been obtained, and it was agreed that the voice on it was not his. However, he challenged whether that file was indeed a recording of the test that he had taken, and there was evidence from no fewer than three experts exploring how the wrong file might have been supplied. The UT acknowledged (para. 47) that there were "enduring unanswered questions and uncertainties relating in particular to systems, processes and procedures concerning the TOEIC testing, the subsequent allocation of scores and the later conduct and activities of ETS". Accordingly, much still turned on the UT's assessment of the appellant's oral evidence. It found that evidence to be a fabrication and dismissed the appeal. It again emphasised, to quote from the judicially-drafted headnote, that "the question of whether a person engaged in fraud in procuring a TOEIC English language proficiency qualification will invariably be intrinsically fact sensitive". (I should also note, because Ms Giovannetti attached particular importance to the point, that in response to MA's argument that his English was so good that he had no need to use a proxy the Tribunal observed that there were many reasons why persons whose English was good might nevertheless use a proxy: see para. 57 of its judgment.)

30. Two judicial review applications in TOEIC cases were heard by the UT along with *MA – Mohibullah v Secretary of State for the Home Department* [2016] UKUT 561

(IAC) and *Saha v Secretary of State for the Home Department* [2017] UKUT 17 (IAC) – but in both cases judgment was not given till later: in *Mohibullah* on 12 October 2016 and in *Saha* on 26 December 2016. Neither case required a decision on the substantive issue whether the applicant had cheated. However, in *Saha* the Secretary of State applied, after the conclusion of the main hearing, to adduce the evidence of Mr Sewell, and the application was granted on the basis that he attend a further hearing. Unfortunately at that hearing the appellants were unrepresented and Mr Sewell was not cross-examined. The Tribunal said, however, that it accepted his essential conclusion that none of the results from the sessions in which Mr Saha claimed to have taken his test could be considered genuine: see paras. 58-59.

31. We were referred to three first-instance decisions this year in judicial review proceedings, two in the High Court and one in the UT, in which the issue of whether the claimant/applicant had cheated was treated as a matter of precedent fact on which the lawfulness of the decision challenged turned and which accordingly had to be decided[3]. In the first – *Iqbal v Secretary of State for the Home Department* [2017] EWHC 79 (Admin) – the claimant succeeded, on the basis that the Secretary of State had, on the evidence adduced, failed to show even a *prima facie* case. In the second – *R (Abbas) v Secretary of State for the Home Department* [2017] EWHC 78 (Admin), [2017] 4 WLR 34 – William Davis J regarded the Secretary of State's evidence as sufficient to require an answer and found the claimant's oral evidence, on which he had been extensively cross-examined, to be "wholly unconvincing and at some points demonstrably false" – see para. 18. Accordingly he upheld the Secretary of State's case that the claimant had cheated. In the third – *Habib v Secretary of State for the Home Department*, promulgated on 22 March 2017[4] – the impugned test was taken at Elizabeth College, and the Secretary of State relied in particular on the Project Façade report and on Mr Sewell's report. It was common ground that the evidence raised a case to answer and UTJ Gleeson found that the applicant's oral evidence, which was riddled with implausibilities, was insufficient to shift the burden on him.

32. We were also referred to two recent decisions of UTJ Freeman in TOEIC cases – *Kaur v Secretary of State for the Home Department* and *Nawaz v Secretary of State for the Home Department* [2017] UKUT 00288 (IAC)[5] – but these were cases in which the issue was not whether the applicants had in fact cheated but whether the Secretary of State's belief that they had was rational, and I need not prolong this judgment further by summarising the reasoning in them.

33. Ms Giovannetti was concerned to emphasise the extent to which the forensic landscape had changed since the Secretary of State's initial, and frankly stumbling, steps in this litigation. The observations of the UT in *SM and Qadir* should not be regarded as the last word. Where the impugned test was taken at an established fraud factory such as Elizabeth College, and also where the voice-file does not record the applicant's voice (or no attempt has been made to obtain it), the case that he or she

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3 In two of the cases – *Abbas* and *Habib* – the decision was to revoke the claimant's/applicant's indefinite leave to remain. In the third, the decision was a refusal of leave to enter. Thus in none of them was the challenge to a decision under section 10.

4 Oddly, the decision in the form produced to us has no neutral citation number.

5 The former is reported as an attachment to the latter.

cheated will be hard to resist. We were not ourselves taken to any of the underlying evidence, but I am willing to accept that that appears to be a reasonable summary of the effect of the recent decisions to which we were referred. However, I am not prepared to accept – and I do not in fact understand Ms Giovannetti to have been contending – that even in such specially strong cases the observations in the earlier case-law to the effect that a decision whether the applicant or appellant has cheated is fact-specific are no longer applicable or that there is no prospect of their oral evidence affecting the outcome.

A. THE SECTION 10 CASES

34. I will begin by setting out the case-law which gives rise to the issues in these three appeals – under head (1) the line of authorities which deals with the availability of judicial review in section 10 cases; and then, under head (2), *Kiarie and Byndloss*. I will then set out the facts and procedural histories of the three cases – head (3) – before proceeding to consider, under heads (4)-(7), the issues themselves.

(1) JUDICIAL REVIEW AND APPEALS: THE PREVIOUS CASE-LAW

35. It is trite law that judicial review is a remedy of last resort and that claimants will not normally be allowed to pursue it where an adequate alternative remedy is available. That principle has been applied in several cases in this Court in the context of attempts to seek judicial review of decisions under section 10 of the 1999 Act by claimants who object to having to leave the country in order to pursue an appeal.

36. The starting-point is *Secretary of State for the Home Department v Lim* [2007] EWCA Civ 773, which concerned the proposed administrative removal of a claimant who was alleged to have been found working in breach of a condition of his leave. At first instance Lloyd-Jones J granted him permission to challenge that decision by way of judicial review – [2006] EWHC 3004 (Admin). He held that the statutory right of appeal did not constitute an adequate alternative remedy because "an out-of-country appeal in which Mr Lim was unable to participate by giving evidence in person would not provide him with a fair hearing" (para. 47): in that connection he noted (para. 48) that it was "far from clear" whether he would be able to give evidence by video-link. Overall, such an appeal would not provide him with "fair, adequate or proportionate protection against the risk that the immigration officer had acted without jurisdiction" (para. 50).

37. This Court reversed that decision. The claimant submitted that the issue of whether he was in breach constituted a question of precedent fact which could properly be decided in the High Court, notwithstanding the existence of an appeal mechanism, in accordance with the decision of the House of Lords in *Khawaja v Home Secretary* [1984] 1 AC 74. Sedley LJ, who delivered the leading judgment, accepted that a finding of breach was a precedent fact, but he held that it did not follow that "everything which s. 10 lays down as making removal permissible is justiciable without regard to the s. 84 appeal mechanism". He said, at para. 21 of his judgment, that it was impossible to take that approach "without disregarding the manifest purpose of s. 82 of the 2002 Act, since the effect would be that the right of appeal had effect only where the individual concerned chose not to raise his or her challenge by way of judicial review". He continued:

> "22. The only coherent solution, it seems to me, is to continue to regard every question arising under s.10 as in principle both appealable and reviewable …, but to calibrate the use of judicial review, through the exercise of judicial discretion, to the nature of the issue or issues. In this way – and, so far as I can see, in no other way – the High Court can remain loyal to what was decided in *Khawaja* by consistently retaining jurisdiction to determine the existence of preconditions of liability to removal, as well as other questions of law apt for the High Court's determination, but can also respect the policy of s.82 by declining to entertain challenges on issues more apt for the appeal mechanism, whatever its hardships.
>
> 23. …
>
> 24. This argument depends upon the well-established principle, not confined to the immigration field, to which I referred earlier in this judgment: that where a statutory channel of appeal exists, in the absence of special or exceptional factors the High Court will refuse in the exercise of its discretion to entertain an application for judicial review. …"

The earlier passage referred to at para. 24 is para. 13, where he had said:

> "It is well established, as the judge reminded himself, that judicial review is a remedy of last resort, so that where a suitable statutory appeal is available the court will exercise its discretion in all but exceptional cases by declining to entertain an application for judicial review: see *R v IRC ex parte Preston* [1985] AC 835, *R v Chief Constable of the Merseyside Police, ex parte Calveley* [1986] 1 QB 424, *R v Home Secretary, ex p Swati* [1986] 1 WLR 477, *R (Sivasubramanian) v Wandsworth County Court* [2003] 2 WLR 475."

Applying that approach, Sedley LJ held that nothing in the reasons given by Lloyd-Jones J was sufficient to support his conclusion that the case was exceptional: this was "precisely the kind of issue for which the legislation, for better or for worse, prescribed an out-of-country appeal" (see para. 27).

38. *Lim* was followed in this Court in *R (RK (Nepal)) v Secretary of State for the Home Department* [2009] EWCA Civ 359 and *R (Anwar) v Secretary of State for the Home Department* [2010] EWCA Civ 1279, [2011] 1 WLR 2552. In *RK (Nepal)* Aikens LJ summarised the effect of what was decided in *Lim* as follows (para. 33):

> "The importance of that decision lies in its emphasis on the appeal structure that Parliament has laid down in the 2002 Act with respect to various types of 'immigration decision'. The courts must respect that framework, which is not open to challenge in the courts by way of judicial review unless there are 'special or exceptional factors' at play. Therefore, except when such 'special or exceptional factors' can successfully be invoked so as to give rise to a right to judicial review, the court must accept that an out of country right of appeal is regarded

> by Parliament as an adequate safeguard for those who are removed under section 10 of the 1999 Act."

39. I should also refer to the judgment of Green J in *R (Khan) v Secretary of State for the Home Department* [2014] EWHC 2494 (Admin), [2016] 1 WLR 747, since the Appellants attached some importance to a particular passage in it. This was another case in which judicial review of a section 10 decision (based on alleged breach of a condition of leave to enter) was refused on the basis that the claimant's right of (out-of-country) appeal constituted an adequate alternative remedy. At para. 70 of his judgment (pp. 771-2) Green J summarised the relevant principles in line with the earlier case-law. Under head (x) (p. 772 C-D) he said:

> "The mere fact that Parliament has chosen to introduce an appellate procedure which can operate harshly, for example in relation to out-of-country appeals, is not in itself a special or exceptional reason for the High Court to assume jurisdiction. Were it otherwise the system of out-of-country appeals would be rendered toothless given that in many cases the out-of-country procedure operates to the disadvantage of the appellant. If this were a factor militating in favour of judicial review that would serve to trigger a judicial review in the vast majority (if not all) section 10 cases (*Lim*; *RK (Nepal)*; *Jan* [[2014] UKUT 265 (IAC)]). The same applies where the High Court takes the view that it is more effective and convenient for it to hear the case; this is however not a good reason to assume jurisdiction (*Willford* [[2013] EWCA Civ 674])."

He went on to gloss that summary at para. 77 of his judgment, but it will be more convenient if I set that out later (see para. 81 below).

40. There are two recent decisions in which the *Lim* approach has been applied specifically in the case of persons accused of cheating in their TOEIC tests.

41. The first is *R (Ali) v Secretary of State for the Home Department* [2015] EWCA Civ 744, [2016] 1 WLR 461, which was decided with another case, *R (Mehmood) v Secretary of State for the Home Department*, and is more often referred to under that name. Beatson LJ, who gave the leading judgment, referred to the *Lim* line of cases and extracted three propositions. I need only quote the first two (p. 476 B-E):

> "51. … First, except where there are 'special or exceptional factors', 'the court must accept that an out of country appeal is regarded by Parliament as an adequate safeguard for those who are removed under section 10 of the 1999 Act': *RK (Nepal)* at [33] *per* Aikens LJ.
>
> 52. Secondly, the existence of disputes of fact are rarely likely to constitute 'special or exceptional factors'. This is because, as Sedley LJ stated in *Lim's* case (at [25]), 'were it otherwise, the courts would be emptying Parliament's prescribed procedure of content', and also because judicial review proceedings are not best suited to resolve such issues, even if they sometimes have to be used for them, for example in 'jurisdictional fact' cases where the court has to determine the merits and not just exercise a traditional public law reviewing

> function: see [*Khawaja*] … . Accordingly, the default position for disputes as to whether there has been a breach of the conditions of leave or deception has been used in connection with an application for leave will, absent such special or exceptional factors, be an out-of-country appeal. ...."

It followed that the fact that there was in Mr Ali's case a dispute as to whether he had in fact cheated in his TOEIC test could not by itself constitute a special or exceptional reason why an out-of-country appeal should not be treated as an adequate alternative remedy. Beatson LJ went on to consider certain particular matters relied on by counsel for Mr Ali (in fact, Mr Malik) as constituting special or exceptional reasons in his case, but I need not set them out since none is directly relied on here. At para. 71 (p. 480 B-D) he accepted that having to leave the country halfway through his course would cause Mr Ali inconvenience and expense, but he said that that in itself could not constitute a special or exceptional reason since it was inherent in the statutory scheme.

42. The second such decision is *R (Sood) v Secretary of State for the Home Department* [2015] EWCA Civ 831, which was heard the day after the decision in *Mehmood and Ali* was handed down. That decision was of course treated as authoritative as regards the overall approach. Beatson LJ, who delivered the leading judgment, again held that the particular reasons relied on by the appellant in that case did not constitute special or exceptional factors. However, counsel did make some general submissions by reference to the importance of maintaining the rule of law. In response to those Beatson LJ said, at para. 44:

> "Beyond the cases of jurisdictional fact mentioned in *Mehmood and Ali*'s case at [52] and (something I hope would never occur) the abusive manipulation of the system by the Secretary of State or her officials, I consider that it is undesirable to seek to define a category of 'special' or 'exceptional'. It would, in my judgment, only be where there is compelling evidence that, in the circumstances of a particular case, the issues could not properly or fairly be ventilated in an 'out of country' appeal, that it might be possible to argue that the circumstances are special or exceptional."

43. I should also mention the decision of this Court in *R (Giri) v Secretary of State for the Home Department* [2015] EWCA Civ 784, [2016] 1 WLR 4418, which was also decided very soon after *Mehmood and Ali*, and by a constitution which included Beatson LJ. The appellant had been refused leave to remain on the basis that he had used deception in an earlier application for entry clearance, and the court at first instance made its own finding on that issue. This Court held that it had been wrong to do so. The grant or refusal of leave to remain was a matter for the discretion of the Secretary of State under section 3 of the Immigration Act 1971 and could only be reviewed on grounds of irrationality. Having reached that conclusion, Richards LJ continued, at para. 20 of his judgment (p. 4426 B-D[6]):

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[6] This passage is of course obiter, and Mr Biggs in his skeleton argument referred to the later case of *R (Ahmed) v Secretary of State for the Home Department* [2016] EWCA Civ 303, in

> "The position would be different if we were concerned not with the exercise of the power under section 3 of the 1971 Act to grant leave to remain but with a decision to remove a person under section 10 of the 1999 Act on the ground that he or she had used deception in seeking leave to remain … . In that event, as a matter of statutory construction, the very existence of the power to remove would depend on deception having been used; and in judicial review proceedings challenging the decision to remove, the question whether deception had been used would be a precedent fact for determination by the court in accordance with *Khawaja*. Miss Giovannetti QC, on behalf of the Secretary of State, accepted as much. In practice, however, the issue will rarely arise in that form, because decisions under section 10 are immigration decisions carrying a right of appeal to the tribunal, which can review for itself the facts on which the decision under appeal was based, and the existence of that alternative remedy means that judicial review is not available in the absence of special or exceptional factors: see, most recently, the decision of this court in [*Mehmood and Ali*]."

(2) *KIARIE AND BYNDLOSS*

44. Although *Kiarie and Byndloss* is relied on by the Appellants because it concerns the effectiveness of out-of-country appeals, that issue arose in a different context from that of the *Lim* line of authorities, to which indeed the Supreme Court was not referred. Under the pre-2014 Act regime, which was applicable in both cases, a person who was subject to a deportation order had a right of appeal to the First-tier Tribunal. As with appeals against decisions taken under section 10, such an appeal had to be brought while the appellant was out of the country, unless they had made a human rights claim. However, by section 94B of the 2002 Act, even where a human rights claim had been made the Secretary of State had power to certify that removal pending the outcome of an appeal would not be in breach of the human rights of the person subject to the order; and if she did so the appeal could only be brought from outside the UK. The Secretary of State made certificates under section 94B in the cases of both appellants, who were facing deportation to Kenya and Jamaica respectively. The appellants challenged the certificates by way of judicial review. Permission was refused by the UT in both cases. In this Court permission was granted but the substantive claims were dismissed.

45. The Supreme Court allowed the appeals and quashed both certificates. The *ratio* of the majority appears in the judgment of Lord Wilson. The details of much of the reasoning are not material for our purposes, and it is unnecessary that I quote extensively from his judgment. The essential steps can be summarised as follows:

(1) The appellants' proposed deportation gave rise to a potential breach of their rights under article 8 of the European Convention on Human Rights.

(2) They were entitled, as an aspect of article 8 itself, to an effective procedure for appealing against that threatened breach.

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which this Court went out of its way to emphasise that that was so. But the reason that it did so is not one that impugns its correctness for our purposes.

(3) The Secretary of State had failed to show that an out-of-country appeal allowed for an effective challenge to the deportation decision. Various problems about pursuing an appeal against deportation from outside the UK were discussed, but what was decisive in Lord Wilson's view was:

(a) that the nature of the issues was such that the appellants would need to give oral evidence – see para. 61 (p. 2401 C-G); and

(b) that, although in principle it might be acceptable for such evidence to be given remotely by video-link[7], the evidence showed that "the financial and logistical barriers [to the appellants being able to do so] were almost insurmountable" – see para. 76 (p. 2406 F-G).

I should say a little more about Lord Wilson's reasoning on the third element.

46. As to (a), at para. 61 Lord Wilson discussed the nature of the issues on which foreign criminals were likely to need to give evidence in a deportation appeal. One was whether they had in truth changed their ways. The other was the quality of their relationships with family members in the UK. It was Lord Wilson's view that on both those issues the appellant's own oral evidence was likely to be essential. In connection with the former he made the point that oral evidence was all the more likely to be necessary in view of the fact that an appellant's claim to have become a reformed character was likely to be met with "a healthy scepticism": see p. 2401 D-E.

47. As to (b), I should note by way of preliminary that at para. 67 Lord Wilson had expressed some doubts as to the satisfactoriness of giving evidence by video-link at all and that in that connection he quoted with approval a passage from the judgment of the UT in *Mohibullah* (see para. 30 above), in which the issue is discussed; that was notwithstanding the Secretary of State's objection that the context in that case was different because it involved "issues relating to deception" (p. 2403F). In the end, however, he was willing to proceed on the basis that, while taking evidence by video-link was sub-optimal,

> "it might well be enough to render the appeal effective for the purposes of article 8, provided only that the appellant's opportunity to give evidence in that way was realistically available to him"

(p. 2403G).

