IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: JR/1260/2016

Field House
15-25 Breams Buildings
London
EC4A 1DZ

22 March 2017 and 27 April 2017

Before:

UPPER TRIBUNAL JUDGE GLEESON

Between:

HABIB

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

MR RAJIV SHARMA appeared on behalf of the Applicant on 22 March 2017. The applicant appeared in person on 27 April 2017.

MR COLIN THOMANN appeared on behalf of the Respondent at both hearings.

APPROVED JUDGMENT

UTJ GLEESON: The applicant has permission to challenge by judicial review the respondent's decision on 5 November 2015 to revoke his indefinite leave to remain in the United Kingdom on the grounds that he has used deception. The applicant is a Bangladeshi citizen: he has with him in the United Kingdom his Bangladeshi citizen wife, who still has indefinite leave to remain and their child, who was born here in 2010 and is a British citizen.

Background

2. The applicant has been in the United Kingdom since August 2002, studying first for a law degree at the University of London, then the Legal Practice Course, taken at the University of Thames Valley (now the University of West London) with a view to qualifying as a solicitor. The applicant had leave to remain continuously as a student or on post-study leave until 30 September 2012. All of the applicant's applications for leave to remain were made before previous leave expired.

3. The deception in question relates to the applicant's reliance in an application in January 2012 on an ETS/TOEIC test which he claims to have taken on 15 November 2011 at Elizabeth College. The applicant relied upon that test result to gain his last period of Tier 4 (General) leave on 14 January 2012, which helped to establish the 10-year period he then relied upon when applying for indefinite leave to remain.

4. The respondent considers Elizabeth College to be a 'fraud factory' and that no test taken there at that time, even where sat in person, can be regarded as genuine. It is the applicant's case that his certificate is genuine and that he did attend and take the test personally at Elizabeth College. The applicant was granted indefinite leave to remain in the United Kingdom in May 2013, along with his wife, and their daughter was then recognised as a British citizen. She is 7 years old now.

5. From 2007-2009, when he had post-study leave, the applicant ran an OISC advice practice, before resuming his studies in 2009, hoping to achieve a Masters' degree in Law (LLM). Those studies were interrupted by health problems, which the applicant describes simply as 'stress', and when he began again in 2012, the applicant was affected by the tightening of the Rules as to English language competence and qualifications. His College required him to sit an ETS/TOEIC test before they would provide a CAS.

6. The applicant is not a qualified solicitor, nor, presently, is he a solicitor in training. He has undertaken several post-graduate diploma courses, and a number of unpaid internships with law firms, but has not been offered a training contract by any of them. The applicant ascribes this to 'high competition'.

7. The Elizabeth College fraud was discovered during the respondent's Immigration and Intelligence Directorate *Project Façade* investigation, for which an interim report was produced in 2014. On 11 January 2015, the applicant came to adverse notice when he was arrested for taxi touting.

8. The respondent's look-up tool identified the applicant as one of those who used a 'pilot' or proxy test taker, and his ETS TOEIC certificate was withdrawn on that basis. The applicant's indefinite leave to remain was revoked on 5 November 2015. He was served with notice of revocation of indefinite leave and of his liability to removal. His wife's indefinite leave and his daughter's British citizenship were not affected.

9. On 27 April 2015, the applicant applied for naturalisation as a British citizen, but failed to respond to two biometric information letters from the respondent. On 19 July 2015,

the respondent's immigration enforcement team attempted to visit him at his home, but could not gain entry. On 22 January 2016, the respondent refused the applicant's application for naturalisation. There is no challenge to the refusal of naturalisation or to the Article 8 ECHR element of the respondent's decisions.

10. On 18 November 2015, with the assistance of Dynamic Solicitors, the applicant challenged the revocation of his indefinite leave to remain, based upon his Article 8 ECHR private and family life. The applicant's solicitors served a Pre-Action Protocol letter on 3 December 2015, and the respondent replied, maintaining her decision, on 7 December 2015. The respondent has invited the applicant to make a paid Article 8 application, but the applicant has not done so.

11. On 4 February 2016, the applicant, acting in person, issued judicial review proceedings, challenging only the revocation of indefinite leave to remain.