48. As to whether such an opportunity was realistically available in the case of either appellant, Lord Wilson's conclusion that it was not was reached on the basis of materials lodged both by them and by the charity Bail for Immigration Detainees ("BID") about the financial and logistical obstacles to making effective arrangements. These obstacles partly consisted in the cost of hiring video-link facilities in Kenya and Jamaica, but the evidence was that arrangements at the UK end were also problematic: the tribunal service itself did not have video-link facilities in a form

7 I will use this term to cover any form of live video evidence, including Skype.

appropriate to a public hearing[8], and its position was that the full responsibility for making and paying for the necessary arrangements had to be borne by the appellant. Realistically neither of the appellants would be able to overcome those obstacles. For them to be removed in circumstances where they had no effective right of appeal did not strike a fair balance between their interests and those of the community as required by article 8. Lord Wilson observed that, while the appellants had proved that that was the case, the burden of justifying an interference with article 8 rights was on the Secretary of State and accordingly the proper analysis was that she had failed to establish that the balance was fair: see para. 78 (p. 2407 D-E).

49. It is important to note that in *Kiarie and Byndloss* the Secretary of State had not certified the human rights claims themselves under section 94 (2), and the case proceeded on the basis that the substantive appeals were arguable. Lord Wilson emphasised that this fact was an essential basis for his reasoning: see paras. 35 (p. 2393 F-G) and 54 (p. 2399 A-B).

(3) THE INDIVIDUAL CASES: FACTS AND PROCEDURAL HISTORIES

50. I can summarise the facts and procedural histories of the individual cases fairly shortly. It will be necessary to address some particular features of the individual cases in more detail at a later stage.

Harwinder Kaur

51. HK is aged 38. She came to this country in September 2009 on a student visa. Her husband accompanied her as her dependant. They have since had a son and daughter, in 2009 and 2013 respectively.

52. On 9 September 2013 HK applied for further leave to remain in order to continue her studies. She submitted to her sponsoring college a TOEIC certificate purporting to show that she passed the ETS test at Elizabeth College on 18 September 2012. She was granted leave up to 31 July 2015.

53. On 6 August 2014 the Secretary of State wrote to HK notifying her of the decision to remove her under section 10. On 17 September an amended decision was served. The letter began:

> "It has come to the attention of the Home Office, from information provided by Educational Testing Service (ETS) that an anomaly with your speaking test indicated the presence of a proxy test taker.
>
> In light of this information it is the considered opinion of the Home Office that you have utilised deception to gain leave to remain in the United Kingdom. You have therefore been served with the attached Immigration Enforcement Papers; these papers inform you of the

8 In this regard Lord Wilson refers at paras. 70-71 (p. 2404 E-H) to the decision of the UT in *Nare v Secretary of State for the Home Department* [2011] UKUT 443 (IAC), which sets out quite rigorous requirements for the arrangements that need to be in place when a video-link is used.

> reasons as to why you are considered an immigration offender, along with your liability for detention and removal."

The "attached Immigration Enforcement Papers" consist of a "Notice to a Person Liable to Removal" (form IS.151A), stating that the author is satisfied that HK is a person to whom removal directions may be given in accordance with section 10 of the 1999 Act. It incorporates a "Specific Statement of Reasons" as follows:

> "You are specifically considered a person who has sought leave to remain in the United Kingdom by deception. For the purposes of your application dated 9 September 2013, you submitted a certificate from Educational Testing Service ("ETS") to your sponsor in order for them to provide you with a Confirmation of Acceptance for Studies.
>
> 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 18 September 2012 at Elizabeth College have now been cancelled by ETS.
>
> On the basis of the information provided to her by ETS, the SSHD is satisfied that there is substantial evidence to conclude that your certificate was fraudulently obtained."

54. HK and her husband and children issued proceedings in the UT on 26 September 2014 seeking judicial review of the amended decision. Permission was initially refused on the papers by UTJ Kebede and subsequently by UTJ Kekic at a hearing on 29 April 2016, essentially on the basis that *Mehmood and Ali* established that an out-of-country appeal was an appropriate alternative remedy.

55. On 19 October 2016 HK and her family made a further application for leave to remain, relying among other things on the effect of removal on her and their private and family life. The application was rejected on the basis that no fee had been paid.

56. Permission to appeal to this Court was given by Sir Stephen Silber on 11 July 2017 "in the light of the decision of the Supreme Court in *Kiarie and Byndloss*". Permission to amend the grounds of appeal was given by Hickinbottom LJ on 3 August and by Hamblen LJ on 14 August.

Rajwant Kaur

57. RK is aged 37. She came to this country in August 2007 on a student visa. Her husband joined her in June 2011, and they have since had two children, born in 2012 and 2015 respectively. She applied for further leave to remain on 11 January 2012 in order to continue her studies. The application was refused. She appealed to the FTT and in February 2013 her appeal was allowed. Although she succeeded on the basis that the refusal was not in accordance with the Immigration Rules, she had also advanced an alternative argument under article 8 of the ECHR, and in that connection the FTT found in terms that both she and her husband had developed "a degree of

private life whilst in the UK" and that removing them before RK had completed her studies would interfere with their article 8 rights.

58. On 21 September 2012 RK submitted an application for further leave to remain. In order to obtain the necessary confirmation of acceptance for studies ("CAS") for the purpose of that application she submitted a TOEIC certificate purporting to show that she passed the ETS test at South Quay College in London on 29 August. The application was granted.

59. In June 2013 the licence of the college where RK was then studying was revoked and in August her fresh application based on a CAS from a different college was refused. She again appealed to the FTT, relying *inter alia* on her rights under article 8. By a determination promulgated on 12 August 2014 her appeal was allowed, though on a basis that did not require consideration of the article 8 claim.

60. On 30 September 2014 the Secretary of State wrote to RK notifying her of the decision to remove her. The letter and form IS.151A are in the same terms, *mutatis mutandis*, as in HK's case.

61. RK issued proceedings in the UT on 12 December 2014 seeking judicial review of the decision of 30 September 2014. Permission was refused by UTJ McGeachy on the papers on 15 January 2016. Although one or two other points are mentioned in his reasons, the essential basis of his decision was that in the light of *Mehmood and Ali* permission ought not to be given to apply for judicial review because she had a statutory right of appeal.

62. Permission to appeal to this Court was given by Sir Stephen Silber on 10 July 2017 in the same terms as in HK's case.

Ataullah Faruk

63. AF is aged 34. He came to this country in February 2006 on a student visa. On 31 October 2011 he applied for further leave to remain to complete his studies. He submitted to his sponsoring college a TOEIC certificate purporting to show that he passed the ETS test at Elizabeth College on 16 November 2011. The application was successful. He completed a degree in Business Studies at the University of Greenwich.

64. Following the completion of his studies he was granted further leave to remain as a post-study migrant and took up employment as a producer with a television station catering for the Bangladeshi community in Europe. He subsequently became host of a popular television talk-show broadcast by NTV. He describes himself as a human rights activist and says that he works for Amnesty International "as a press monitor and Administrative Officer" Prior to the expiry of his visa he applied for indefinite leave to remain, but no decision had been reached on that application at the time that the Secretary of State made her decision under section 10.

65. On 21 March 2015 the Secretary of State wrote to AF notifying him of the decision to remove him under section 10. We do not have a copy of the letter but it can be assumed that it was in the same terms as the letter to HK which I have quoted above.

We do have the form IS.151A, which is likewise in identical terms, *mutatis mutandis*, to HK's.

66. AF issued proceedings in the UT on 8 May 2015 seeking judicial review of the decision of 21 March 2015. Permission was refused by DUTJ Pitt on the papers on 5 April 2016, both on the basis that the Secretary of State's decision that AF had used deception was *Wednesbury*-reasonable and on the basis that in any event following *Mehmood and Ali* permission ought not to be given to apply for judicial review because he had a statutory right of appeal.

67. Permission to appeal to this Court was given by Sir Stephen Silber on 11 July 2017 on the basis of two particular features of AF's case which he regarded as arguably "special and exceptional": it is more convenient that I explain these later (see paras. 130-2 below).

68. In the meantime, in January 2016 AF made a claim for indefinite leave to remain on the basis that he had been resident in this country for ten years. The claim was made both under the Immigration Rules and on the basis of article 8 of the Convention. It was refused by the Secretary of State on 5 August 2016 on the basis that he had cheated in his TOEIC test. The human rights claim was certified under section 94 (2), with the result that he is entitled only to an out-of-country appeal. He has issued judicial review proceedings challenging the certification, but they have been stayed pending the outcome of these proceedings.

(4) THE SHAPE OF THE ISSUES

69. The Appellants' case before us was, in essence, that their claims should be allowed to proceed by way of judicial review, notwithstanding their entitlement to a statutory (out-of-country) appeal, because they turned on a disputed question of (precedent) fact on which it was necessary in the interests of justice that they be able to give oral evidence, and that they would not be able to do so in an appeal from outside the country. They contended that the denial of an effective hearing in that way was contrary to their rights both at common law and under article 8 of the Convention.

70. The Secretary of State's initial response, as set out in Ms Giovannetti's skeleton argument, was focused on rebutting the various elements in that case. But she subsequently put forward an alternative answer, namely that, even if an out-of-country appeal did not constitute an adequate alternative remedy, it had at all times been, and remained, within the power of the Appellants to make a human rights claim, as a result of which they would become entitled to an *in*-country appeal: an appropriate alternative remedy was accordingly within their grasp and they should not have permission to proceed by way of judicial review. This way of putting the case first emerged in correspondence from the Treasury Solicitor but was then developed in Ms Giovannetti's "Reply and Position Statement", which was submitted shortly before the hearing and subsequent to the lodging of the Appellants' skeleton arguments. The late stage at which it emerged was unfortunate. It means not only that we do not have the benefit of fully developed skeleton arguments but also that not all aspects of the point were fully explored in oral submissions.

71. I will consider first the Appellants' case based on the ineffectiveness of an out-of-country appeal – "the out-of-country appeal issue" – and then the Secretary of State's

case based on their right to make a human rights claim the refusal of which would attract the right to an in-country appeal – "the human rights claim issue".

(5) THE OUT-OF-COUNTRY APPEAL ISSUE

The Appellants' Case

Article 8

72. As noted above, the Appellants advanced their case both at common law and by reference to article 8 of the Convention. Mr Biggs submitted that the former was the right starting-point in principle, since it was unnecessary to resort to the Convention if the rights in question were afforded at common law: he reminded us of the observations of Lord Neuberger in *R (Osborn) v Parole Board* [2013] UKSC 61, [2014] AC 1115, at para. 63 (p. 1148 D-E). I have considerable sympathy with that approach, but the particular way in which the case-law has developed in this area makes it, I think, more convenient to start with article 8, and that was the course taken by Mr Knafler, who took the lead for the Appellants.[9]

73. Mr Knafler's starting-point was that the rights of HK and her husband and children to respect for their private and/or family life would be sufficiently seriously interfered with by their removal to engage the operation of article 8 – i.e. that "*Razgar* questions (1) and (2)" were satisfied (see *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27, [2004] 2 AC 368, per Lord Bingham at para. 17 (p. 389 D-F)).

74. Mr Knafler's primary submission in support of that contention was that article 8 was likely to be engaged in pretty well any case of a student who, as in HK's case, has resided and studied lawfully in the UK for a substantial period at his or her own expense. In his skeleton argument he referred to a large number of decisions of the AIT and UT about the article 8 rights of students, but in his oral submissions he relied in particular on two. The first was the decision of the Asylum and Immigration Tribunal (SIJ Grubb and IJ Hall) in *MM v Secretary of State for the Home Department* [2009] UKUT 305 (IAC). The Tribunal in that case carried out a thorough review of the then case-law and concluded, to quote from the (judicially-drafted) headnote:

> "Whilst respect for 'private life' in Art 8 does not include a right to work or study *per se*, social ties and relationships (depending upon their duration and richness) formed during periods of study or work are capable of constituting 'private life' for the purposes of Art 8."

[9] To avoid a possible confusion, I should say that the Appellants' reliance on article 8 for this aspect of the case does not mean that they are relying on section 92 (4), as set out at para. 11 above, in order to assert a statutory right to an in-country appeal of the 2002 Act. They cannot do so because they had not made such a claim at the time that the section 10 decision was taken: see para. 15. They thus have to rely on article 8 apart from the statute in the way developed below.

The second was the decision of the Upper Tribunal (Blake J, Ockelton V-P and SIJ Allen) in *CDS* (*Brazil*) *v Secretary of State for the Home Department* [2010] UKUT 305 (IAC). At para. 19 of its judgment the Tribunal said:

> "… people who have been admitted on a course of study at a recognised UK institution for higher education are likely to build up a relevant connection with the course, the institution, an educational sequence for the ultimate professional qualification sought, as well as social ties during the period of study. Cumulatively this may amount to private life that deserves respect because the person has been admitted for this purpose, the purpose remains unfilled, and discretionary factors such as misrepresentation or criminal conduct have not provided grounds for refusal of extension or curtailment of stay."

75. Mr Knafler made it clear, however, that he did not need to rely on any general proposition about the position of students, on which he acknowledged that the authorities showed "some hesitation". He said that he could in any event rely on a number of particular features of HK's case. She and her husband had been in the country for five years at the date of the Secretary of State's decision. They have relatives settled in the UK, who live near to them and with whom they have a close relationship. Their two children, who were born here and have never been to India, are now attending school and have their own relationships with friends and cousins. These factors were developed to some extent in HK's witness statement and in a report from a child psychologist, but I need not give further details.

76. If, therefore, article 8 would indeed be engaged by HK's removal, it was necessary to consider the remaining *Razgar* questions – whether her removal would be in accordance with the law (question (3)) and, if so, whether it was (for short) justified (questions (4)-(5)). In practice the answer to those questions depended straightforwardly on whether she had cheated in her TOEIC test. If she had not, it was not suggested that there was any legitimate basis for removing her. Mr Knafler emphasised that we were not in this kind of case concerned with the familiar balancing exercise of weighing the state's interest in maintaining an orderly system of immigration control against the interests of the individuals in question: HK was entitled by the Rules to be here unless she had cheated.

77. The only question being whether HK had cheated, it was confirmed by *Kiarie and Byndloss* that article 8 in its procedural aspect required that a fair procedure for the determination of that question be available to the Appellants. As to whether such a procedure was available, Mr Knafler's case can be summarised as follows:

    (1) The nature of the issues in a typical TOEIC appeal, and certainly in these cases, was such that it was as essential that the tribunal hear the oral evidence of the appellant as it was in the case of the deportation appeals which were the subject of *Kiarie and Byndloss*, albeit for different reasons. Mr Knafler referred to the TOEIC cases which have already been decided, as summarised above, and pointed out how central the oral evidence of the person accused of cheating had been in all of them.

(2) That being so, there could only be a fair hearing of HK's appeal from India if she and her husband would have access there to reliable and affordable arrangements for giving evidence by video-link.[10] The Appellants relied on the evidence from BID which had been before the Supreme Court in *Kiarie and Byndloss*, supplemented by some rather miscellaneous further evidence prepared for the purpose of these appeals. There was a witness statement from Sairah Javed, now of the Joint Council for the Welfare of Immigrants but who was formerly in practice as a solicitor: this dealt principally with the difficulties which she had encountered in one particular case in trying to arrange for a client to give evidence by video-link from Pakistan, but she also gave some general evidence, not specific to any particular country, to a similar effect to the conclusions of the Supreme Court in *Kiarie and Byndloss*. AF's solicitor, Ms Urvi Shah, gave similarly general evidence. There were also witness statements from lawyers in Pakistan and India confirming that video-link facilities would not be available through the court systems of either country.

78. It followed, Mr Knafler submitted, that the supposed alternative remedy which had led the UT to refuse permission in HK's case was inadequate and that accordingly her application for judicial review should have been allowed to proceed. It was well established that where necessary questions of primary fact could be determined, and oral evidence heard, in judicial review proceedings: Lord Wilson made that very point at para. 42 of his judgment in *Kiarie and Byndloss* (p. 2395 D-E). The question whether an applicant had cheated in their TOEIC test had indeed already been decided in judicial review claims where the issue had fallen to be decided as a question of precedent fact and where the statute provided for no right of appeal – see para. 31 above.

79. As regards RK and AF, Mr Biggs and Mr Malik submitted that article 8 was engaged equally in their cases as in HK's, and that the fair determination of the question whether they had cheated would likewise require them to give oral evidence, which they would be unable realistically to do so by video-link from, respectively, Pakistan or Bangladesh. I summarise their submissions in turn.

(1) As to RK, Mr Biggs pointed out that she already had the benefit of a finding from the FTT in early 2013 that the removal of her and her husband before she had completed her studies would interfere with their article 8 rights. Her case in that regard could only be stronger by the time of the Secretary of State's decision a year and a half later, not least because she had by then had a child. In her case she was able to rely on the specific evidence adduced about the difficulties of pursuing an appeal by video-link from Pakistan.

(2) As to AF, he had been in the UK for over nine years at the date of the Secretary of State's decision. Unlike the other two section 10 Appellants he has completed his studies and embarked on a successful career in this country. It was plain beyond argument that his article 8 rights were engaged. Mr Malik did

[10] I did not understand Mr Knafler to accept that even the availability of the opportunity to give evidence by video-link would necessarily make the process fair: he drew our attention to the reservations expressed by the UT in *Mohibullah* to which Lord Wilson had referred in *Kiarie and Byndloss* (see para. 47 above). But, as in that case, this was not a battle which he needed to fight.

not rely on any specific evidence about the difficulties that might face AF in pursuing an appeal from Bangladesh but he relied on the general evidence from Ms Javid.

Common Law

80. Although it was, again, Mr Knafler who led on the common law challenge, Mr Biggs also addressed us on it fully. There were some differences of emphasis in their submissions, but I can deal with them as a composite. They essentially depended on the same proposition as the article 8 case, namely that in circumstances such as those of the Appellants the requirement that the right of appeal conferred by section 82 of the 2002 Act be exercised from abroad meant that a fair and effective appeal was simply not available: that was what the Supreme Court had found in *Kiarie and Byndloss*, and the evidence in the present case was to the same effect. They submitted that such a state of affairs was in plain conflict with the fundamental constitutional right of access to the courts most recently re-affirmed by the Supreme Court in *R (Unison) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409: we were referred in particular to paras. 66-75 of the judgment of Lord Reed (pp. 431-4).

81. The question then was how that right of access to the courts could be vindicated in cases like the present. Mr Knafler and Mr Biggs acknowledged that it could not be by permitting an appeal to be pursued from within the UK, since (in a case of the kind with which we are concerned) section 92 (1) explicitly provided to the contrary. But their submission was that the ineffectiveness of an out-of-country appeal constituted, in the language of *Lim*, a "special and exceptional reason" for allowing the decision to be challenged by way of judicial review. In support of that submission Mr Knafler referred to para. 77 of the judgment of Green J in *Khan*, in which, as I have said, he glossed the general statement of principle at para. 70 (x). The passage in question (p. 776 E-G) reads:

> "In my view the High Court should in this context treat a decision according only an out-of-country appeal as special or exceptional only if facts emerged which showed, whether systemically or in relation to an individual case, that an out-of-country appeal implied a materially inferior right of access to the Tribunal than an in-country right of appeal. If that were the case then the High Court might well conclude that there was a violation of the fundamental right of access to a court that needed to be protected by the exercise of its own jurisdiction. If such a situation did arise it could readily be categorised as 'special' or 'exceptional'. But as matters stand there is no evidence to this effect in this case …".

Mr Knafler submitted that since *Kiarie and Byndloss* it was now established that, in a case where oral evidence was central and the opportunity to give such evidence by video-link facilities was not realistically available, an out-of-country appeal did indeed afford "a materially inferior right of access".

82. That left the question of how that submission could be reconciled with the decisions in *Lim* and in *Mehmood and Ali* and *Sood*. In *Lim* this Court had allowed the Secretary of State's appeal notwithstanding Lloyd-Jones J's view that an out-of-country appeal would not provide the claimant with a fair hearing. In *Mehmood and*

Ali Beatson LJ had said in terms that even in a deception case – indeed specifically a TOEIC case – the default position was that an out-of-country appeal was an adequate alternative remedy. Mr Biggs, who developed this point more fully than Mr Knafler, submitted that we were not bound by either decision because in neither was the Court squarely confronted with a submission that an out-of-country appeal would be positively unfair or ineffective, whether because the claimant would not be in a position to give evidence by video-link or otherwise. Although in *Lim* the possibility that there might be difficulties about giving evidence by video-link was evidently raised at first instance, there appears – unlike in these cases – to have been no evidence about it, and the question was not addressed in the judgment of Sedley LJ. As for Mr Ali, the particular factors relied on in his case were limited and specific. Mr Biggs reminded us that in *Sood*, which post-dated *Mehmood and Ali*, Beatson LJ had expressly contemplated that a claimant could proceed by way of judicial review where "the issues could not properly or fairly be ventilated in an out-of-country appeal" – see para. 42 above.

The Secretary of State's Response

83. In this section I have found it easiest not only to set out the Secretary of State's response to the Appellants' case but also to give my conclusions on it as I go. I again deal separately with the article 8 and common law aspects.

Article 8

84. While she made no formal concessions Ms Giovannetti did not attempt to rebut the case that article 8 was engaged in the case of these three Appellants. Given their particular histories as summarised above, this was realistic. She was, however, concerned to rebut Mr Knafler's primary case that article 8 would be engaged in the great majority of cases where a student was faced with premature removal. She referred to the judgment of Lord Carnwath in *Patel v Secretary of State for the Home Department* [2013] UKSC 72, [2014] AC 651, which was concerned (*inter alia*) with the refusal of leave to remain to two Pakistani students who had applied for further leave to remain to continue their studies. They had failed to supply the correct documentation but sought to rely on article 8. At para. 57 of his judgment (pp. 674-5) Lord Carnwath commented:

> "It is important to remember that article 8 is not a general dispensing power. It is to be distinguished from the Secretary of State's discretion to allow leave to remain outside the rules, which may be unrelated to any protected human right. … One may sympathise with Sedley LJ's call in *Pankina's* case [2011] QB 376 for 'common sense' in the application of the rules to graduates who have been studying in the UK for some years … . However, such considerations do not by themselves provide grounds of appeal under article 8, which is concerned with private or family life, not education as such. The opportunity for a promising student to complete his course in this country, however desirable in general terms, is not in itself a right protected under article 8."

In *Nasim v Secretary of State for the Home Department* [2014] UKUT 25 (IAC) the UT (UTJJ Allen and Peter Lane) referred at para. 20 of its judgment to that passage as

"a significant exhortation from the Supreme Court to re-focus attention on the nature and purpose of Article 8".

85. We were also referred – though in fact by Mr Knafler rather than Ms Giovannetti – to the decision of the UT in *Munir*, to which I have already referred in another context (see para. 15 above). Judge Kekic in her judgment referred to both *CDS (Brazil)* and *Patel* and said, at para. 62:

> "What these decisions show is that an applicant will not have an article 8 right to remain in the UK to complete a course of study simply because he has invested time and money in those studies. The opportunity for a student to complete his studies is not a protected right under article 8. Whilst that does not mean such a person would never succeed in an article 8 claim, it is implicit in the language of these judgements that successful claims in such circumstances would be rare and that compelling considerations would be required to distinguish the case from the generality of other such cases. No such considerations were identified in the present case."

Mr Knafler submitted that that passage – or at least the second half of it – was not a true reflection of the case-law and that it conflated the distinct questions of whether article 8 was engaged and of whether, if so, the interference was justified.

86. Although the question of the correct approach to the article 8 rights of students is not decisive in the particular cases before us, it appears that there is some uncertainty about the effect of the authorities. It may accordingly be helpful if I say that I can see no real tension between the decisions in *MM* and *CDS (Brazil)* on the one hand and Lord Carnwath's observations in *Patel* on the other. What those observations authoritatively confirm is that the right to complete a course of education is not *as such* a right protected by article 8. However, neither the AIT in *MM* nor the UT in *CDS (Brazil)* said that it was, and Lord Carnwath was not addressing either decision (to which indeed the Supreme Court had not been referred, since they were not material to the issues before it). Rather, what those decisions say is that persons admitted to this country to pursue a course of study are likely, over time, to develop a private life of sufficient depth to engage article 8. So far as that relates to ordinary social relationships, that is obviously correct. It is true that the UT in *CDS (Brazil)* goes rather further, in that it enumerates as possible components in a student's private life not only ordinary social relationships but also a "connection with the course, the institution, an educational sequence for the ultimate professional qualification sought". That is perhaps a little ambiguous, but I do not think it should be read as meaning that the mere fact that the student is part-way through a course leading to a professional qualification by itself engages article 8. In my view it means only that a student's involvement with their course and their college can itself be an important aspect of their private life; and, so read, I regard it as unexceptionable. Whether those and other factors are sufficient to engage article 8 in any particular case will depend on the particular facts, and I would not venture on any generalisations beyond making the trite point that the longer a student has been here the more likely he or she is to have generated relationships of the necessary quality and depth.

87. At the risk of stating the obvious, it is worth pointing out that the question whether a person's article 8 rights are engaged is quite distinct from the question whether the

interference of which he or she complains constitutes a breach of those rights. Specifically in the case of a student, even if his or her article 8 rights are engaged, it does not follow that those rights are breached by their removal before they have completed their course. On the contrary, if they cannot comply with the applicable Immigration Rules, their removal is very likely to be justified. I think that that is all that Judge Kekic meant in *Munir*; but if she meant that it will be rare for the article 8 rights of students to be engaged at all I do not agree.

88. In the particular circumstances of the present cases, it is also worth emphasising that, as Mr Knafler correctly submitted (see para. 76 above), whether the Appellants' removal would be a breach of their article 8 rights depends not on any multi-factorial assessment of proportionality but on the single factual question of whether they cheated in their TOEIC tests – and on whether a fair procedure has been made available for deciding that question.

89. I turn therefore to Ms Giovannetti's case on whether an out-of-country appeal constitutes a fair procedure in these cases. She was at pains to emphasise that the legal context is very different from that in *Kiarie and Byndloss*. The Supreme Court was there concerned with the effect of certification under section 94B, and not with decisions taken under section 10 or, therefore, with the line of authorities deriving from *Lim*. That is obviously correct as far as it goes, but I do not see that the distinction is material for the purpose of the particular way in which the Appellants rely on *Kiarie and Byndloss*. They do so only, but crucially, as (a) establishing that, in a case where the oral evidence of the appellant is important to the determination of an appeal, an out-of-country appeal will not satisfy the procedural aspect of article 8 unless facilities for giving evidence by video-link are realistically available; and (b) as finding, on the evidence before it, which the Appellants say is substantially identical in their cases, that such facilities were not so available.

90. Taking those points in reverse order, Ms Giovannetti did not attempt to challenge the Appellants' contention that there was on the evidence in these cases no realistic possibility of their being able to give evidence by video-link. She simply made the point that in other cases, where appellants were being returned to countries with a higher level of development and/or were better funded, a different conclusion might be reached. I would accept that, in principle, whether it is realistically possible for evidence to be given by video-link needs to be assessed on a case-by-case basis; but I would encourage the Secretary of State and the UT to take a pragmatic view of what is likely to be the position in typical cases and to use these appeals and *Kiarie and Byndloss* as a useful benchmark. Ms Giovannetti also informed us that the Home Office was actively engaged in developing arrangements for making video-link available, in an effective and accessible way, to appellants in the principal countries to which removals or deportations take place; and that accordingly in due course this form of objection to the fairness of an out-of-country appeal would hopefully be met.

91. That leaves the prior question of whether the appeals in these cases, and appeals in TOEIC cases more generally, can only be fairly determined if the appellant gives oral evidence. Ms Giovannetti did not quite confront that question head-on; and certainly she did not explicitly submit that the appeals of any of these three Appellants could be fairly determined without them giving oral evidence. She did emphasise how the forensic scene had changed since the first cases; and she also pointed out that HK and AF took their tests at Elizabeth College, which was one of the "fraud factories"

identified by Mr Sewell. But she did not go so far as to submit that we were in a position to decide, in the cases of these Appellants or more generally, that their cases were so open-and-shut, or so exclusively depedent on technical evidence, that the evidence of the individual Appellant could be of no avail. I should however make it clear that I would not have accepted any such submission. We could not have reached a firm conclusion on the strength of the case against any of these Appellants without being taken in detail through the materials deployed in the more recent TOEIC cases and being addressed on the answer which each of the Appellants might give, which we were not. Further, even if the Secretary of State's evidence is as strong as she says, I would be reluctant to accept that it was possible fairly to determine an allegation of this character – that is, an allegation of deliberate dishonesty, with serious implications for the Appellants' rights and reputation – without them being given the opportunity to give oral evidence in rebuttal. In that connection I note Lord Wilson's observation in *Kiarie and Byndloss* that oral evidence may be particularly important precisely because of the scepticism with which an appellant's case was likely to be met: see para. 46 above. I do not rule out the possibility that a sufficiently strong case may be shown, but the test would have to be no lower than that required for certification in the context of a human rights appeal: cf. para. 156 below.

92. For those reasons I am not persuaded that Ms Giovannetti has any answer to the Appellants' case that an out-of-country appeal would not satisfy the procedural requirements of article 8. Such a breach of the Appellants' rights can be avoided by allowing them to challenge the removal decisions in their cases by way of judicial review. That route is not precluded by the decisions in *Mehmood and Ali* and *Sood*, since in neither of those cases – or indeed in the *Lim* line of cases more generally – was any reliance placed on article 8.

Common law

93. That conclusion means that it is strictly unnecessary in these appeals to consider the Appellants' common law case. I should nevertheless do so because the common law position will be important in any TOEIC case where the article 8 rights of the applicant are not engaged.

94. Ms Giovannetti submitted that it was not axiomatic that the procedural requirements imposed by the common law should always be as demanding as in cases where article 8 rights were engaged. On the contrary, the nature of the rights affected by a given decision was always an important determinant of the nature of the procedural protection required: see, for example, *Wiseman v Borneman* [1971] AC 297. That is right in principle. But in the case of a migrant whose leave to remain is invalidated on the grounds of deception, with the consequences identified at paras. 20-21 above, I believe that common law principles of fairness, just as much as article 8, require that they should have the opportunity to give evidence orally (except in a case where it is established that oral evidence could truly make no difference).

95. The question then is whether that conclusion is open to us on the authorities. I do not believe that the general principle asserted in the *Lim* line of cases is a real obstacle. Those cases recognise that the existence of a statutory right of appeal does not constitute an absolute bar to a challenge being pursued by way of judicial review. In my view Parliament cannot be taken to have intended that access to judicial review should be unavailable in a case where it is established that the statutory appeal

procedure would not afford effective access to justice. That is, in essence, recognised both by Green J at para. 70 (x) of his judgment in *Khan* (see para. 39 above) and by Beatson LJ in *Sood* (see para. 42 above). It is true that their formulations are not quite the same. Beatson LJ referred to an exception arising in "the circumstances of a particular case", whereas Green J contemplated that it might arise "systemically". I am not sure there is any real difference, but I can myself see no reason why there may not be a class of cases with common features such that the issues, in Beatson LJ's phrase, "[can] not properly or fairly be ventilated in an out of country appeal".

96. However, it is not as easy as that. As Ms Giovannetti pointed out, *Mehmood and Ali* and *Sood* go further than simply re-stating the principles established by *Lim*: they apply those principles to precisely the kind of case with which we are concerned, namely decisions based on an allegation of cheating in a TOEIC test, and hold that an out-of-country appeal is an adequate alternative remedy. However, I would accept the answer given by Mr Knafler and Mr Biggs, as summarised at para. 82 above. Despite the breadth of some of the statements in them, *Mehmood and Ali* and *Sood* cannot in my view be treated as having decided as a matter of law that an out-of-country appeal was an adequate alternative remedy in a TOEIC case. Formally, they were decisions only that the appellants in those cases had not shown that it was not. That cannot preclude this Court from coming to a different conclusion, on different arguments and different evidence – specifically about the practical unavailability of video-link facilities – even though the same arguments could perhaps have been advanced in those cases. The same goes for *Lim*. Although in that case a doubt about the availability of video-link facilities was aired at first instance, this Court did not address that question at all, and it cannot be treated as part of its *ratio* that, even if it had been shown that it would be impossible for the appellant to give evidence by video-link, the appeal would nevertheless be effective.

Conclusion

97. For the reasons given above I would hold that an out-of-country appeal would not satisfy the Appellants' rights, either at common law or under article 8 of the Convention, to a fair and effective procedure to challenge the decisions to remove them; and that in those circumstances, subject to the human rights claim issue considered below, they were entitled to proceed with such a challenge by way of judicial review.

98. I emphasise that that conclusion depends on the particular features of the Appellants' cases, namely that the nature of the issues raised by their appeals was such that they could not be fairly decided without hearing their oral evidence, and also that facilities for giving such evidence by video-link were not realistically available. Even if those features are shared by the great majority of TOEIC cheating cases, it does not follow that they will be present in all cases where the legislation provides for an out-of-country appeal: in particular, whether it is necessary for the appellant to give oral evidence will depend on the nature of the issues.

(6) THE HUMAN RIGHTS CLAIM ISSUE

The Secretary of State's Case

99. It is, as I have said, the Secretary of State's case that it was and is open to the Appellants at any time to make a human rights claim, within the meaning of section 113 of the 2002 Act (that is, to claim that the requirement that they should leave the UK was incompatible with their rights under article 8), and that to do so would open the door to an in-country right of appeal. The exact way in which this would occur would depend on when the claim was made. The position is rather complicated and requires to be taken in stages.

100. If the human rights claim was made *before* the section 10 decision was taken the position is straightforward. All the decisions with which we are concerned are subject to the pre-2014 Act regime. Under that regime the mere fact of having made a human rights claim would mean that the appeal against the section 10 decision itself could be brought in-country. However, this will rarely be so in TOEIC cases. It will only be by chance that a person given notice of liability to removal under section 10 would already have a prior human rights claim extant and unresolved.

101. If the human rights claim was made *after* the section 10 decision, section 92 (4) would not operate, for the reason explained at para. 15 above. But Ms Giovannetti pointed out that in *Nirula* at first instance evidence was given, and accepted by Mr Ockelton, that it was the Secretary of State's policy in such a case to withdraw the original decision and (unless she changed her mind) to re-make it in same terms, thus producing a "post-human rights claim" decision which could be appealed in-country. The relevant extract from chapter 51 of the Secretary of State's Enforcement Instructions and Guidance was quoted at para. 64 of the judgment and read:

> "If asylum or HR is claimed after serving the IS151A part 2, and removal directions are in place then refer to OSCU for advice before suspending the removal directions. Otherwise withdraw the IS151A part 2 and where the applicant will get an in country appeal right serve an IS151B with any refusal of the claim."

As Mr Ockelton observed, that is decidedly cryptic, but he held at, para. 65, that the effect was:

> "that a [human rights] claim made to the Secretary of State after the service of an immigration decision … will result in the withdrawal of the decision that carries no right of appeal, and, if necessary, the making of another decision … [which] ... will carry an in-country right of appeal unless certified."

The manoeuvre so described was referred to in the argument before us as "the *Nirula* work-around". The effect is – or was – that even if a human rights claim was made only after the section 10 decision (or indeed after the appeal to the FTT was lodged) an in-country appeal would under the pre-2014 Act regime be made available.

102. Ms Giovannetti said that the policy described in *Nirula* remained in place at all material times, and I think also (though I am not entirely clear about this) that it remains in place today. However, that needs some unpacking. Although no doubt it is correct in respect of the period prior to the 2014 Act regime taking effect, I cannot see the relevance of the policy as regards the period thereafter. Although under the old regime the withdrawal of the old section 10 decision and its replacement by a new post-claim decision was necessary in order to afford the person affected an in-country appeal, that is no longer the case. The right to an in-country appeal is generated by the refusal of the human rights claim and it is against that refusal that the appeal lies (see para. 19 above). That is the case irrespective of what happens to the original section 10 decision, and there is accordingly no need for that decision to be withdrawn. On analysis, therefore, Ms Giovannetti's contention that the Appellants still have access to an in-country right of appeal does not, under the new regime, depend on the *Nirula* work-around but on the fact that they can make a human rights claim and appeal against its refusal when and if that occurs.

103. Thus, to summarise, Ms Giovannetti's case should be analysed as being that:

(a) as long as the old regime remained in effect, the Appellants could have triggered a right to an in-country appeal against the section 10 decision simply by making a human rights claim – relying on the *Nirula* work-around if the claim post-dated the notice; and

(b) once the new regime came into effect, they could and can acquire a right to an in-country appeal by making a human rights claim challenging the decision to remove them and, if and when it is refused, appealing against that refusal.

Although the position under the new regime is for that reason relevant to the issues before us, despite the initial decisions in the Appellants' case being made under the old regime, Ms Giovannetti discouraged us from considering the position as regards a case where the initial decision was made after the coming into effect of the 2014 Act, since no such case is before us. I accept that we should not do so (save to the extent necessary in Mr Ahsan's case).

104. Ms Giovannetti emphasised that the availability of that route was subject to the right of the Secretary of State to certify any human rights claim made, under section 94 (2) of the 2002 Act in its pre-2014 Act form and section 94 (1) of the Act in its current form. But she said that that was unobjectionable. If the claim was indeed clearly unfounded, there could be no objection to it having to be pursued from abroad, even if such an appeal was not properly effective. She referred to the decision of the ECHR in *De Souza Ribeiro v France* (2014) 59 EHRR 10, at para. 83. She also emphasised that Lord Wilson had made it clear in *Kiarie and Byndloss* that it was fundamental to his analysis that the claims in those cases had not been certified under section 94 (2) (see para. 49 above). If in a particular case the claim had been wrongly certified, the claimant's rights were protected by the availability of judicial review. This was not in fact controversial. Mr Knafler accepted that if a human rights claim was properly certified as wholly unfounded an appellant could not object to having to pursue it from out of country.

105. It is not on the face of it relevant to Ms Giovannetti's argument whether any of the Appellants had in fact made a human rights claim at the time that they brought their

judicial review proceedings, or at the time that permission was refused, or whether they have done so subsequently: what matters is that they were, and remain, entitled to do so. However she set out in some detail what she said the position was about human rights claims in each of the three cases, and it is convenient to deal with that at this stage.

106. *Harwinder Kaur*. It is not suggested that HK had made a human rights claim prior to the issue of the present proceedings. In section 4 of the claim form, however, which asks whether the claim includes any issues arising from the Human Rights Act 1998, and if so which article of the Convention is said to have been breached, the "Yes" box is ticked and article 8 is identified as the relevant article – although the Grounds, which are elaborately pleaded, make no reference to HK's Convention rights in any way. Mr Knafler submitted that the mention in section 4 of the claim form constituted the making of a human rights claim within the meaning of section 113. I cannot accept that a merely formulaic reference to article 8 of that kind is sufficient. Although the statute does not prescribe the degree of detail in which a human rights claim must be advanced, it is in my view necessarily implicit in the concept of making such a claim that at least the nature of the breach alleged should be identified. However, as noted above, on 19 October 2016 HK's solicitors submitted to the Secretary of State what was described as the submission of a fresh claim applying for leave to remain. This explicitly relied on the private and family lives of HK and her husband and children, and Ms Giovannetti accepted that it constitutes a human rights claim. No decision has been made on that application.