Permission for judicial review

12. Permission for judicial review was granted by Upper Tribunal Judge Blum at an oral renewal hearing on 4 May 2016 on the basis that:

> "1. In circumstances where the respondent would have been aware (i) of the criticism levelled against the methodology employed by ETS in determining whether a proxy tester was used (*R on the application of Gazi v Secretary of State for the Home Department (ETS – judicial review) IJR* [2015] UKUT 00327 (IAC)) especially at [8]-[15], and (ii) the applicant's educational background (he was awarded an LLB in 2004 and completed the Legal Practice Course in 2007), it is arguable that the respondent was required to give the applicant an opportunity to make representations prior to her decision to revoke his ILR.
>
> 2. It is additionally arguable that, in light of the criticism in *Gazi* and the fact that the respondent was in possession of the expert report form Dr Harrison since at least March 2015, there was no 'worthwhile evidence' before the respondent of deception practised by the applicant, and that the respondent was not rationally entitled to conclude that the applicant exercised deception, a conclusion underpinning the challenged decision.
>
> 3. Although it did not form part of the judicial review grounds the Upper Tribunal may also wish to consider whether the respondent lawfully applied section 76(2) of the Nationality, Immigration and Asylum Act 2002, given that the applicant did not appear to rely on his ETS test result in his ILR application, although regard will need to be given to section 7.12 of the ILR application form."

13. Mr Sharma for the applicant accepted that following *Abbas*, ground 3 is unarguable, and it was not pursued at the hearing.

Upper Tribunal hearing

14. The Upper Tribunal is seised therefore only of the question whether the respondent's revocation of the applicant's indefinite leave to remain in the United Kingdom was lawful. The existence of the Secretary of State's power to revoke indefinite leave under section 76 of the Nationality, Immigration and Asylum Act 2002 (as amended) depends on deception having been used. In the light of the decision of Mr Justice

William Davis at [7] in *R on the Application of Abbas v Secretary of State for the Home Department* [2017] EWHC 78 (Admin), it was common ground that the Upper Tribunal is required to make a finding of precedent fact as to whether the applicant used deception.

15. This application had previously been adjourned by consent, to await the outcome of a number of relevant Upper Tribunal decisions, which have been reported as *R on the application of Saha & Another v Secretary of State for the Home Department* (Secretary of State's duty of candour) [2017] UKUT 17 (IAC) (*Saha*), *Mohibullah, R (on the application of) v Secretary of State for the Home Department* (TOEIC - ETS - judicial review principles) [2016] UKUT 561 (IAC) (*Mohibullah)*, and *MA* (ETS - TOEIC testing) Nigeria [2016] UKUT 450 (IAC) (*MA (Nigeria)*).

16. All of those decisions now having been promulgated, the application has been restored for substantive judicial review.

Evidence

17. The applicant's evidence consists of his witness statement and his oral evidence. He has not called for the sound files for his test and there is no independent evidence to show whether he took the test personally.

18. The respondent relies on evidence which she says shows that the Elizabeth College ETS/TOEIC testing was a 'fraud factory', as follows:

    (a) *Project Façade – criminal inquiry into abuse of the TOEIC, Elizabeth College, London (Criminal Investigations (Immigration)* dated 15 May 2015. This document, prepared by Detective Inspector Andrew Carter of the Immigration and Enforcement Criminal and Financial Investigation Team, would have been within the respondent's knowledge when she made her decision in November 2015.

    (b) witness statements and supporting documents from Rachel Green (17 February 2017) and Adam Sewell (6 January 2017);

    (c) expert evidence from Professor Peter French (20 April 2016) and Richard Heighway (26 July 2016); and

    (d) ETS' responses to questions from the Government Legal Department, provided on 9 March 2016.

Applicant's evidence

19. The applicant gave oral evidence against a witness statement signed on Monday 20 March 2017. He produced further documents at the hearing. In the interests of justice and the overriding objective, there being no objection from Mr Thomann on behalf of the respondent, I admitted the additional evidence and the witness statement. In his witness statement, which the applicant prepared himself, he gave his address as "Warnar Place, London E2" (in context, Warner Place in Tower Hamlets). At the

hearing, he adopted his statement and asked that it stand as his evidence in chief.

20. The applicant's witness statement reminds me that he has cooperated with the Rules and apart from the present difficulty, he has neither overstayed nor been in the United Kingdom without leave at any time in the last 15 years.