107. *Rajwant Kaur*. Ms Giovannetti submitted that RK did not make a relevant human rights claim at any time prior to the issue of her judicial review claim or at any stage in the proceedings before the UT. Mr Biggs argued that the reliance on article 8 in the second of her two earlier tribunal cases (see para. 59 above) constituted a human rights claim for these purposes. That cannot be right: the claim was made for the purpose of proceedings in which she had succeeded and was not at the date of the section 10 decision an extant claim requiring determination. However, in a witness statement dated 4 September 2017 lodged for the purpose of her appeal to this Court RK does give evidence, albeit very briefly, of some "personal and family circumstances". There is no express invocation of article 8, but Ms Giovannetti was content to treat this as raising a human rights claim, while pointing out that there was no explanation for why it had not been made earlier.

108. *Ataullah Faruk*. It is not suggested that AF had made a human rights claim prior to the issue of his judicial review proceedings. There is, as in HK's case, a bare indication in section 4 of his claim form that an issue under article 8 of the Convention arises, but no such case is made in the Grounds, which are, again, very fully pleaded. Mr Malik did not advance any submissions about whether that was sufficient to amount to the making of a human rights claim; but in my view it was not, for the reasons I have given in HK's case. However, it is accepted that such a claim was made in January 2016: see para. 68 above.

The Appellants' Response

109. The Appellants' response to Ms Giovannetti's case on the human rights claim issue differed as between Mr Knafler on the one hand and Mr Malik and Mr Biggs on the other. I take them in turn.

110. Mr Knafler acknowledged that in an appropriate case the route proposed by Ms Giovannetti might indeed constitute an appropriate alternative remedy. Specifically, if at the time that the Upper Tribunal was deciding whether to grant permission to apply for judicial review of a section 10 decision the applicant had made a human rights claim (for example, in his or her grounds) and the Secretary of State had in her turn made a new decision which attracted an in-country appeal, then it might indeed be legitimate to refuse permission. But he said that that had not happened in HK's case. He did in fact contend, as noted at para. 106 above, that HK had made a human rights claim in her claim form, which had not led the Secretary of State to make a new decision. But even if he were wrong about that – as I have held he is – the fact remained that at the time that permission was considered there had been no refusal of a human rights claim such as to generate a right to an in-country appeal.

111. Mr Knafler submitted that even where a human rights claim had been made, but not yet refused, it would be wrong in principle to refuse permission to apply for judicial review on the basis that it could be assumed that a decision would be made eventually. There was no guarantee that the Secretary of State would act with reasonable promptitude. She acknowledged no obligation to do so, and it was notorious that decision-taking in the Home Office could be very slow: it was to be noted that no decision had yet been made on HK's claim made in October 2016. The matter was wholly out of an applicant's hands. Mr Knafler reminded us of the grave consequences of the service of a section 10 notice as summarised at para. 9 above. There was a serious risk of persons with a viable challenge to their removal being forced in practice to abandon it and leave the country because they could not get on with their lives; and indeed the Secretary of State would have an incentive to delay a decision in the hope that that would occur.

112. Mr Malik and Mr Biggs took a more radical position. They focused on the fact that any in-country appeal under the post-October 2014 regime afforded by following Ms Giovannetti's route would, necessarily, not be an appeal against the section 10 decision itself but only against the refusal of the human rights claim, which is a different decision. Such an appeal could not be an adequate alternative remedy to the quashing of the section 10 notice by way of judicial review. There were two strands to their submissions in this regard.

113. First, Mr Biggs in particular submitted that persons against whom a finding of deception was made by the Secretary of State were entitled as a matter of justice to a judicial decision about whether that finding was justified, both because of its effect on their reputations and because of its specific consequences for future applications for leave to enter: see paras. 20-21 above. A human rights appeal would not necessarily achieve that outcome. It is true that if (a) the tribunal accepted that the appellant's human rights were engaged by their proposed removal and (b) the only justification advanced for the removal were that they had used deception, then that issue would have to be determined. But one or other of those conditions might be absent. As to (a), not every person against whom a decision based on deception is made may have established a significant private or family life in this country. As to (b), the proposed removal might be justified on other grounds (as in fact the Secretary of State was arguing in Mr Ahsan's case – see para. 150 below).

114. Second, the section 10 notice had the specific consequences in law identified at para. 9 above – including that if the person served with it did not leave the country they

would be committing a criminal offence. If it was wrongly made, that very decision needed to be quashed so that those consequences were, as a matter of law, undone. A decision by the tribunal simply that removal would be contrary to their human rights would not have that effect. Mr Biggs illustrated the general point by reference to the circumstances of RK's case. Her outstanding application for leave to remain depended on her having had unbroken leave to remain at the point that she made her further application. If the section 10 decision stood, that would not be the case since the effect of section 10 (8) was that her leave was invalidated. But if that decision were quashed she would be able to rely on section 3C of the 1971 Act in the usual way.

Discussion and Conclusion

115. I start from the position that, other things being equal (though that is an important qualification in this case), it is better for the issue whether a person has cheated in their TOEIC test to be determined in an appeal to the FTT rather than by way of judicial review proceedings in the UT. The FTT is, generally, the more appropriate forum for the determination of disputed issues of primary fact, and as a matter of the best use of judicial resources the UT ought not to be burdened with cases that could properly be determined in the FTT. That approach is reinforced by the consideration that Parliament specifically provided for appeals against section 10 decisions to be heard in the FTT, albeit out-of-country. (The FTT is also, though this is perhaps a neutral point, a jurisdiction where costs are not normally awarded.)

116. Of course, as already established, the direct route to the FTT by way of an old-style appeal against the section 10 decision itself would not provide an effective remedy in these cases, because it is out-of-country. The question before us is whether a different route to the FTT (in-country), via a human rights appeal, constitutes an appropriate available remedy. In my judgment, it may do, if but only if all of the following conditions are satisfied:

(A) It must be clear that on such an appeal the FTT will determine whether the appellant used deception as alleged in the section 10 notice.

(B) It must be clear that if the finding of deception is overturned the appellant will, as a matter of substance, be in no worse position than if the section 10 decision had been quashed in judicial review proceedings.

(C) The position at the date of the permission decision must be *either* that a human rights claim has been refused (but not certified), so that the applicant is in a position to mount an immediate human rights appeal, *or* that the applicant has failed to accept an offer from the Secretary of State to decide a human rights claim promptly so that a human rights appeal would become available.

If those conditions are satisfied, the UT would in my view normally be entitled to refuse permission to apply for judicial review – though it is impossible to predict the idiosyncrasies of particular cases, and I should not be regarded as laying down a hard-and-fast rule. I should say something more about each of the conditions.

117. As for (A), if in a case of this kind permission were given to apply for judicial review of the section 10 decision, the applicant would obtain a judicial determination of

whether he or she did or did not cheat in their TOEIC test, since that is a matter of precedent fact on which the lawfulness of the decision depends. I regard the right to such a determination as a matter of real value because of the potentially grave other consequences of an official finding of that character, as identified at paras. 20-21 above, even where (untypically) it is not, or no longer, central to any removal decision. However an appellant would *prima facie* also obtain such a determination in a human rights appeal. The tribunal would of course have to decide the deception issue for itself rather than simply review the Secretary of State's finding on rationality grounds, and the appeal would to that extent be an appropriate alternative. But if there is any risk that the appeal will be determined on a basis which does not require such a determination, e.g. for the reasons suggested by Mr Biggs at para. 113 above, that will not be the case.

118. I should say, for the avoidance of doubt, that the reasoning in the previous paragraph does not mean that in every case where a finding of deception is made the subject of that finding is entitled to a judicial determination of the truth of the allegation. Whether it does so will depend on the legal context in which the question arises, including whether it is material to a human rights claim. That there are cases where only a rationality review is available is illustrated by *Giri* (see para. 43 above)[11]. Ms Giovannetti was asked by the Court whether an appellant was entitled to pursue a challenge to a deception finding in its own right, irrespective of its impact on the question of leave to remain or potential removal. She said that in principle they would be, but she submitted, relying on *Giri*, that such a challenge could only be on *Wednesbury* grounds.[12]

119. I turn to condition (B). Mr Biggs must be right that where the FTT on a human rights appeal finds that the appellant did not cheat, that will not formally lead to the reversal of the section 10 decision: that is a different and prior decision which will not as such be the subject of the appeal. In contrast, a successful judicial review challenge would lead to the section 10 decision being quashed. But I would not regard that difference as necessarily conclusive. This is an area where we should be concerned with substance rather than form. I would regard the crucial question as being whether the fact that the section 10 decision remained formally in place – so that leave to remain was still formally "invalidated" (see section 10 (8)) – would leave an appellant worse off as a matter of substance than if the decision had been quashed. Unfortunately this aspect was not explored in the oral submissions as fully as it might have been, no

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11 NB, however, that in *Kiarie and Byndloss* Lord Wilson specifically distinguished *Giri* on the basis that it "did not engage the court's duty under section 6 of the 1998 Act": see paras. 45-46 (p. 2396 B-C).

12 I record in this connection that in NA's judicial review grounds Mr Ó Ceallaigh argued that the effect on his reputation of the deception finding was sufficient in itself to engage his article 8 rights: he referred to the decisions of the European Court of Human Rights in *Pfeifer v Austria* (2009) 48 EHRR 8 and *Axel Springer SA v Germany* [2012] ECHR 227; and if that were correct a question might arise as to what form of review should be available where that right was claimed to have been breached. In her skeleton argument for the appeal Ms Giovannetti submitted that those decisions had no application in NA's case, and she would no doubt make the same submission in the cases of the section 10 Appellants. But no attempt was made to rely on this aspect of article 8 in their skeleton arguments or in the oral submissions, and I express no view about it.

doubt as a result of the late emergence of the human rights claim issue; and the guidance I can give must be rather tentative.

120. 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.[13] 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[14].) 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.)

121. So far so good, but the law in this area is very complicated and I am not confident that all its ramifications were fully explored before us. I do not feel in a position to say definitively that the Secretary of State will always be able to exercise her discretion, in the aftermath of a successful human rights appeal, so as to achieve the same substantive result as the formal quashing of the section 10 decision. There may, for example, be legislation (i.e. primary or secondary legislation rather than simply the Rules) which would result in the appellant having to be differently treated depending on whether he or she had leave to remain during a particular period. If there were any real doubt about whether in a given case a successful human rights appeal would be as effective as the formal quashing of the section 10 decision the applicant should have the benefit of that doubt and be permitted to pursue judicial review proceedings.

122. As for condition (C), I believe Mr Knafler was right to concede that if at the permission stage a human rights claim has already been made and refused, so that the claimant could appeal forthwith, then the UT would be entitled to refuse permission on the basis that an appropriate alternative remedy was available (assuming that the other two conditions are satisfied). That would lead to the crucial question being determined in what I believe to be the most appropriate forum.

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13 Examples of Ms Giovannetti and the Treasury Solicitor acknowledging this principle appear at para. 133 below.

14 Or indeed reversed on an old-style appeal against the section 10 decision itself.

123. However I also agree with Mr Knafler (subject to the point next considered) that it would be wrong to refuse permission where a human rights claim had been made but not yet refused. That would mean refusing permission on the basis, not that an alternative remedy was in fact available, but that it would become available at some uncertain date in the future. I regard that as wrong in principle, since the applicant is left entirely in the hands of the Secretary of State and may have to pass many weeks or months in limbo.

124. The remaining question is what the position is if no human rights claim has been made at all: the Secretary of State cannot decide a claim which has not been made. Given the complexity of the law in this area, I am not prepared to be critical of an applicant who has brought judicial review proceedings challenging a section 10 decision under the pre-2014 Act regime but who has not appreciated the possible procedural value of also making a human rights claim. Under that regime the making of such a claim would not, so far as the statute was concerned, have entitled him or her to an in-country appeal, because the claim would necessarily have post-dated the decision; only the most sophisticated might have been aware of the *Nirula* work-around. Nor do I think it is reasonable to expect them to have re-assessed the position following the coming into force of the new regime. However, the position would in my view be different if this route to an in-country appeal – in what I believe to be inherently the more appropriate forum – had been expressly offered to them by the Secretary of State and unreasonably refused. If the Home Office were to invite a judicial review applicant to make a human rights claim and undertake to consider such a claim and reach a decision within a reasonably short period (say 28 days), and that offer were not accepted, I would regard it as legitimate for the UT to refuse permission – assuming that the other conditions were satisfied – on the basis that an in-country appeal was potentially available and that the only reason why it was not yet actually available was the applicant's own inaction.

125. The position is of course different if a human rights claim has already been made and certified. In such a case the claimant's right to an in-country appeal must depend on a challenge to the certification decision: see para. 104 above.

126. I turn to consider whether those conditions are satisfied in these three cases. Condition (C) is plainly not. HK made a human rights claim over a year ago but no decision has been made.[15] RK has now, albeit very belatedly, made such a claim, but there has been no offer by the Secretary of State to deal with it within a short timescale. AF has also made such a claim, but it has been certified. The question whether conditions (A) and (B) are met does not therefore arise. However, on the face of it condition (A) would appear to be met in all three cases, since we were not made aware of any other issue in any of them that might make it unnecessary to decide if the Appellant had cheated. As regards (B), my provisional view is that the particular problem in RK's case raised by Mr Biggs (see para. 114 above) could have been satisfactorily met by the Secretary of State treating her outstanding application as if she had had section 3C leave at the time it was made; but I need not express a concluded view.)

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15 I appreciate that the delay may not be culpable: perhaps the Secretary of State wanted to await the outcome of these proceedings. But the end result is what it is.

127. It follows that I do not believe that permission to apply for judicial review should be refused on the basis that the Appellants have an alternative remedy in the shape of a human rights appeal.

Concluding Observations

128. We have been told that a large number of applications to the UT for permission to apply for judicial review have been stayed pending the outcome in these appeals. It follows from the foregoing discussion that decisions may still have to be taken on a case-by-case basis about whether a human rights appeal does in the circumstances of the particular case afford an appropriate alternative to proceeding by way of judicial review. That produces a less clear-cut outcome than a blanket decision that a human rights appeal either is always or is never an appropriate alternative remedy; but I am afraid that cannot be helped. The Secretary of State may in the end, after consideration of this judgment, prefer not to take the point; but that must be for her assessment. If she does take it in all or some cases, she will no doubt wish to consider how best to ensure that applicants are made aware of the availability, or potential availability, of a human rights appeal in their particular cases. And it may be that some applicants, once they are made aware of that option, may positively prefer to pursue it. But none of these are matters that we can dictate.

129. It is worth reflecting briefly on how this very messy and unsatisfactory state of affairs has arisen. It seems to be the product of three factors operating together:

(1) First, the basic route of challenge to a section 10 decision provided for by the legislation is by way of an out-of-country appeal, in circumstances where such an appeal does not, in cases like these, afford access to justice.

(2) Second, although the legislation as it stood before the 2014 Act allowed for an in-country appeal where a human rights claim had been made, that route was not available in these cases because the claim had to have been made before the decision was taken, and the Secretary of State served the section 10 notices without any prior warning, giving no opportunity to make a human rights claim first. There may have been good reasons for her taking that course, though when we put the point to Ms Giovannetti her instructions did not enable her to say more than that there had been careful consideration by the Home Office of what was the best way of proceeding.[16]

(3) Third, although under the old legislation that problem could have been resolved by use of the *Nirula* work-around, the structural changes effected by the 2014 Act closed off that route. An in-country appeal is now only (arguably) available by appealing against a different decision, which inevitably leads to the complications discussed above.

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16 She also reminded us that this Court had held in *Mehmood and Ali* that it was not unlawful for the Secretary of State not to have given the appellants the opportunity to respond to the allegations of cheating before she made the section 10 decisions (see para. 72 (p. 480 D-F)). That is true as far as it goes, but the point in issue was different.

It would be useless, even if we were in a position fairly to do so, to attribute blame for all this. I would only observe that it is a yet further illustration of the difficulty and complexity of the law in this area.

(7) THE ADDITIONAL POINTS IN MR FARUK'S CASE

130. As noted above, Sir Stephen Silber gave AF permission to appeal not on the basis of the more general grounds in HK's and RK's cases, although he has since adopted those grounds, but on the basis of two reasons peculiar to his case which were said to constitute "special and exceptional factors" of the kind recognised in the *Lim* line of cases. These continued to be relied on by Mr Malik by way of fallback. I take them in turn.

131. The first depended on an e-mail exchange between the Home Office and ETS in 2012, when AF's application to extend his leave to remain was being considered: copies were eventually disclosed as a result of a subject access request. In the exchange ETS was asked by the Home Office to "verify" the information contained in the TOEIC test certificate which AF had submitted in support of that application. It replied saying that the details in question "have been verified and are correct". It is AF's case that that exchange constituted evidence that he had in fact taken the test in person and that it was a breach of the Secretary of State's duty of candour that it had not been disclosed in the present proceedings prior to the refusal of permission by the Upper Tribunal. This contention seems to me obviously ill-founded. The only reasonable reading of the exchange, which pre-dates the *Panorama* revelations by over a year, is that it was not directed to establishing that AF had taken the test personally but was simply a routine enquiry to establish that the test certificate was a genuine record of his scores.

132. The second stemmed from the fact that AF had a pending application for an extension of his leave to remain at the time that the section 10 notice was served. It was said that but for the allegation of cheating that application would have been granted, and that it would have led to his accruing ten years lawful residence in 2016 and qualifying for indefinite leave to remain. Mr Malik's point was not that the invalidation of AF's existing leave to remain by the service of the notice would deprive him of that opportunity: as I understand it, he acknowledged that if the appeal succeeded the *status quo ante* would be restored. Rather, it was that if he had to leave the country in order to pursue his appeal he would cease to be able to show ten years' continuous residence. Ms Giovannetti's response was that the Secretary of State acknowledged that, if on an out-of-country appeal the FTT found that AF had not cheated, she would be obliged to proceed in any application under the Rules on the basis that the section 10 notice was wrongly given and that AF would have accrued the necessary ten years. I see no reason to go behind that assurance, and if this had been the only basis of AF's appeal I would have dismissed it.

133. I should add for completeness that in her witness statement lodged for the purpose of his appeal AF's solicitor, Ms Shah, recounted in some detail the experience of a different client, a Mrs Shah, who had brought an out-of-country appeal in a TOEIC

case and had succeeded[17]. Ms Shah says that when she asked the Home Office "to reinstate Mrs Shah's previous visa status" – the "invalidated" leave not having expired – she was told that she would have to apply for entry clearance in the usual way and show that she qualified under an appropriate category. That decision is now itself being challenged by way of judicial review. Ms Shah's point was that if AF returned to Bangladesh in order to pursue his appeal he would presumably be treated in the same way and be deprived of – or at least unjustifiably hampered in achieving – the fruits of his victory. A similar point, based on the case of a Mr Patel, was made in evidence from Mr Khan of HK's solicitors. There was some discussion of this point in oral submissions. Ms Giovannetti said that she was unable to comment on the particular cases referred to but acknowledged that the Secretary of State ought to take whatever steps were possible to restore successful out-of-country appellants to the position that they would have been in but for the impugned decision. After the conclusion of the hearing the Treasury Solicitor on 30 October 2017 wrote to the Court as follows:

> "… I have been asked to clarify my client's position in circumstances where an out of country appeal has taken place and the Tribunal has allowed the Migrant's appeal and, in doing so, has found against the Secretary of State.
>
> For the avoidance of doubt in such circumstances, the Secretary of State accepts that she is bound by the findings of the Tribunal in a successful out of-country appeal and that any detriment to the appellant should be minimised as far as possible. This is likely to include the need to grant entry clearance.
>
> The Secretary of State will use her best endeavours to ensure that appropriate steps are taken to give effect to the Tribunal's decision."

It is not necessary or appropriate for this Court to express an opinion on any disputed matters that do not arise in these appeals and were not the subject of argument. But I hope that the Secretary of State will indeed ensure that Entry Clearance Officers are properly aware of the need to give full effect to decisions of the FTT and UT.

CONCLUSION ON THE SECTION 10 APPEALS

134. I would allow all three appeals and give permission to the Appellants to apply for judicial review of the section 10 decisions in their cases and thus, in that context, for a determination of the question whether they cheated in their TOEIC tests. I would remit the cases to the UT for that purpose. In AF's case consideration will need to be given to how those proceedings relate to his stayed application in relation to the certification of his subsequent human rights claim.

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17 This was a case where, remarkably, the Secretary of State had failed to lodge even the evidence of Ms Collins and Mr Millington, let alone any look-up evidence, and was refused an adjournment in order to do so.

(B) MR AHSAN'S APPEAL

THE FACTS AND THE PROCEDURAL HISTORY

135. NA is a Pakistani national, now aged 30. He came to this country on 23 August 2006 on a student visa valid until 30 November 2007. His leave was extended on various occasions. In support of applications made on 2 October 2012 and 26 July 2013 he submitted a TOEIC test certificate issued by Colwell College in London on the basis of a test taken on 27 June 2012. The most recent grant of leave was to 19 June 2015.

136. In August 2014 the licence of NA's sponsoring college was revoked. On 23 October he made a further application for leave to remain on the basis of continuing his studies at a different college, the Centre of Training and Management ("CTM"). It is common ground that while that application was pending he enjoyed leave to remain under section 3C of the 1971 Act.

137. In the meantime, on 28 October 2014 the Home Office wrote to NA enclosing a section 10 notice dated 24 October notifying him that he was liable for removal on the basis that he had used a proxy for the tests on whose results he had relied in his 2012 and 2013 applications. The notice was in essentially the same terms as in the cases of the section 10 Appellants. In fact it was invalid because under the applicable commencement provisions NA's case fell under the 2014 Act regime, under which, as we have seen, section 10 in its original form had been replaced.

138. On 9 February 2015 NA commenced judicial review proceedings challenging the section 10 decision. The grounds contained an explicit statement that he had taken the TOEIC test himself and advanced at least some reasons in support of that statement. By that time the Secretary of State had appreciated that the section 10 decision was invalid. The proceedings were accordingly compromised by a consent order dated 6 May. By the recitals to that order the Secretary of State (a) agreed to withdraw the section 10 notice; (b) acknowledged that she had to consider the outstanding application of 23 October 2014; (c) allowed NA a further 60 days to update that application; and (d) confirmed that he "has been and remains on section 3C leave since he submitted his application" (I have slightly re-ordered those points for ease of summary).

139. On 17 June 2015 NA's solicitors, Maliks & Khan ("MK"), wrote to the Home Office purportedly submitting updated information in accordance with recital (c) of the order of 6 May. As I understand it, the original purpose of that recital was to enable NA to submit a fresh application supported by a CAS from CMT; but that proved impossible because, as MK explained in the letter, CMT's licence had been revoked on 12 June. They asked for a further 60 days to enable him to find a new sponsor. But they also indicated that NA was submitting a separate application on form FLR (FP) seeking leave to remain "due to the extensive private life he has established under Article 8 of the ECHR".

140. That application was submitted under cover of a further letter from MK dated 22 June 2015, which asks that it be accepted as a "variation" of the extant application. Form FLR (FP) is described on its face as appropriate for an application for leave to remain based either on family life as a parent or partner or on "private life in the UK (10 year route)": qualification by the last of those routes at least would entitle the

applicant to indefinite leave to remain under paragraph 276DE of the Immigration Rules. NA had no child or partner, and he had been in the UK for less than nine years, so the form does not appear very apposite. The way it is completed yields almost no information about the basis on which the application is made[18], but I assume that the terms of MK's covering letter are intended to be incorporated. These are somewhat diffuse but they appear to say that the application is for leave to remain (not specified as being indefinite leave) under article 8 outside the Rules and/or as a matter of common law fairness. The basis of the application is explained as follows:

> "The Applicant seeks to extend his stay in the UK in order for him to complete his education in the United Kingdom.
>
> The Applicant came to the UK to complete his studies. The Applicant came to the UK at the age of 18 and is now 27 years old.
>
> The Applicant has invested a lot of time and money on his education in the UK. Therefore, it is unfair for the client to go back to Pakistan without completing his education.
>
> The Applicant's current Tier 4 institution licence has been revoked and therefore, the Applicant cannot rely on the CAS submitted in his last Application for extension as a Tier 4 Student. The Applicant cannot be held responsible for the Home Office revoking the Tier 4 Sponsors Licence. The Applicant has not contributed and is at no fault in the revocation of the Licence. The Applicant is not able to complete his education to the end due to this recent hindrance by his Tier 4 Sponsor."

MK then refer to the well-known decision of the UT (Blake P and UTJ Batiste) in *Patel v Secretary of State for the Home Department* [2011] UKUT 00211 (IAC). That decision establishes, in short, that in cases where a sponsor's licence has been revoked a student ought generally to be given an extension of leave sufficient to give him or her a reasonable opportunity to make an application to vary their current leave by naming a new sponsor; and that an extension of 60 days would be sufficient for that purpose. They continue:

> "Therefore, as per the judgment, the appellant ought to have been afforded a reasonable opportunity to vary the application under s. 3C(5) Immigration Act 1971 by identifying a new sponsor before the application is determined. However, the Applicant is unable to secure a new Tier 4 sponsor without having current valid leave. The Applicant has approached a number of Tier 4 institutions however they have declined to issue the Applicant a valid CAS for the purpose of continuing with his education. Due to recent restrictions placed on Tier 4 Sponsor's by the SSHD most college/universities are reluctant to take on students that have no valid leave or where the students previous Sponsor has had their Licence revoked."

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[18] There appear to have been one or more attachments which may have contained such details, but they are not in the bundle.

This passage is rather obscure, but I understand it to raise a different point than merely needing a further 60 days: what appears to being said is that sponsors will not issue a CAS on the basis of section 3C leave only.

141. I do not understand why MK advanced the application for further leave to remain in the way they did. Seeking to rely on the original application of October 2014, as varied by the application on form FLR (FP)[19], itself glossed by the terms of the covering letter, was a recipe for confusion. Nevertheless it is adequately clear that a, if not the, central thrust of the application was that NA was entitled under article 8 to leave to remain for a sufficient time to find a new sponsor and to complete his studies thereafter. It was on any view a human rights claim within the meaning of section 113 of the 2002 Act.

142. By a decision dated 31 December 2015 NA's application was refused. The reasoning in the decision letter proceeds methodically through the various bases of application for which form FLR (FP) is designed. This results in a fair amount of repetition, but the reasons can for present purposes be sufficiently summarised as follows:

(1) NA did not qualify under any of the positive provisions of the Immigration Rules relating to private or family life. In particular, so far as private life was concerned he had not been in the UK for ten years.

(2) In any event his application would fall for refusal under the suitability provisions of Appendix FM (which apply also to private life claims) because he had relied on a fraudulently obtained TOEIC certificate: the allegation that he had used a proxy for the spoken English part of the test was in substantially identical terms to those in the abortive section 10 notice, and I need not set them out here. No reference is made to his denials in the compromised judicial review proceedings.

(3) There were no exceptional circumstances justifying the grant of leave to remain under article 8 outside the Rules. In that connection the letter says, among other things:

> "You have stated that you wish to study in the UK. This has been carefully considered. However, it is open to you to return to Pakistan and pursue your studies there. Alternatively, you can apply for entry clearance from Pakistan to study under the appropriate route."

143. The decision letter concluded with a certification decision in the following terms:

> "After consideration of all the evidence available, your claim has been certified under section 94(3) of the Nationality, Immigration and Asylum Act 2002 because the Secretary of State is not satisfied that it is not clearly unfounded. This is because you lived in Pakistan for 18 years before entering the UK and have stated that you have family

[19] When this judgment was circulated in draft we were told that form FLR (FP) was selected because there is no other appropriate form.

> there. It is therefore not considered that it would be reasonable to expect you to return to Pakistan as explained above."

(The reference to section 94 (3) must be an error, since sub-section (3) has no application to NA's case. But the case has proceeded on the basis that the intended reference is to sub-section (1).) The letter explains that the effect of that certification is that NA's right to a human rights appeal could only be pursued from outside the UK.

144. It will be noted that the reasons given for the certification focus entirely on the fact that NA would be able to integrate in Pakistan if returned, which was evidently believed to be decisive of his case based on article 8 generally. Nothing is said about his case based on the need for a further period of 60 days (or more) as a result of the revocation of CMT's licence. Nor is it said that his claim not to have used deception was clearly unfounded: indeed, as I have noted, his denials are not referred to at all.

145. The present proceedings were issued on 31 March 2016. The only ground pleaded is that the certification of NA's human rights claim was unlawful. I need not summarise in detail the particular contentions advanced under that ground. It is sufficient to say that it is contended that neither NA's case based on his private life nor his denial that he had committed TOEIC fraud could be said to be wholly unfounded.

146. Permission to apply for judicial review was refused by UTJ Rimington on the papers on 14 June 2016, essentially on the basis that, irrespective of the deception issue, it was not arguable that NA could be entitled to leave to remain on the basis of his private life.

147. NA renewed his application at an oral hearing before UTJ Kekic on 26 August 2016. She refused permission. Her written summary of her reasons reads:

> "(1) The evidential burden on the respondent with respect to the allegation of deception has been discharged.
>
> (2) The applicant's private life application does not meet the requirements of the Immigration Rules and does not disclose any compelling or exceptional factors which would warrant a grant of discretionary leave.
>
> (3) The applicant has the remedy of pursuing an out of country appeal."

148. On 10 July 2017 Sir Stephen Silber gave permission to appeal in the same terms as in HK's and RK's cases, i.e. by reference to *Kiarie and Byndloss*.

THE ISSUES

149. The history of the case has not conduced to the issues being clearly defined in advance of the hearing. The best way of identifying them is to summarise the parties' cases as they appear from the skeleton arguments and the oral submissions.

150. I start with how Ms Giovannetti put her case. In her initial skeleton argument she contended that, viewed as a straightforward private life claim based only on the length of time that NA had been in the UK, it was, as both UT judges had held, hopeless. To anticipate, I agree; and Mr Knafler did not attempt to argue otherwise. In her oral submissions she addressed the case based on NA's interest in continuing his education, and submitted that that too was hopeless. This was a case of a not unusual type where a student's college had lost its licence and he had been unable to find another college within the 60-day period which *Patel* had held to be reasonable. That being so, any challenge to the certification on the basis that it was arguable that NA had not cheated in his TOEIC test was immaterial, since even if that was the case he had no basis for leave to remain.

151. I turn to Mr Knafler's submissions. He contended that it was impossible to hive off the deception issue in the way argued for by Ms Giovannetti. There was plainly an arguable issue on the human rights claim which arose from the interruption of NA's studies by the revocation of CTM's licence. That had occurred only ten days before the letter of 22 June 2015 and on any view NA should have been given 60 days to find a new sponsor; but he said that the point raised in the final passage quoted from MK's letter (para. 140 above) might have required a longer grant. This aspect was not addressed in the decision letter and was not the basis of the decision.

152. That being so, the decision stood or fell by the finding that NA had used deception, and the certification of his claim in that regard was indefensible since there was clearly an arguable issue as to whether he had cheated as alleged. Mr Knafler reminded us of the well-known authorities on certification, most recently reviewed at paras. 48-62 of the judgment of Beatson LJ in *R (FR (Albania)) v Secretary of State for the Home Department* [2016] EWCA Civ 605. He relied on the many observations in the UT and this Court to the effect that the question whether an applicant or appellant had cheated was fact-sensitive and could not be decided without consideration of their oral evidence. He also relied on the fact that NA had very recently – in mid-August 2017 – sought and obtained a copy of his voice-files and that his solicitors, who have been representing him for many years, have made witness statements saying that the voice on it is clearly recognisable as his.

DISCUSSION AND CONCLUSION

153. The first question is whether NA's article 8 case was clearly unfounded, so that it is, as Ms Giovannetti submits, unnecessary to consider the deception issue at all. If that case were being run on the basis simply of nine years' residence, together with difficulty of re-integration on return, it would be impossible to challenge the certification. But there is of course the more specific case based on the interruption of NA's studies by the successive revocation of the licences of his most recent sponsors. I am doubtful about this. NA may well have had an arguable case that he was entitled to a further 60 days leave in order to find another sponsor, but by the time of the Secretary of State's decision that period had long passed. On the other hand, MK do appear to have been contending that he could not get a CAS unless and until leave, other than section 3C leave, was granted. We were not addressed on the detail of all this, and it may be that that argument is spurious. However, the point was not specifically addressed in the decision letter, and it is important to bear in mind that this is a certification case and the benefit of any real doubt must go to the appellant. I

am not prepared to say that this aspect of NA's human rights claim was wholly unfounded.

154. The certification can thus only be upheld on the basis that the case that NA had cheated was, in effect, unanswerable. However, that was not the reason for the certification given in the decision letter. There is the further problem that the letter did not advert in any way to NA's denial of having cheated pleaded in the previous judicial review proceedings, let alone seek to explain why any such denial was clearly unfounded. In my judgment those points are sufficient to render the certification unlawful.

155. It is not strictly necessary in those circumstances to consider whether, if the Secretary of State had addressed the question, she could reasonably have concluded that the case against NA was unanswerable, and accordingly certified that his human rights claim was clearly unfounded. But I find it hard to see how she could have. It is clear from the authorities summarised in *FR (Albania)* that the question would have to be decided on the basis of the information reasonably available to the Secretary of State at the time of her decision. The emphasis placed in the case-law on the fact-sensitivity of cases of this kind means that any certification will be vulnerable unless it is based on a thorough review of the evidence said to demonstrate cheating in the particular case, including any denial by the person in question. I do not see how, on the materials apparently available to the Secretary of State at the end of 2015 (being the date of the decision in his case), as assessed in the case-law from the following year, she could reasonably have been sure that his case that he took the test personally would be disbelieved by a tribunal.

156. I recognise that, as Ms Giovannetti has emphasised, the nature of the available evidence has since then changed and that those changes are reflected in the more recent case-law. As I have already said, we were not taken to the evidence in question ourselves. I do not rule out the possibility that it may be capable of supporting certification in some cases; but if the Secretary of State intends to certify in any given case she will need to confront the repeated admonitions to the effect that these cases are fact-sensitive and say with particularity why there is in the circumstances of the particular case nonetheless no prospect that the appellant's oral evidence could discharge the evidential burden on them. I took Ms Giovannetti to be floating the possibility that an appeal could not succeed where the claimant had not taken the elementary step of obtaining a copy of his or her voice-file. I accept that that may well be a weighty consideration; but I am not prepared to say that it will in all cases be decisive.

157. For those reasons it seems to me that permission to apply for judicial review should have been granted in NA's case, and his appeal should accordingly be allowed. Formally, whether permission should have been granted is the only issue before us, and the application for judicial review should be remitted to the UT for a substantive hearing. However, the nature of the issue – i.e., essentially, whether NA's human rights claim is arguable – is such that it follows from my reasoning that the substantive application also would inevitably succeed, and I would accordingly be minded to order now that the certificate be quashed so that NA can proceed with an in-country human rights appeal. I would, however, be prepared to consider any representations about that course before making a final order.

SUMMARY

158. I am conscious that the discussion and analysis in the previous 157 paragraphs is very elaborate. In case it is of assistance to practitioners and others I will give a short summary of my reasoning on the points of possible wider application raised by these appeals. But I emphasise that any summary of this kind carries the risk of being over-broad and omitting important subtleties, and on any point of difficulty it is necessary to go back to the detailed reasoning. Since I understand that the judgment is agreed by Floyd and Irwin LJJ I will refer to my conclusions as those of the Court:

(1) In deciding by what route a decision to remove someone on the basis that they cheated in a TOEIC test can be challenged, the starting-point is to establish whether the decision was made under the 2014 Act regime or its successor. (If it was made prior to 20 October 2014 it will fall under the old regime, and if it was made after 5 April 2015 it will fall under the new regime; in between those dates the position depends on the effect of the applicable commencement and transitional provisions.)

(2) If the decision falls under the old regime it will have been taken under section 10 of the 1999 Act in its unamended form. The person affected by the decision will generally have a right only to an out-of-country appeal, under section 82 of the 2002 Act, read with section 92 (1): they will not, except by unusual chance, have a right to an in-country appeal under the "human rights claim" provision of section 92 (4), because they will not typically have made such a claim prior to the removal decision: see para. 15.

(3) What the Court holds in part (A) – see in particular paras. 72-98 – is that an out-of-country appeal is not an effective remedy where (a) it would be necessary for the appellant to give oral evidence on such an appeal and (b) facilities for him or her to do so by video-link from the country to which they will be removed are not realistically available. It accordingly holds, subject to (4) below, that persons against whom such a decision is made will be entitled to challenge the decision by way of judicial review; that is so whether or not their article 8 rights are engaged. In reaching that conclusion the Court follows the approach of the Supreme Court in *Kiarie and Byndloss* to what are substantially similar circumstances and distinguishes its previous decisions in *Mehmood and Ali* and *Sood*. The Court finds that both conditions were satisfied in the present cases and observes that condition (a) is likely to be satisfied in TOEIC cases generally (see para. 91) and that in typical cases condition (b) is likely to be satisfied also (see para. 90).

(4) Notwithstanding (3), the Court at para. 99-127 accepts that in principle permission to proceed by way of judicial review could be refused if the person in question could achieve an equivalent remedy by an in-country human rights appeal under the 2014 Act regime, subject to the Home Secretary's power to certify the claim as wholly unfounded. But such a remedy would only be equivalent if the three conditions identified at para. 116 above are satisfied, which they were not in these cases.

(5) Part (B) of the judgment concerns a challenge to the certification of a human rights claim in a particular case to which the 2014 Act regime applies. The Court finds that the certificate is liable to be quashed. The decision does not directly

depend on the issue of whether the Appellant cheated in his TOEIC test, but the Court makes some observations about the appropriateness of certification where that is the determinative issue: see para. 156.

(6) The judgment also discusses the authorities on the extent to which the article 8 rights of students may be engaged by their removal prior to completion of their studies (see paras. 84-88) and the obligations of the Secretary of State to facilitate return in cases where a person who has been removed is successful in an out-of-country appeal (see para. 133).