21. Due to unspecified health issues, for which there is no medical evidence before me, the applicant did not complete his LLM examinations as originally planned. He deferred them to July/August 2012, and was caught by the change in the Rules in July 2012, such that the College where he wished to study then required a certificate of English language competence. The applicant had studied in English since arriving 10 years earlier, but had never previously been required to take a language test.

22. The applicant was living in Bow, London E3 and he searched for a test centre on the internet. In the final week of October 2011, the applicant selected Elizabeth College in Stewart's Road, SW8, about 10 minutes' walk from Vauxhall Underground Station, and 40 minutes to 1 hour from his home in Bow. In his oral evidence, the applicant accepted that there were other testing centres, much nearer his home, which had test dates available in December 2011.

23. The applicant described his two visits to the College, the first to pay his fee in cash, and the second to sit the test, in his witness statement at [11]-[15]:

> "11. The College was at First Floor. Sign Board was placed outside the building. I went up-stair and spoke to the receptionist. There were persons working as receptionist. There was a que [sic] at the receipt [sic] and 2 people were already waiting for call. A white girl called me. She checked my Passport (ID documents) and proof of address from the bank statement. She took copy of my documents and asked to complete registration form which I did. Afterward, she asked for fee which I paid for the sum of £175 in cash. She given me receipt for the payment and booked my test for 15 November 2011.
>
> 12 On 15 November 2011, I west [sic] to the College for test at 9.30. I reported at the reception. I was asked to confirm name, date of birth, address and test ID. I was asked to wait. There were about 9-10 other test takers/students.
>
> 13. There were 2 parts in the test. Each part has 2 modules. 1st part was for speaking and writing test and 2nd part was listening and reading test.
>
> 14. I was sent to a room to do the listening and reading test. I was given headphone with speaker. The test was computer based. First part took place in the morning session and the 2nd part in the afternoon.
>
> 15. After 20 days I received my Test Certificate which I provided to my College (London East Bank College). …
>
> 21. I confirm under oath that I have never exercised [sic] deception or misrepresentation. The Home Office has revoked my indefinite leave to remain without giving me an opportunity to explain my position.
>
> 22. I request the immigration judge to kindly order the Home Office for the

> reinstatement of my Indefinite Leave to remain as my life is on hold and I am caused undue mental distress, depression and anxiety. My career is destroyed because I could not pursue for a Training Contract to qualify as a Solicitor of England and Wales for which I have invested huge amount of money, efforts, time and hard work."

24. The applicant was tendered for cross-examination. His oral evidence was given very quietly, and I had to ask him to speak up several times. Sometimes, it seemed that he misunderstood the question, as he gave answers which would have been appropriate for a different question altogether. I reframed the question (sometimes twice) and the appellant then answered it. The following is a summary of the evidence he gave in cross-examination.

25. The applicant confirmed that he had lived in Bangladesh until he was 35 years old, and that English is not his first language, as is apparent from some grammatical infelicities in his witness statement (see above).

26. The applicant confirmed that he had not previously sat any English language examinations nor been tested for his language competence in English. His University of London LLB studies were undertaken at Holborn College, which provided tuition. He attended Holborn College for lectures. He obtained his qualification on the basis of a written examination only. The applicant had not disclosed to the respondent, nor had he brought with him for the Upper Tribunal hearing, the academic transcript showing the detail of the marks achieved when he took his Masters degree. The applicant said he had it at home.

27. The applicant did bring to the Upper Tribunal hearing a number of other previously undisclosed academic records which, in the interests of justice and without objection from Mr Thomann, were exchanged over the short adjournment and admitted as bundle 3. They confirm that in July 2007, the applicant obtained a Post-Graduate Diploma in Legal Practice from Thames Valley University in July 2007, which he passed with distinction.

28. The applicant stated that during the period 2007-2009, when he had a post-study work visa, he had a practice as an OISC immigration adviser. In 2009, he began his LLM studies and was no longer entitled to work in that role, so he closed his OISC practice. The applicant said that he had been unable to complete the LLM because of health problems, but when pressed, he simply cited 'stress' as the problem. There was no medical evidence to support his assertion that he was not medically fit to complete his studies until 2012.