Lord Justice Floyd:

159. I agree.

Lord Justice Irwin:

160. I also agree.

Neutral Citation Number: [2018] EWCA Civ 1684

Case No: C8/2017/3287
C8/2017/1385
C8/2016/3560

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/07/2018

Before :

LORD JUSTICE McFARLANE
LORD JUSTICE UNDERHILL
and
LORD JUSTICE SINGH

- -

Between :

(1) Md Ashif Khan	**1st Appellant**
(2) Md Monirul Islam	**2nd Appellant**
(3) Md Safayet Hossain	**3rd Appellant**
- and -	
Secretary of State for the Home Department	**Respondent**

- -
- -

Stephen Knafler QC and Nick Armstrong (instructed by **Bindmans LLP**) for the **1st Appellant**
Shahadoth Karim (instructed by **Hamlet Solicitors LLP**) for the **2nd Appellant**
Michael Biggs (instructed by **JKR Solicitors) for the 3rd Appellant**
Lisa Giovannetti QC and Rob Harland (instructed by the **Government Legal Department**) for the **Respondent**

Hearing dates: 26-27 June 2018

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Approved Judgment

Lord Justice Singh :

Introduction

1. These three appeals were listed to be heard together in order to enable this Court to address common issues that arise where a person has been accused of obtaining an English language certificate known as the Test of English for International Communication ("TOEIC") certificate through the use of deception, in particular by using a proxy test-taker. The result of that test is then submitted in support of an application for leave to remain.

2. The factual background includes the revelations as to widespread fraud which were uncovered by the BBC in a *Panorama* programme. Consequently the Secretary of State decided to curtail leave to remain in a large number of cases and refused subsequent applications for leave to remain on the basis that a person had used deception. These have become known as the "ETS" cases after the name of the institution which provided the language certificates: Educational Testing Services.

3. The legal background includes the recent decision of this Court in *Ahsan v Secretary of State for the Home Department* [2017] EWCA Civ 2009; [2018] INLR 207. However, there is one potentially significant legal difference between these cases and that of *Ahsan*. This arises from the legislative changes made by the Immigration Act 2014 ("the 2014 Act"). In particular there will not usually be a statutory right of appeal (either from within or from outside the United Kingdom). Section 10 of the Immigration and Asylum Act 1999 was amended by the 2014 Act. The legislation that was considered in *Ahsan* included section 10 in its earlier pre-2014 form.

4. On 14 August 2017 Sir Stephen Silber (sitting as a Judge of the Court of Appeal) granted permission to appeal in the case of *Hossain*. Subsequently, on 1 November 2017, Hickinbottom LJ granted permission to appeal in the case of *Islam* and linked that case with *Hossain* to be test cases to address the questions of law which arise where (1) there is no right of appeal as a result of the 2014 Act and there is at most available an administrative review by the Secretary of State; and (2) the only way of challenging a decision of the Secretary of State that a person has used deception is by way of judicial review. On 14 May 2018 Hickinbottom LJ granted permission to appeal in the case of *Khan* and linked that to be heard with the other two cases.

5. A large number of other cases are pending both in this Court and in the Upper Tribunal (Immigration and Asylum Chamber) awaiting the outcome of these appeals. We are informed that there at least 86 applications in this Court for permission to appeal against decisions of the Upper Tribunal in similar cases; and that there are at least 49 such cases which have been stayed by the Upper Tribunal pending judgment in these appeals.

6. A few weeks before the hearing was due to take place the Secretary of State proposed that the appeals should be resolved by way of compromise. Although a hearing was still necessary the parties have been able to agree consent orders in each of these three appeals, save for the question of costs in the case of *Hossain*, to which I will return later. Nevertheless, the parties were also agreed that, to the extent that the Court saw fit, it would be desirable for this Court to give a short judgment setting out the basis

upon which these appeals have been compromised, as this should assist in the conduct of other cases.

Factual background

Md Ashif Khan

7. Mr Khan was born on 14 December 1989 and is a national of Bangladesh. He entered the UK on 19 September 2009 with leave to enter as a student. This was subsequently extended as he went on to take a BSc degree in Business Management and an MSc in International Business Management. In order to make those applications Mr Khan took an English language test in two parts on 19 June 2012 and 12 July 2012. The Respondent disputes whether he took that test himself.

8. The Respondent interviewed Mr Khan on 2 July 2014 and 1 April 2015 and found him to be credible. However, the Secretary of State was later informed by ETS that the voice files assigned to the applicant did not match his voice and decided to curtail his leave to remain on the basis of that information on 15 March 2016. A replacement decision letter, which changed the immigration rule relied upon by the Respondent as the basis for the decision, was sent on 20 July 2016.

9. Mr Khan filed an application for permission to bring a claim for judicial review in the Upper Tribunal on 30 August 2016. UTJ Gleeson refused permission to bring that claim on 18 January 2017. However, on 30 August 2017 UTJ Blum granted permission to amend the grounds for judicial review. The grounds included a request that the Upper Tribunal should hear oral evidence when reviewing the factual matters underpinning the curtailment decision.

10. UTJ Perkins refused permission following a renewed application at a hearing on 27 November 2017.

11. Mr Khan then applied to this Court for permission to appeal against that refusal. As I have mentioned, on 14 May 2018, Hickinbottom LJ granted permission to appeal.

Md Monirul Islam

12. Mr Islam was born on 6 January 1984 and is also a national of Bangladesh. He entered the UK on 29 September 2009 with leave as a student, which was subsequently extended. On 16 September 2015 the Respondent curtailed his leave to remain with immediate effect on the basis that he had fraudulently obtained a TOEIC certificate used to support an application for leave to remain made on 19 October 2012.

13. Mr Islam applied for permission to bring a claim for judicial review in the Upper Tribunal on 8 December 2015.

14. Permission to bring that claim was refused on the papers by UTJ Warr on 3 February 2016. Permission was subsequently granted on 7 March 2016 by UTJ Kekic following a renewed application at an oral hearing.

15. However, the substantive claim for judicial review was dismissed by UTJ McWilliam following a hearing on 22 March 2017.

16. As I have mentioned, permission to appeal to this Court was granted by Hickinbottom LJ on 1 November 2017.

Md Safayet Hossain

17. Mr Hossain was born on 1 April 1989 and is also a national of Bangladesh. He entered the UK on 10 September 2009 with leave as a student, which was extended twice until September 2015. A third application to extend leave to remain in order to undertake an MBA course was refused by the Respondent on 25 September 2015 on the basis that Mr Hossain had cheated in an English language test in 2013. The Respondent maintained that decision following an administrative review on 18 November 2015.

18. Mr Hossain filed an application for permission to bring a claim for judicial review in the Upper Tribunal on 15 February 2016.

19. UTJ Gill refused permission to bring that claim on 9 May 2016 because the application was in reality a challenge to the decision made on 25 September 2015 and, in her view, was two months out of time.

20. After a renewed application UTJ Kekic refused permission on 15 August 2016.

21. As I have mentioned Sir Stephen Silber granted permission to appeal to this Court on 14 August 2017.

The compromise reached by the parties

22. On 30 January 2018 Mr Stephen Knafler QC (leading Mr Nick Armstrong) filed a skeleton argument on behalf of Mr Khan with a proposed directions order. In that skeleton argument, at para. 11, it was suggested that, as this Court had indicated in *Ahsan*, it might be appropriate for cases of this type to proceed through the human rights appellate route, providing the Respondent was willing to give the appropriate assurance of the kind referred to in *Ahsan*.

23. Accordingly, it was suggested on Mr Khan's behalf that the preferable way forward would be for the Respondent to agree to, and for the Court to approve, a directions order whereby permission to appeal and permission to apply for judicial review would be granted; but that these proceedings would then be withdrawn with no order for costs (for the avoidance of doubt, negating any earlier adverse costs orders) on the basis that (by way of a preamble):

    (i) the Appellant would submit full particulars of why it would be incompatible with Article 8 for him to be required to leave the UK, within 28 days;

(ii) the Respondent would either rescind her decision of 20 July 2016, refuse the human rights claim or certify it within a further 28 days;

(iii) both parties are of the understanding that, in any human rights appeal, the FTT would be able to determine whether or not the Appellant committed a TOEIC fraud;

(iv) if the Appellant succeeds on his appeal, on the basis that he did not commit such a fraud, then in the absence of some new factor justifying a different course, the Secretary of State would rescind her decision of 20 July 2016 and afford the Appellant a reasonable opportunity of securing further leave to remain.

24. At para. 13 an alternative proposal was made, which it is not necessary to set out here.

25. On 11 June 2018 the Respondent proposed a draft consent order and provided a statement of reasons in support of that proposal. The Respondent (at para. 2) noted the proposals set out at para. 12 of Mr Khan's skeleton argument of 30 January 2018.

26. At para. 3 of the statement of reasons, the Respondent acknowledged that cases involving ETS allegations have proliferated before both this Court and the Upper Tribunal and that the proceedings that have ensued have been "protracted". At para. 4, the Respondent further noted that, following *Ahsan*, those cases which predated commencement of the material provisions of the Immigration Act 2014 in relation to amended appeal rights are to be reviewed and, in circumstances where a human rights claim has been made or intimated, the Respondent will take a human rights decision which (if not certified under section 94 of the 2002 Act) will therefore carry an in-country right of appeal. At para. 5 the Respondent acknowledged the practicality of the suggestion that (in the unique circumstances of the ETS litigation) those cases which postdate the changes to appeal rights should be approached in a similar way. At para. 6 it was said that, for the reasons set out in *Ahsan*, the above approach would, on the face of it, provide the Appellant with a suitable alternative remedy, obviating the justification for a challenge to be brought by way of judicial review.

27. At para. 7, the Respondent noted that, while the parties cannot bind the FTT:

> "In any human rights appeal where TOEIC fraud is relied upon the Respondent will instruct its Presenting Officers to request a finding on the fraud to be made by the FTT as part of its fact finding on the human rights claim."

28. At para. 8 it was said:

> "The Respondent further proposes to take the same approach to the other two Appellants in these proceedings, since each has raised matters in these proceedings capable of effectively amounting to a human rights claim. It is noted also that both individuals were the subject of earlier decisions which would have brought them within the cohort of cases being reviewed post-*Ahsan*. Indeed, it has been

> the Respondent's case throughout these proceedings that Mr Hossain has a right of appeal, and that would necessarily be affected by the Court's ruling in *Ahsan*."

29. Importantly for other cases, at para. 9, the Respondent said this:

> "The Respondent will further extend a similar offer as that in *Ahsan* to other appellants in cases before this Court and the Upper Tribunal. It is anticipated that the vast majority of the cases currently before the Court and the Upper Tribunal would be disposed of by the provision of an alternative remedy in this way. The Respondent will need to review the cases and contact the relevant appellants/applicants. He proposes to update the Court in relation to these arrangements in line with the approach adopted in *Ahsan*."

30. On 15 June 2018 counsel acting for all three Appellants filed a "provisional" response to the Respondent's proposed consent order, in a position statement. They considered that the Respondent's proposals were helpful but that not all issues had necessarily been resolved.

31. On 18 June 2018 the Respondent filed a skeleton argument in these appeals. He observed, at para. 1, that in each case there had been a decision to curtail the Appellant's leave to remain in the UK and/or refusing further leave to remain; and notification of his liability for removal under section 10 of the Immigration and Asylum Act 1999 (as amended). It was noted that, because of the legislative changes in 2014, the Appellants have no right of appeal, whether in-country or out of country against the refusal, curtailment or a section 10 decision *per se*. However, even under the new legislative scheme, there is a right of appeal against a decision to refuse a human rights claim and indeed that is a right of appeal which can be exercised in-country, subject to certification (e.g. under section 94 of the Immigration, Nationality and Asylum Act 2002).

32. The Respondent noted the proposal which had been made on behalf of Mr Khan in the skeleton argument dated 30 January 2018 and stated that the Secretary of State had considered that proposal with care by reference to the facts of all three cases. At para. 6 the Respondent agreed (for the reasons set out in the statement of reasons in support of the draft consent order of 11 June 2018) "that it would be just, fair and appropriate to deal with these three cases in the manner suggested." It was also recorded that:

> "As further set out in the statement of reasons, the SSHD also proposes to adopt a broadly similar approach to other analogous 'ETS' cases that fall within the new statutory scheme."

At para. 7, the Respondent said that the above course had the following merits:

> "(i) It is similar to the approach taken to the '*Ahsan* cohort' of cases. The Respondent acknowledges in his statement of reasons that the 'ETS litigation' has been unique in a number of respects.

> These Appellants, like many others accused of ETS deception, have now been in-country for a significant period; there have been protracted debates about the evidence on both sides and the law relating to appeal rights has also changed in the meantime.
>
> (ii) It will allow disputes of fact to be put before the First-tier Tribunal in this country, which is a specialist Tribunal, experienced and expert in determining such disputes in the context of the relevant legislation and the immigration rules. The proposed course will allow the FTT to consider the issues for itself whilst even on the Appellants' case, the role of the Upper Tribunal in judicial review proceedings is primarily a supervisory one."[1]

33. There continued to be, as the Respondent's skeleton argument pointed out, a number of differences between the parties on issues of law, in particular the scope of any fact finding that the Upper Tribunal may be able to embark upon in judicial review proceedings. In particular, at para. 24, it was pointed out that, under the new statutory scheme, the question of deception is no longer a matter of "precedent fact". In this respect the Respondent submitted that there is a crucial difference from the legal position which was considered by this Court in *Ahsan*.

34. In the conclusion, at para. 42, it was said:

> "Nonetheless, the SSHD accepts that in all the circumstances, including the facts of the Appellants' cases, the unique circumstances and lengthy history of the ETS/TOEIC litigation, and the various other factors identified in the statement of reasons, it is fair and appropriate to accept the proposal put forward by Mr Khan for the settlement of his appeal, to offer to compromise the other two appeals in a similar manner, and to put forward a broader proposal for other similar cases."

35. At para. 43 it was said that these proposals would afford the Appellants at least an equal and arguably a better remedy than that which they currently sought.

36. Subsequently, in a document which we understand was served on 22 June 2018 although it is on its face undated, entitled "Response to the Appellants' Position Statement", the Secretary of State further clarified his position in advance of the hearing of these appeals. Paras. 2-4 of the Response explain, in response to points raised in the Appellants' position statement, why it was important in principle that the Secretary of State should not agree to inhibit his right to certify a human rights claim in cases of this kind. But para. 5 goes on to say:

> "Notwithstanding the above, the Respondent is able to agree that in **these** specific cases she will not certify the claims. For the reasons

[1] In a footnote it was stated that this was subject to the proviso that a case has not been certified.

set out above, this cannot and should not bind the SSHD in other cases, the facts of which are not before the Court and are in any event … likely to vary on a case by case basis, including depending on any updated evidence they put before the SSHD, and so not currently within his knowledge." (Bold in original)

37. 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)

38. At that stage there was still an issue between the parties as to the appropriate order for costs. However, after further discussions which took place both before and on the first day of the hearing of these appeals, the parties were able to agree both consent orders and orders as to costs, save for there remaining an outstanding issue in relation to the appropriate costs order in the case of *Hossain*.

39. In my view, it is appropriate in the circumstances which have arisen for this Court to approve the consent orders which have been agreed by the parties, which I append in final form. It is clear that the vast majority of similar cases will be dealt with in accordance with the approach which the Secretary of State has taken in these three cases and that, if there are individual cases which are not dealt with in that way, they can (if necessary) proceed through the Upper Tribunal or this Court on their own facts.

40. Beyond that it does not seem to me either necessary or appropriate for this Court to say anything on the merits of the points which may remain in dispute between the parties. I would only add that the parties have agreed this course on the basis that the FTT will be encouraged to decide as a matter of fact in the context of the proposed appeals to it whether in each case the Appellant did cheat in their TOEIC test as alleged, even if it might be possible to dispose of the appeal on some different basis (see para. 27 above); and I believe that this Court should endorse that encouragement.

Costs

41. The parties have been able to agree the appropriate costs order in the cases of *Khan* and *Islam*. This is reflected in the draft consent orders which have been presented to this Court for our approval. In those cases the Secretary of State has agreed that there shall be no order as to costs up to 30 January 2018 and that, from 31 January 2018, the Respondent must pay the Appellants' costs, to be the subject of detailed assessment if not agreed.

42. However, in the case of *Hossain*, the parties have not been able to agree the appropriate costs order. We were informed by counsel for the Secretary of State that an offer had been made (without prejudice save as to the issue of costs) in similar terms to the cases of *Khan* and *Islam* but that this was not acceptable to the Appellant. We therefore conducted a hearing into the Appellant's application for his costs, both in this Court and in the Upper Tribunal. We heard oral submissions by Mr Biggs on behalf of Mr Hossain. We also heard submissions by Ms Giovannetti QC on behalf of the Secretary of State.

43. The starting point for Mr Biggs's application is what I said in giving the main judgment of this Court in *ZN (Afghanistan) and Anr v Secretary of State for the Home Department* [2018] EWCA 1059, at para. 67:

> "The underlying rationale for the normal rule that costs follow the event is that a party has been compelled by the conduct of the other party to come to court in order to vindicate his legal rights. If those legal rights had been respected in the first place by the other party, it should never have been necessary to come to court. Accordingly, there will normally be a causal link between the fact that costs have been incurred and the underlying merits of the legal claim. This underlying rationale also explains why civil procedure normally requires a party to send a pre-action protocol letter to the other party. If the response to that letter had been to accept the merits of the claim in advance, it should never have been necessary to bring that claim to court."

44. However, that passage needs to be read in context. It was addressing the particular issue which was before the Court in that case, which concerned whether there is a need for a causal link between the fact that an appeal has become academic and the underlying legal merits of the case before a costs order should be made in favour of the appellant. The passage should not be regarded as setting out a test for the award of costs in judicial review proceedings or otherwise. I was simply stating that, normally, a causal link between the fact that costs have been incurred and the underlying merits of the legal claim will be required. However, that is a necessary but not always a sufficient basis for the award of costs.

45. The relevant legal framework for costs in judicial review proceedings was set out in my judgment in *ZN (Afghanistan)* at paras. 34-61. The leading authority on this subject was and remains the decision of this Court in *R (on the application of M) v Croydon London Borough Council* [2012] EWCA Civ 599; [2012] 1 WLR 2607: see in particular the judgment of Lord Neuberger of Abbotsbury MR (as he then was), at paras. 60-63.

46. As I summarised at paras. 50-52 of my judgment in *ZN (Afghanistan)*, Lord Neuberger identified three separate categories of claim. The first category consists of cases where a claimant has been wholly successful, whether following a contested hearing or pursuant to a settlement. In those cases the Court could not see why a claimant should not normally be entitled to all of his costs. Secondly, in cases where a claimant has only succeeded in part, whether following a contested hearing or pursuant to a settlement, Lord Neuberger accepted that there would often be much to be said for concluding that there should be no order for costs. Thirdly, in cases where there has been some compromise, and the compromise does not actually reflect the claimant's claims, there is an even stronger case for there to be no order for costs. This is mitigated, he said, by the proviso that there will be some cases in which it may be sensible to consider the underlying claims and consider whether it was "tolerably clear" who would have won if the matter had not settled.

47. One issue which was the subject of discussion in *ZN (Afghanistan)* is the relevance (if any) of the fact that a party is on legal aid: see paras. 71-93 in my judgment; paras. 96-104 in the judgment of Leggatt LJ; and para. 106 in the judgment of Sir Brian Leveson P. That issue does not arise on the facts of the present case because Mr Hossain is not on legal aid.

48. Mr Biggs's primary submission before us is that Mr Hossain should recover his costs in full, both in the Upper Tribunal and in this Court, because (i) he was compelled to come to court in order to vindicate his legal rights because his attempts to secure a review of the Respondent's adverse decision failed, both in the administrative review which resulted in the decision of 18 November 2015 and in the adverse response to his pre-action protocol letter; and (ii) he has in substance achieved what he was seeking, which is a reconsideration of the decision under challenge. In other words, Mr Biggs submits that this case falls into the first category identified by Lord Neuberger in *M*.

49. In the alternative, Mr Biggs submits that Mr Hossain was successful at least in part (Lord Neuberger's second category in *M*) but that, in the circumstances of this case, including having regard to the conduct of the Respondent, he should nevertheless recover his costs.

50. Before I address the application for costs in greater detail, I would wish to stress, as this Court has frequently done in previous cases, that costs applications must not be allowed to become in reality cases in which the underlying merits of a claim have to be determined. I would deprecate such satellite litigation. I would also stress that, inevitably, cases such as this turn on their own facts. I therefore turn to the facts of this case.

51. Mr Biggs is entitled to point out, as he does, that from an early stage the submission was made on behalf of Mr Hossain that his removal would breach his rights under Article 8: see, for example, his application for an administrative review dated 2 November 2015, at para. 13.

52. I turn next to the pre-action protocol letter and the Respondent's reply to it. In the pre-action protocol letter dated 16 December 2015, the lawyer acting on behalf of Mr Hossain said, at para. 16:

> "Our client's rights under Article 8 of ECHR will be breached as his future career will be seriously jeopardised by the removal decision. He lawfully entered and intends to obtain the qualifications. He needs to complete the current course in order to get a good job in the market and to enhance his career prospects. He will be socially embarrassed by the removal. He will not be allowed to return to the UK within 5 years if removed. On this ground he should have in-country right of appeal but the SSHD has denied this right."

53. That was a repetition of the same passage as had appeared in para. 13 of the application for an administrative review.

54. I do not think those points assist Mr Biggs. As is tolerably clear from both the application of 2 November 2015, at para. 13, and the pre-action protocol letter, at para. 16, reliance was then being placed by the lawyer acting on behalf of Mr Hossain on the *substantive* rights in Article 8. The argument was being made that those substantive rights would be breached by his removal from the UK "as his future career will be seriously jeopardised".

55. It is true that the passages ended in the final sentence with a reference to the assertion that Mr Hossain should have had but had been denied an in-country right of appeal. However, no such appeal was ever lodged: if the assertion was a good one, there is no reason why it could not have been lodged and then the point as to whether the FTT had jurisdiction to consider it could have been tested as a matter of law. In fact, the last sentence was not further developed nor was it explained on what legal basis the Appellant should be given any right of appeal, still less an in-country one.

56. The Respondent's decision refusing the administrative review was dated 18 November 2015. In relevant part it said:

> "… You further state that your rights under Article 8 ECHR would be breached, however Article 8 claims are not eligible decisions for administrative review as defined in Appendix AR of the Immigration Rules – specifically AR 2.6."

That is undoubtedly correct and it has not been suggested on behalf of the Appellant that it is wrong.

57. The Respondent's reply to the pre-action protocol letter was dated 5 January 2016. Mr Biggs points out that there was no specific response made to the reliance on Article 8 at all, although it was noted in a bullet point at para. 4 that Mr Hossain was relying upon Article 8.

58. However, it should be noted that it is common ground before this Court that the letter of 5 January 2016 did not constitute a refusal of a human rights claim. This is because it was not in the correct form for such a refusal and, importantly, it would have had to notify the Appellant of his right to appeal against such a refusal. Whether or not such an appeal had to be made from out of the country would depend on whether there was certification but that would not affect the existence of a right of appeal in human rights cases. But the reality is that neither side appreciated at that time that there was the possibility in cases such as this of an appeal on human rights grounds. That was clarified by this Court in *Ahsan*, which was decided only in December 2017. Although, with hindsight, it might be said that the Secretary of State is in some way at fault for not having appreciated what the nature of the pre-action protocol letter was, equally it might be said that the Appellant had the benefit of legal advice at all material times and that nobody then acting on his behalf appreciated the point either.

59. I turn next, and importantly, to the grounds on which judicial review was brought in the Upper Tribunal. They were set out in a document entitled 'Grounds upon which Relief is Sought'. At para. 30 the same passage that had appeared earlier in the application for an administrative review, at para. 13, and in the pre-action protocol letter, at para. 16, was repeated. However, once again the point about the possibility

of a right of appeal was not developed. Nor, as I have already mentioned, was such an appeal ever launched.

60. The burden of the grounds for judicial review, when read fairly and as a whole, was essentially to focus upon an allegation of an unfair procedure having been adopted by the Secretary of State *before* the adverse finding of deception in taking the language test was made: see in particular para. 28. Furthermore the allegation was that the finding of fact that the Appellant had engaged in deception was wrong and *Wednesbury* unreasonable. Mr Biggs fairly conceded at the hearing before us that the grounds at that stage were not pleaded as well as they might have been. The fact remains, however, that the grounds were formulated as they were. It was on the basis of those grounds that the Upper Tribunal had to consider the application for permission to bring the claim for judicial review.

61. This Court has seen both the written reasons given by UTJ Kekic, dated 11 August 2016, and a transcript of the hearing before her on the same date, in which she explained why she refused permission. It is true that the first reason given was that the operative decision was dated 25 September 2015 and not 18 November 2015 (the date of the decision on the administrative review); and that therefore the application was out of time on 15 February 2016. Nevertheless, the second reason given by the Judge was that:

> "The evidential burden on the Respondent was discharged by the documentary evidence adduced in support of her decision so the application could not have succeeded even if it had been made in time."

I would observe also that she made no order for costs in the proceedings before the Upper Tribunal. Mr Biggs now applies for costs not only in the Court of Appeal but also in the Upper Tribunal.

62. Finally, in considering the factual chronology, I turn to the grounds of appeal in this Court. Both those grounds and the skeleton argument filed in support of them focussed again on the arguments that there had been procedural unfairness before the decision was taken by the Secretary of State and that the decision could not be sustained on the facts. It is true that the first ground of appeal was that the Judge was wrong to hold that the application had been made out of time. It is also true that that point was conceded in the Respondent's skeleton argument dated 28 September 2017, at para. 2. However, the Respondent did not concede the appeal at that stage. Far from it. The skeleton argument went on to dispute the substantive arguments which were then being advanced on behalf of this Appellant.

63. The crucial event, as it seems to me, occurred in December 2017, when this Court decided *Ahsan*. At some point after that decision both sides came to appreciate that there may be an alternative route which is preferable in cases of this kind. Furthermore, the Secretary of State responded fairly in response to the skeleton argument by Mr Knafler on behalf of Mr Khan dated 30 January 2018. As I have explained earlier in this judgment, in the following months the Secretary of State took the view that the same approach should be taken in cases such as *Hossain* and indeed in all cases that fall into the same category, which are being reviewed. That seems to

me to be both fair and responsible on the part of a public authority. It ensures consistency of treatment.

64. I am not persuaded by Mr Biggs's submissions, attractively though they were made, that Mr Hossain should be regarded as having been successful in substance in this case. The case certainly does not, in my view, fall into the first category identified by Lord Neuberger in *M*. If it falls into his second category (partial success), then it will often be the case that the appropriate order is no order as to costs. I see no reason in the circumstances of this case to take a different view up to the point from which the Secretary of State is willing to pay Mr Hossain's costs, that is 31 January 2018.

65. It seems to me that the way in which the grounds were formulated at all material stages was different from the reason why the appeal has now become unnecessary. In substance the reason why all of these three cases have settled is that, as the result of this Court's decision in *Ahsan*, both the Secretary of State and the Appellants' representatives have now come to appreciate the possibility of a human rights appeal to the FTT in cases such as this, which would obviate the need for a claim for judicial review of the Secretary of State's decision that there has been deception. Although the Appellants' representatives do not accept all of the Secretary of State's thinking as to the steps which have led to that outcome, the cases have all settled for sensible and pragmatic reasons.

66. I also bear in mind that it would be desirable for there to be a consistency between the order as to costs made in this case and those made (by consent) in the cases of *Khan* and *Islam*. All three cases have been treated in the same way by the Secretary of State and all three, it seems to me, have settled for essentially the same reasons, not because of anything specific to the grounds that were advanced in any of them in particular.

67. For all the reasons I have given, in my view, the just and appropriate order for costs in this case is that there should be no order as to costs until 30 January 2018 but the Respondent shall pay the Appellant's costs from 31 January 2018, to be the subject of detailed assessment if not agreed.

Lord Justice Underhill:

68. I agree.

Lord Justice McFarlane:

69. I also agree with the judgment of Singh LJ. In doing so, I would particularly wish to associate myself with what is said at para. 50 concerning the need to avoid satellite litigation under the umbrella of a costs application.

APPENDIX

CONSENT ORDER – KHAN

HAVING REGARD to the requirements of paragraph 6 of the Practice Direction 52A to Part 52 of the Civil Procedure rules.

AND UPON the parties confirming that none of the parties to these proceedings is a child or a protected party

AND UPON the Respondent accepting that the Appellant has made a human rights claim which, if refused, will attract an in-country right of appeal to the First-Tier Tribunal;

AND UPON the Appellant undertaking to submit full particulars relating to his claim that removal would breach his human rights within 28 days; and the Respondent undertaking to respond to those submissions with a further decision within 28 days of receipt;

AND UPON the Respondent agreeing that (although in principle his decision would be subject to certification under s94 of the Nationality, Immigration and Asylum Act 2002) having considered the information available in this case, that it would not be appropriate to certify the decision

AND UPON the Respondent agreeing that if the Appellant succeeds on that appeal, on the basis that he did not commit a TOEIC fraud then, in the absence of some new factor justifying a different course, the Respondent will rescind her decision of 20 July 2016 and:

(i) Grant the Appellant a reasonable opportunity, being not less than 60 days, to submit an application for further leave.

(ii) Waive any fee or charge (including health surcharge) that might be payable for making such an application.

(iii) Should that application be for leave to repeat all or part of the MSc 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, or a cap (whether five years 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, so far as is practicable, the Appellant is not disadvantaged by an earlier wrong finding of deception.

(iv) Treat the claimant as having had continuous leave to remain since 20 July 2016 (and any earlier period as may be established).

AND UPON the Appellant accordingly applying to withdraw the underlying judicial review proceedings

BY CONSENT IT IS ORDERED:

1. The Appellant is granted permission to appeal;

2. The Appellant is granted permission to move for judicial review.

3. The Appellant is granted permission to withdraw that claim for judicial review.

4. The Respondent shall pay the Appellant's reasonable costs, from 31st January 2018, to be subject to detailed assessment if not agreed.

5. There shall be a detailed assessment of the Appellant's publicly funded costs.

CONSENT ORDER – ISLAM

HAVING REGARD to the requirements of paragraph 6 of the Practice Direction 52A to Part 52 of the Civil Procedure rules.

AND UPON all parties hereto requesting that the Court dismiss the appeal by consent without determining the merits.

AND UPON the parties confirming that none of the parties to these proceedings is a child or a protected party

AND UPON the Respondent accepting that the Appellant has made a human rights claim and that steps (i)-(iv) will follow as set out in the Statement of Reasons attached;

AND UPON the Appellant undertaking to submit full particulars relating to his claim that removal would breach his human rights within 28 days;

AND UPON the Respondent undertaking to respond to those submissions with a further decision within 28 days of receipt;

AND UPON the Respondent agreeing that (although in principle his decision would be subject to certification under s94 of the Nationality, Immigration and Asylum Act 2002) having considered the information available in this case, that it would not be appropriate to certify the decision;

AND UPON the Respondent agreeing that if the Appellant succeeds on that appeal, on the basis that he did not commit a TOEIC fraud then, in the absence of some new factor justifying a different course, the Respondent will rescind her decision of 16th September 2015 and:

a. Treat the claimant as having had continuous leave to remain since 16 September 2015 (and any earlier period as may be established).

b. Grant the Appellant a reasonable opportunity (being not less than 60 days) to submit an application for further leave if by the time the First Tier Tribunal appeal is determined the appellant's original leave, valid until 15th June 2019, has expired;

c. Waive any fee or charge (including health surcharge) that might be payable for making such an application

AND UPON the Appellant accordingly applying to withdraw the underlying judicial review proceedings on the basis that the parties agree that the matter is academic in light of the foregoing:

BY CONSENT IT IS ORDERED:

1. The Appeal is dismissed;

2. The Appellant is granted permission to withdraw his claim for judicial review;

3. The respondent to pay the appellant's reasonable costs from 31 January 2018 onward, and there is otherwise no order as to costs. This costs order to replace all other orders in these proceedings.

CONSENT ORDER – HOSSAIN

HAVING REGARD to the requirements of paragraph 6 of the Practice Direction 52A to Part 52 of the Civil Procedure rules.

AND UPON all parties hereto requesting that the Court dismiss the appeal by consent without determining the merits.

AND UPON the parties confirming that none of the parties to these proceedings is a child or a protected party.

AND UPON the Respondent accepting that the Appellant has made a human rights claim and that steps (i)-(iv) will follow as set out in the Statement of Reasons attached (amended to reflect the fact that if the Appellant is successful in establishing before the First Tier Tribunal that he did not use deception in obtaining his ETS certificate, then the decisions of 25th September 2015 and 18th November 2015 will be rescinded);

AND UPON the Respondent agreeing that (although in principle his decision would be subject to certification under s94 of the Nationality, Immigration and Asylum Act 2002) having considered the information available in this case, it would not be appropriate to certify the decision;

AND UPON the Respondent agreeing that if the Appellant succeeds on that appeal, on the basis that he did not commit a TOEIC fraud then, in the absence of some new factor justifying a different course, the Respondent will rescind his decisions of 25th September 2015 and 18th November 2015 and:

(i) Grant the Appellant a reasonable opportunity, being not less than 60 days, to vary his application for leave to remain made on 13th July 2015.

(ii) Treat the Appellant as having continuous leave to remain by virtue of s.3C of the Immigration Act 1971 as a result of his in-time application for further leave to remain made on 13th July 2015.

(iii) In the specific circumstances of this case, the period from 30th July 2015 to the further decision is not to be counted towards the cap on post-graduate study.

AND UPON the parties agreeing that the matter is academic in light of the foregoing.

BY CONSENT
IT IS ORDERED THAT:-

1. The Appeal is dismissed.

UPON HEARING SUBMISSIONS FROM COUNSEL FOR THE APPELLANT AND COUNSEL FOR THE RESPONDENT
IT IS ORDERED THAT:-

1. The issue of costs is to be the subject of reserved judgment and further order.

Neutral Citation Number: [2018] EWCA Civ 1571

Case Nos C8/2016/3005, C8/2016/4577
& C8/2017/1814

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
ON APPEAL FROM THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)
UPPER TRIBUNAL JUDGE FRANCES
Claim No JR/895/2016

ON APPEAL FROM THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)
UPPER TRIBUNAL JUDGE FREEMAN
Claim No JR/902/2015

ON APPEAL FROM THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)
UPPER TRIBUNAL JUDGE McWILLIAM
Claim No JR/7513/2016

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/07/18

Before :

LORD JUSTICE HICKINBOTTOM

- -

Between :

THE QUEEN ON THE APPLICATION OF S M ASHIQUR RAHMAN

Appellant

- and-

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

THE QUEEN ON THE APPLICATION OF AL AMIN

Appellant

- and-

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

THE QUEEN ON THE APPLICATION OF
FARHAN ALI **Appellant**

- and-

THE SECRETARY OF STATE
FOR THE HOME DEPARTMENT

Respondent

- -

Sonali Naik QC and **Irena Sabic** (instructed by **Migrants Resource Centre**)
for **the Appellant S M Ashiqur Rahman**
Sonali Naik QC and **Greg Ó Ceallaigh** (instructed by **Bindmans LLP**)
for **the Appellant Al Amin**
Amanda Jones (instructed by **Farani Javid Solicitors**) for **the Appellant Farhan Ali**
David Mitchell (instructed by **Government Legal Department**) for the **Respondent**

Written submissions only: 3-26 June 2018

- -

Approved Judgment

Lord Justice Hickinbottom:

Introduction

1. Some sets of criteria for leave to remain under the Immigration Rules include a requirement that the applicant passes a test of proficiency in the English language. In 2014, one form of the approved test, "Test of English for International Communication" ("TOEIC test") provided by Educational Testing Service ("ETS"), was the subject of a television programme which suggested that there was widespread cheating by the use of proxies in the spoken English part of that test. At the request of the Secretary of State, ETS employed voice recognition software to go back over recordings to identify different tests in which it seems that the same voice appears, which could thus be assumed to be the voice of a professional proxy. In reliance on ETS's findings, the Secretary of State cancelled or refused leave to remain for over 40,000 persons who were said to have obtained leave on the basis of such cheating.

2. Many individuals identified in that way denied cheating, and brought proceedings challenging the relevant decision of the Secretary of State by way of judicial review. Generally, the claims were unsuccessful, often at the permission stage. To assist with the ultimate resolution of these cases, four were chosen for consideration by this court on appeal. They fell into two categories.

3. First, there were cases in which the applicant had been served with a notice of liability to "administrative" removal under section 10 of the Immigration and Asylum Act 1999 ("section 10") on the basis that he had used deception in obtaining extensions of their leave by using a proxy for the spoken part of his TOEIC tests. They each denied doing so and, relying on R (Kiarie and Byndloss) v Secretary of State for the Home Department [2017] UKSC 42; [2017] 1 WLR 2380 ("Kiarie & Byndloss") (which held that an out-of-country appeal was not a fair or effective procedure in the different context of challenging a deportation order), they sought permission from the Upper Tribunal (Immigration and Asylum Chamber) ("the Upper Tribunal") to apply for judicial review of the section 10 decision. Permission was in each case refused on the basis that the applicant had an appropriate alternative remedy in the form of an out-of-country appeal. The primary issue raised by the cases in this court was whether such an appeal was indeed an effective remedy.

4. Second, there were cases in which there had been no section 10 decision, but an application for leave to remain on human rights grounds had been refused by the Secretary of State partly on the basis that the applicant had cheated in a TOEIC test. Such a disappointed applicant would generally have been entitled to an in-country appeal against that decision; but the Secretary of State certified each of these cases under section 94(1) of the Nationality, Immigration and Asylum Act 2002 ("section 94(1)") on the basis that the human rights claim was "clearly unfounded". Certification meant that any appeal could only be pursued from outside the United Kingdom. In each case, permission to apply for judicial review of the certification was refused by the Upper Tribunal. Again, the main issue before this court was whether an out-of-country appeal was an appropriate remedy.

5. In a substantial judgment (Ahsan and Others v Secretary of State for the Home Department [2017] EWCA Civ 2009 ("Ahsan")), this court (Underhill, Floyd and Irwin LJJ) held that, in a case in which a decision to remove an individual had been made on the basis that he had cheated in a TOEIC test, an out-of-country appeal would not be an effective remedy where (i) it would be necessary for the appellant to give oral evidence and (ii) facilities for him to do so by video-link from the country to which he would be removed are not realistically available (see [158(3)]). Therefore, the court accordingly held that, unless the person in question would achieve an equivalent remedy by an in-country human rights appeal under the later regime of the Immigration Act 2014, persons against whom a section 10 removal decision had been made were entitled to challenge it by way of judicial review at which the issue of whether the applicant had cheated could be determined on the basis of evidence including oral evidence (see [158(3)-(4)]). The court further held that certification of a human rights claim under section 94(1) where the decision-maker had taken into account cheating (as he had found it to be) was liable to be quashed, to allow an in-country appeal to proceed at which the issue of cheating could be considered and determined, again on the basis of full evidence (see [158(5)]).