29. The applicant asserted under cross-examination that the revocation of his indefinite leave to remain had prevented him obtaining a training contract enabling him to qualify as a solicitor. When it was pointed out to the applicant that his indefinite leave was not granted until May 2013 and was revoked in November 2015, the applicant corrected his evidence and accepted that the revocation of his indefinite leave had nothing to do with his inability to obtain a solicitors' training contract. The applicant was disappointed; he felt that the firms had taken advantage of him, giving him hope without any real intention of providing a training contract.

30. The applicant was asked about the process which led to his selecting Elizabeth College for his English language test, in October 2011. He said that he needed an English language qualification at Level B2 before his leave expired on 15 January 2012. The applicant explained that he had approached several providers of English language qualifications, and that certainly, there had been providers nearer to his home in Bow than Elizabeth College, which was in Vauxhall, a journey of 40 minutes to 1 hour by underground and on foot.

31. The applicant's evidence at this point was confusing as he misunderstood the question and it had to be repeated several times. His evidence, when clarified, was that the dates which the East London centres could offer were for tests in late December 2011. He was concerned that the result would not come through in time for his application which had to be in by 15 January 2012 at the latest.

32. The applicant visited Elizabeth College a few weeks before he took his test, and paid in cash. He has never disclosed the receipt, but claimed in his evidence that he still had it at home. He thought the amount was £175. It had not occurred to him to pay by cheque, card or BACS, and Elizabeth College had not suggested that to him.

33. Mr Thomann put to the applicant that the real reason he had travelled nearly an hour from his home, to pay the fee and produce his ID documents, was that he was arranging with Elizabeth College for a proxy test taker and that a cash payment was essential, so that there should be no record of the amount paid. The question was asked twice, and each time the applicant appeared to respond to a different question from that which was asked: the first time, he said, 'No, they said it would take 15-20 days for the certificate after the examination'. The second time, asked directly whether the payment was in cash so that there was no trace of paying the proxy test taker, the applicant said that he did not know why he had paid in cash: Elizabeth College had not asked him for cash, he just paid that way.

34. The applicant said he had attended Elizabeth College on 15 November 2011 and sat the test personally. He had no recollection of what questions were asked. The applicant said he had noticed nothing untoward at the centre. He only knew that he had personally taken the test, and that others did so at the same time. The applicant's evidence was that there were 9 or 10 other candidates there on 15 November 2011. The applicant was shown the respondent's look-up tool which showed that 65 people had attended each session on that day. He then changed his answer, saying that he meant that there were 10 people in the room where he took the test, including him. That answer is inconsistent both with his witness statement, which described 10 people waiting in reception, and his immediately preceding oral evidence.

35. Mr Thomann put to the applicant that Elizabeth College was a fraud factory, organising proxy test takers for those who were nervous about not getting the desired outcome from the test. The applicant said he did not know that. He had confidence that he could do the test himself. He was asked to confirm that English was his second language: the applicant responded that he had confidence that he could do the test himself. I asked him to answer the question and he confirmed that English was his

second language. He said everyone made mistakes in their English, but all the courses he had taken were in English.

36. Mr Thomann put to the applicant that the English in his witness statement was peppered with grammatical errors: the applicant said he was stressed and ill when preparing it. I asked him what illness he had: the applicant said, he meant that he was stressed.

37. The applicant was asked why he and his representatives had not called for the voice recording of his test, which was available from ETS. He said:

> "I didn't think so I need it. I was unaware and I didn't ask for the voice recording. I sat the test myself. I did sit the examination myself sir."

38. Mr Thomann put to the applicant that he had produced no receipt or supporting evidence to confirm that he had taken the test personally, and that, in fact, it was not he who sat the test that day. The applicant said he did not know who to call to find out. He continued:

> "You see the College what happened, why is happened this, I forgot to write about going back to the College."

Mr Thomann concluded his cross-examination by putting to the applicant that it was untrue that he went to Elizabeth College on 15 November and sat the examination. The applicant replied that it was true.

39. In re-examination, Mr Sharma confirmed with the applicant that he had worked as an OISC adviser until 2009, during the period when he had Post-Study Leave. In 2009, he registered as an LLM student and stopped his OISC practice. The applicant said there was no particular reason, he just wanted to study further. He had brought money over from Bangladesh at that time to enable him to continue his studies. He had already passed the LLB and the LPC, both of which were taught in English. The applicant was now unsure whether, in fact, he had the College receipt as he had stated earlier in his evidence: he had changed many things.