6. After that judgment had been handed down, the Secretary of State reviewed appeals in this court which had been stayed pending Ahsan, about 250 in number; and subsequently offered to compromise them. In the section 10 appeals, in which the appeal was against the refusal to grant permission to proceed with a judicial review of the decision to remove, the offer was on the basis that by consent the appeal be allowed, permission to judicial review be granted and the substantive judicial review be remitted to the Upper Tribunal for determination. The offers made were on the basis that all costs (including the costs of the appeal) would be reserved to the tribunal pending that determination.

7. It seems that most of the appellants were content with the substantive relief offered, but not with the proposed costs order. They generally sought an order for their costs of the proceedings (including the appeal) to date, on the basis that they had been successful.

8. At the Secretary of State's request, four cases were chosen, with a view to full written costs submissions being made prior to a single judge determining the costs issue in those cases on the papers. It was hoped that, in that way, guidance might be given to enable many or all of the other cases to be disposed of by consent. In the event, one of the selected cases was not suitable, because on its facts it did not fall within the category of case to which the Secretary of State had offered settlement.

9. The costs applications in the remaining three cases now fall to me for determination. Two cases (those of Mr Rahman and Mr Al Amin) are section 10 cases. The third case (that of Mr Ali) is a certified human rights case. Although the parties have requested that the determination is made on the papers – and I consider that the applications can be justly and properly determined without an oral hearing – I am responding to the applications in the form of a written judgment so that, insofar as it may be of any help, it can be openly used to assist with the resolution of the many cases behind it.

10. Sonali Naik QC and Irena Sabic of Counsel made written submissions on behalf of Mr Rahman; Ms Naik and Greg Ó Ceallaigh of Counsel on behalf of Mr Al Amin; and Amanda Jones of Counsel on behalf of Mr Ali. David Mitchell of Counsel made written submissions for the Secretary of State. At the outset, I thank them all for their assistance.

The Law

11. The legal framework for costs in judicial review proceedings was helpfully set out in the recent judgment of Singh LJ in ZH (Afghanistan) and KA (Iraq) v Secretary of State for the Home Department [2018] EWCA Civ 1059 at [34]-[52], which I commend. For the purposes of these applications, I can be relatively brief.

12. CPR rule 44.2 confers a discretion on the court as to whether or not costs should be paid by one party to another, the amount of any costs and when they are to be paid, and the form of the order. If an order for costs is to be made, the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party. However, that does not preclude the court from making a different order. In deciding what order to make on costs, the court will have regard to all the circumstances, including the conduct of the parties and whether a party has succeeded in its case in whole or in part.

13. This court considered the application of the general costs rules in the public law context in R (M) v Croydon London Borough Council [2012] EWCA Civ 595; [2012] 1 WLR 2607. At [44]-[46], Lord Neuberger of Abbotsbury MR (with whom Hallett and Stanley Burnton LJJ agreed) identified three general principles which apply to costs after a trial in ordinary civil litigation, as follows:

> "44. … The first is that any decision relating to costs is primarily a matter for the discretion of the trial judge, which means that an appellate court should normally be very slow to interfere with any decision on costs.… [I]f a trial judge departs from rationality or the correct principles it is legitimate for an appellate court to interfere with his conclusion.
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> 45. The second principle is that… the general rule in all civil litigation is that a successful party can look to the unsuccessful party for his costs. Of course as CPR 44.3(2)(b), (4), (5) and (6) demonstrate, there may be all sorts of reasons for departing from this principle, but it represents the *prima facie* position…
>
> 46. The third principle is that the basis upon which the successful party's lawyers are funded… will rarely, if ever, make any difference to that party's right to recover costs…".

14. Lord Neuberger dealt with cases in which there had been no determination on the merits, at [47]:

> "It is open to parties in almost any civil proceedings to compromise all their differences save costs, and to invite the

> court to determine how the costs should be dealt with. The court has jurisdiction in such a case to determine who is to pay costs, but it is not obliged to resolve such a free-standing dispute about costs."

15. Having cited the judgment of Chadwick LJ in BCT Software Solutions Limited v C Brewer & Sons Limited [2003] EWCA Civ 939 – and confirming that the general position where there had been a compromise in a public law claim was no different from a private law claim, and that each case will depend upon its own facts – at [60]-[63], Lord Neuberger identified three categories of claim, in which general points could be made with regard to the correct approach to allocation of costs in public law cases where there had been a compromise. First, where a claimant had been wholly successful (i.e. had achieved what he set out to achieve), a claimant should generally be entitled to all his costs. Second, where he has succeeded only in part, no order for costs might be appropriate. Third, where there is a compromise that does not actually reflect the claimant's claims, there is an even stronger case for there to be no order for costs, particularly if it was not "tolerably clear" who would have won if the matter had not settled.

16. Those principles are now well-established. With appropriate modification, they are equally applicable where there has been an appeal.

17. This court of course has power to make an order in respect of the costs below (CPR rule 52.20).

18. I now turn to the individual applications before me.

S M Ashiqur Rahman

19. Mr Rahman is a Bangladesh national, who entered the UK on 28 October 2009 with leave as a Tier 4 (General) Student which was extended from time-to-time. He passed a TOEIC test in October 2012. On the basis of that result, he was granted leave to remain until 30 November 2014 as a student at Blake Hall College.

20. On 13 August 2014, Blake Hall College wrote to Mr Rahman indicating that his registration at the college had been terminated because (i) he breached the attendance regulations by not achieving a minimum of 80% attendance and (ii) he had been identified by the Secretary of State as having previously submitted a fraudulently obtained TOEIC test certificate.

21. The procedural history thereafter was lengthy and somewhat tortuous; but, for the purposes of this application, it is unnecessary to go into it in any detail. It is sufficient to say that a section 10 decision to remove was made by the Secretary of State on 29 September 2014, the service of which had the effect of terminating Mr Rahman's leave to remain. On 1 October 2014, he was served with a notice requiring him to report. On 13 January 2015, the section 10 decision was revoked and replaced by another decision to remove under section 10.

22. On 26 January 2016, in person, Mr Rahman issued judicial review proceedings in the Upper Tribunal, particularly challenging the decision requiring him to report, but this

was treated by the tribunal as in substance also challenging the section 10 decision. On 9 May 2016, Upper Tribunal Judge Frances refused the application for permission to proceed with the judicial review on the basis that (i) it was too late and (ii) in respect of the challenge to the section 10 decision, Mr Rahman had a suitable alternative remedy in the form of an out-of-country right of appeal. The judge declared the application to be totally without merit; and, on 30 June 2016, refused permission to appeal to this court.

23. On 1 August 2016, Mr Rahman appealed to this court against that refusal of permission to proceed. The appeal was stayed behind Ahsan. After judgment was handed down in that case, Mr Rahman obtained legal aid and legal representation; and the submissions of Ms Naik and Ms Sabic, filed on 12 February 2018 in response to my directions of 15 December 2017 and 6 February 2018, confirmed that the relief Mr Rahman sought from this court was (i) to allow the appeal, (ii) to extend time and to grant permission to proceed with the judicial review and (iii) to remit the substantive judicial review to the Upper Tribunal for determination notably of the issue relating to deception. Indeed, that was the most that could have been achieved from this court.

24. On 22 May 2018, the parties agreed a consent order which, expressly without determining the substantive merits, granted Mr Rahman that relief and gave directions for exchange and filing of submissions in relation to costs.

25. Ms Naik and Ms Sabic for Mr Rahman submit that Mr Rahman has been "wholly successful" so that, unless there is good reason to the contrary, he should be entitled to his costs to date of both the judicial review and the appeal, or alternatively of the appeal alone. Mr Mitchell for the Secretary of State seeks an order that all costs are reserved to the Upper Tribunal; but submits that this court should direct in some detail how the tribunal should exercise their discretion as to costs dependent upon the eventual finding with regard to deception.

26. In respect of the appeal, in my view there can be no doubt but that Mr Rahman has been wholly successful, in that he has achieved all that he sought to achieve from the appeal, namely that the appeal be allowed, permission to proceed with judicial review be granted and remittal of the substantive judicial review to the Upper Tribunal for determination, as effectively required after Ahsan. In my view, in those circumstances, Mr Rahman is entitled to his costs of the appeal in any event. That is so irrespective of what the tribunal might ultimately find in relation to the allegation of deception or otherwise.

27. However, with regard to the costs of the judicial review, the position is different. As yet, Mr Rahman has not succeeded in respect of the issues raised in that claim, notably whether he used deception in respect of the TOEIC test. Those issues will in due course be determined by the Upper Tribunal. In my view, the costs of the judicial review cannot be dealt with now. They should await the outcome of the claim before the tribunal. It is unnecessary for this court to make any order in respect of those costs: other than the costs of the appeal with which I have dealt, the past and future costs of the judicial review claim can be considered and dealt with by the tribunal at the appropriate time in the usual way.

28. In addition, there will be the usual order for the detailed assessment of Mr Rahman's publicly funded costs of the appeal.

29. Therefore, in Mr Rahman's case, subject to any observations of Counsel on the precise form of the order, I shall order that:

    i) The Secretary of State shall pay the Appellant's costs of the appeal to be the subject of detailed assessment on the standard basis if not agreed.

    ii) The Appellant's publicly funded costs shall be the subject of detailed assessment.

Mr Al Amin

30. In my view, there is no material difference between Mr Rahman's case and that of Mr Al Amin.

31. Mr Al Amin is also a Bangladesh national, who entered the UK on 12 May 2010 with leave as a Tier 4 (General) Student which was extended from time-to-time eventually being valid to 30 May 2015. He passed a TOEIC test in September 2012, as he required such a pass to obtain leave to remain to study at Havering College, which he did until August 2013. In September 2013, he began an HND Level 6 course followed by a BSc course in applied computing at Glyndŵr University.

32. On 10 September 2014, Glyndŵr University wrote to Mr Al Amin saying that they had been notified by the Secretary of State that his TOEIC test certificate was invalid because it had been obtained by deception. As a result his Confirmation for Acceptance of Studies had been withdrawn and, with it, his leave to remain.

33. On 31 October 2014, Mr Al Amin was served with a section 10 notice of removal, which he challenged by way of judicial review issued on 23 January 2015. Again, for the purposes of these applications it is unnecessary to go into the detail of the precise procedural path of that claim; but, (i) on 12 August 2017, Mr Al Amin's claim having been struck out, Upper Tribunal Judge Gill ordered Mr Al Amin to pay the Secretary of State's costs of preparing an Acknowledgment of Service and summary grounds; and (ii) on 3 May 2017, the claim having been reinstated, Upper Tribunal Judge Freeman refused permission to proceed on the basis that the decision "carried with it an out-of-country right of appeal, which was the appropriate way of challenging it…". The judge declared the claim to be totally without merit, and he refused permission to appeal to this court on 30 May 2017. He left the earlier costs order in place.

34. On 30 June 2017, Mr Al Amin appealed to this court, challenging the refusal of permission to proceed below. The claim was initially stayed pending the outcome of Kiarie & Byndloss, and then Ahsan. After judgment was handed down in the latter, this appeal was compromised on identical terms to those in Mr Rahman's case.

35. The costs submissions of the parties were essentially the same as those in respect of Mr Rahman, except Ms Naik and Mr Ó Ceallaigh restricted their application to seeking the costs of the appeal.

36. In my view, the costs considerations are essentially the same as in Mr Rahman's case; and, therefore, as in that case and for the same reasons, subject to any observations of Counsel on the precise form of the order, I shall order that:

    i) The Secretary of State shall pay the Appellant's costs of the appeal to be the subject of detailed assessment on the standard basis if not agreed.

    ii) The Order of Upper Tribunal Judge Gill dated 12 August 2016 be quashed. Of course, that will not prevent the tribunal making an appropriate order in respect of the Secretary of State's costs of preparing an Acknowledgment of service etc in due course, if it considers such an order appropriate.

    iii) The Appellant's publicly funded costs shall be the subject of detailed assessment.

Farhan Ali

37. Mr Ali is a Pakistan national, who entered the UK on 6 September 2009 with leave as a Tier 4 (General) Student which was later extended to 31 December 2011. On 30 December 2011, he applied for leave to remain, again as a Tier 4 (General) Student. That application required evidence of proficiency in the English language, and Mr Ali submitted a TOEIC test certificate from ETS. Leave was granted, as was further leave to remain as Tier 1 Post Study Migrant in April 2012 valid until August 2014. A further application in 2014 to remain as a Tier 1 Entrepreneur was refused; and, on 30 March 2015, Mr Ali was served with removal papers.

38. On 17 November 2015, Mr Ali applied for leave to remain on family and private live grounds. That application was refused on 27 April 2016, on the basis that (i) the TOEIC test certificate upon which the earlier leave had been granted was fraudulently obtained by the use of a proxy, and (ii) the marriage certificate relied upon in the instant application was also obtained by deception. Mr Ali's human rights claim was certified under section 94(1) as clearly unfounded.

39. On 7 July 2016, Mr Ali issued judicial review proceedings in the Upper Tribunal, challenging the certification. The claim sought costs on an indemnity basis.

40. On 10 October 2016, Upper Tribunal Judge Perkins refused permission to proceed on the papers; and, on 2 December 2016, Upper Tribunal Judge McWilliam upheld that refusal at an oral hearing.

41. It is clear from the claim – and, of course, quite understandable – that Mr Ali was particularly concerned about the findings of the Secretary of State that he had been deceitful both in respect of his TOEIC test certificate and his marriage, which in his view amounted to a finding that he had committed perjury and was not lawfully married. Of that, in paragraph 6 of her determination, Judge McWilliam said:

> "The applicant has a right of appeal, albeit out-of-country, against the substantive article 8 decision, and this is an adequate remedy. This will enable him to challenge the decision in respect of the English language certificate and the

> lawfulness of the marriage. The applicant has previously challenged the decision in respect of the English language certificate and he was refused permission in a decision issued on 27 October 2015, Upper Tribunal Judge Hanson having decided that an out-of-country appeal was an adequate remedy."

42. However, she also said this (at paragraph 5):

> "*Putting aside the issues in relation to the validity of the marriage and ETS certificate*, the application has no prospect of success. The applicant cannot meet the requirements of the Rules and it is not arguable that the applicant advanced compelling circumstances that would entitle him to leave outside the Rules. There is no material arguable error of law. It is unarguable that the decision, on the evidence before the decision maker, breaches the applicant's rights under art 8 under the rules or outside of the Rules." (emphasis added).

43. At the same hearing the judge refused permission to appeal to this court.

44. On 6 December 2016, Mr Ali renewed that application to this court. The application was stayed pending the outcome of Ahsan; and, following the delivery of judgment in that case, on 22 May 2018 the substantive appeal was compromised by a consent order in which, again expressly without determining the merits of the claim, Mr Ali was granted permission to appeal, the appeal was allowed and the application for leave was remitted to the Secretary of State to remake the decision. The reasons annexed to the order explained:

> "The [Secretary of State] has reviewed her position in the light of [Ahsan]. In accordance with the findings in that case, and taking a pragmatic approach in the circumstances relevant to this appeal, the [Secretary of State] proposes the certificate is withdrawn. The decision is remitted to [Secretary of State] to reconsider her decision in the light of the withdrawn certificate, and with particular regard to the materiality of the fraud accusation to the human rights claim. A new decision will be forthcoming to the Appellant."

Costs were left outstanding, and made subject to directions for the exchange of written submissions which have now been served and lodged.

45. Mr Mitchell for the Secretary of State submits that the order for costs he proposes on the cases of Mr Rahman and Mr Al Amin is equally appropriate here: no findings have yet been made in respect of Mr Ali's conduct in connection with his TOEIC test and marriage and, not until such findings are made, can costs be determined. On the other hand, on the basis that "there was no basis in law or fact for the original decision's statement that he had committed perjury and that his marriage was unlawful", Ms Jones submits that the Secretary of State should pay Mr Ali's costs of the claim and appeal on an indemnity basis.

46. I find significant difficulty in accepting key elements of either set of submissions.

47. So far as Mr Mitchell's submissions are concerned, as Ms Jones emphasises, the judicial review claim was not directly concerned with whether the findings and conclusion of the Secretary of State on Mr Ali's application for leave to remain were sound; but only whether he (the Secretary of State) was entitled to certify the human rights claim as clearly unfounded which determined from where an appeal (which would directly concern and determine those factual matters) should be made, in country or out-of-country. Even if an application for leave to remain is clearly unfounded, there is still an (out-of-country) right of appeal. In any event, an order reserving costs is clearly inappropriate, given that there is no court or tribunal to which to reserve them to, the substantive claim having been entirely compromised. If there is a new decision by the Secretary of State with which Mr Ali is dissatisfied, then that decision will have to be the subject of a new challenge in the appropriate court or tribunal.

48. However, turning to Ms Jones' submissions, I do not accept that I can proceed as if there had been findings that Mr Ali has not been deceitful in respect of his TOEIC test and/or his marriage. No such findings by an independent tribunal have yet been made, and I cannot pre-empt them. In any event, in this case, Judge McWilliam concluded that, leaving aside any issues in relation to the language test and marriage, the claim for leave to remain on human rights grounds was bound to fail in any event such that the certification was certainly lawful. She considered that, leaving aside entirely any issue involving deception, Mr Ali could not in any event satisfy either the criteria in the Rules or the requirement for exceptional circumstances. In many cases where the Secretary of State makes findings of deception, it would be impossible to say that, if he had left all such factors out of account, he would inevitably have come to the same conclusion with regard to section 94(1) certification; but that appears to have been Judge McWilliam's conclusion. In the judicial review claim, it would have been open to the Secretary of State to have relied upon matters other than those involving deception to have maintained the validity of the certification; although, of course, the court may have been persuaded that it would in any event have been wrong to leave the Secretary of State's findings of fact in place. However, the consent order states that the Secretary of State had adopted the course he did for pragmatic reasons, and, on the basis of all the evidence, I accept that he did.

49. Following Ahsan, in some cases where there has been certification under section 94(1) on the basis that deception in relation to a TOEIC test had been weighed in the balance that article 8 requires to be performed, no doubt the appropriate order will be that the costs of the claim and/or appeal should be payable by the Secretary of State. However, in the unusual circumstances of this case, I consider the appropriate order is that there be no order as to costs of the claim or the appeal.

50. Therefore, again subject to any submissions on the form of the order, I would order that (i) paragraph (6) of the Order of Judge Perkins dated 10 October 2016 be quashed, and (ii) there shall be no order for costs in respect of the claim or appeal.

Postscript

51. As I indicated at the outset of this judgment, it was hoped that the approach of the court in relation to these applications would assist in the resolution of other appeals in which similar points arise. I do not know the extent to which this judgment might assist in resolving other cases. However, it seems to me that the parties in those cases should be given some time to consider their position, and agree a consent order if possible, in the light of this judgment.

52. I therefore propose that that parties in those cases have until 31 July 2018 to attempt settlement; and that, by 17 August 2018, the Secretary of State through the Government Legal Department updates this court on the progress of those negotiations. Of course, that direction does not prevent any party making any application to court that it considers appropriate in the circumstances of a particular appeal.