Respondent's evidence

Project Façade

40. The respondent in her decision relied on the May 2015 *Project Façade* report, a nationwide Home Office criminal undertaken following the February 2014 Panorama investigation, which identified a number of colleges and test centres which had corrupted the TOEIC process, including allowing proxy test takers. The *Project Façade* report explained that the Home Office entered into a licence agreement with ETS in April 2011, to provide English language testing for certain types of visa applicants. ETS Global then entered into agreements with a number of private test centres, as well as administering tests overseen by their own staff at 2 secure public test centres.

41. The *Project Façade* review comprised 21 separate criminal investigations into specific

test centres, prioritised according to a number of factors, including high test volumes, audits which highlighted cheating, and other intelligence and information indicating widespread abuse of the examination. The report makes clear that it is an interim report and that the criminal investigations into ETS/TOEIC test centres were ongoing.

42. ETS' own investigation used voice analysis software, corroborated by 2 human assessors, and identified 33725 invalid scores and 22694 questionable scores. In contrast, at ETS Global's public test centres in Bloomsbury and Westminster, between 11 April 2011 and 9 February 2014, there were 1039 tests, of which 3 were found invalid and none questionable. In the majority of the private test centres, the level of cheating was high. In some private test centres, thousands of tests were invalidated: in one centre, 88% of the results were rated 'invalid'.

43. Between 18 October 2011 and 26 September 2012, Elizabeth College had administered 2919 TOEIC speaking and writing tests. ETS identified 2074 (69%) results as invalid and 1845 (31%) as questionable. Audits conducted at the centre reflected widespread cheating: one invalid test taker admitted having used a proxy; the ETS auditor identified a suspect proxy sitting a test during the audit visit; and financial enquiries established that payments from six TOEIC candidates, well in excess of the test fee, were made into a named director's account.

44. None of the Elizabeth College results were accepted as genuine. None of the ETS voice samples checked against the voices of candidates interviewed under caution was a match.

Mr Adam Sewell

45. Adam Sewell is the lead Home Office Analyst in relation to Secure English Language Testing analyst since February 2014. He has been responsible for collating, analysing and presenting data within the respondent's Immigration and Intelligence Directorate in Sheffield, since 13 January 2014.

46. Mr Sewell's statement, dated 6 January 2017, introduced and explained the updated Home Office Elizabeth College report he prepared in January 2017, the conclusions of which were that:

> "**Key Judgements**
> 1. The majority of tests at Elizabeth College were not conducted under genuine test conditions.
> 2. The results reported by Elizabeth College are not a true reflection of the English ability of the candidates."

47. The January 2017 paper stated that Elizabeth College operated 8410 TOEIC tests between 18 October 2011 and 29 September 2012, which were compared to those of Pearson Test Centres, which the respondent considers is an organisation conducting genuine tests. Candidates were recorded by Elizabeth College as having English language ability at the higher end of the score range, consistent with those of candidates at other TOEIC test centres where abuse was known to have taken place,

and significantly better than those at Pearson test centres.

48. Proxy test takers had now been identified by ETS at Elizabeth College in 201 of the 2014 speaking and writing sessions, indicating that abuse was widespread and occurred throughout the entire period that Elizabeth College offered TOEIC tests. As regards listening and reading tests, the summary says this:

> "8. Analysis of listening and reading test results at Elizabeth College shows several abnormal patterns that are not consistent with tests conducted under genuine test conditions. Some of these patterns are extreme and can only be attributed to the deliberate manipulation of test results. The batching and clustering of results towards specific areas of the score range that correspond to the requirements of immigration rules indicates that results were manipulated in order to provide candidates with the scores that they required for immigration purposes.
>
> 9. These concerns were not limited to a small number of individual candidates but were widespread throughout the entire period that Elizabeth College test centre was offering TOEIC tests."

49. The summary is supported by graphs illustrating the results obtained: the difference between the Pearson and the Elizabeth College test results is striking, with the Pearson College results being distributed across all grades, but the Elizabeth College grades focused only on those grades which would meet the respondent's English language requirements of 160 points (the applicant scored 160 too). Appended to Mr Sewell's report is a detailed day by day summary of the test sessions at Elizabeth College. On 15 November 2011, when the applicant claims to have taken his test, there were 4 sessions: two groups of 65 sat Speaking and Writing tests, and two groups of 26 and 45 sat Listening and Reading. On any view, there were more than 9 or 10 people at the test centre that day.

50. The Elizabeth College evidence and Mr Sewell's reliability as a witness were considered by the Upper Tribunal in *Saha* at [58]-[59]:

> "(57) In his statement Mr Sewell describes himself as an Analyst within the Home Office Immigration and Intelligence Directorate. Through questioning we satisfied ourselves about Mr Sewell's credentials to give the evidence contained in his statement. We accept that from February 2014 he has had the designation of Lead Analyst in relation to Secure English Language Testing ("SELT"), following which he completed his training in Government intelligence analysis techniques.
>
> (58) Since February 2014, Mr Sewell and the members of the team which he leads have been engaged in analysing data provided to the Home Office by ETS. His witness statement contains the following especially material passage:
>
> > " Wider analysis of tests conducted by the Elizabeth College Test Centre and the results of voice analysis conducted by [ETS] reveals that there was widespread abuse of testing by the Elizabeth College Test Centre. Multiple candidates that reportedly sat speaking and writing tests at the same time in the same classroom as the Applicant were deemed to have used proxy test takers by [ETS] . This shows that the Elizabeth College Test Centre was not operating genuine tests under genuine test conditions at the time that the Applicant claims

> to have undertaken [his] tests. *Therefore none of the results from these test sessions could be considered genuine even if the candidate had sat the test in person.*" …
>
> (59) Having subjected Mr Sewell's evidence to careful scrutiny we find no reason to reject any of its essential tenets." *[Emphasis added*]

Rachel Green's evidence

51. Rachel Green is a Senior Executive Officer in the respondent's Litigation Operations, and a Team Manager with management responsibility for two case-working teams. Ms Green has worked for the respondent in that capacity at Lunar House in Croydon since November 2006. Before that, she was an asylum caseworker, charged with interviewing asylum claimants and making decisions on their claims. Ms Green has worked in Asylum Processes, in which capacity she produced instructions for UKVI staff.

52. Since November 2016, Ms Green has been the Central Lead on ETS for the respondent's Appeals, Litigation and Subject Access Directorate (ALS), in which role she coordinates the respondent's ETS handling strategy. Her witness statement dated 17 February 2017 is directed at enabling the Upper Tribunal to understand how evidence of an invalid TOEIC test result, obtained from ETS, is obtained via what the respondent describes as her 'revised look-up tool'.

53. The revised lookup tool was developed in April 2016, following the hearing in *SM and Qadir,* and is an Excel spreadsheet enabling the respondent to search a list of thousands of test certificates provided by ETS, by date, test centre, morning or afternoon, total tests at a particular test centre, and by 'count and %' which shows the number of tests which ETS designated as 'released' (deemed reliable or valid by ETS), questionable, or invalid, and as a percentage of the total. Finally, there are average test scores which Ms Green says 'shows the mean average [sic] of all the scores from the selected data'. All of these analyses are of ETS' assessment of the testing.

54. Annexed to Ms Green's statements at Annex A are a full screenshot of the revised look up tool. Annex B is a percentage analysis of the results for 15 November 2011 at Elizabeth College, the date the applicant claims to have attended his test. Annex C shows the detailed results for 15 November 2011, bringing up all the test results for that time and that day at Elizabeth College.

55. The results are stark. Annex A is merely illustrative. Annex B shows that there are 0 'released' results at Elizabeth College for 15 November 2015; 103 questionable, and 27 invalid, which is 27% of all the tests taken that day. The average test scores on that day were 153.9 for speaking and 160.2 for writing.

ETS responses (Jones Day solicitors)

56. The respondent in these proceedings is engaged in litigation with ETS and she produces a schedule of responses to questions she has posed to ETS via their solicitors, Jones Day. The covering letter does not make it clear whether those answers were obtained in the respondent's proceedings against ETS or for the purpose of the present

proceedings.

57. The answers given go to the process of reviewing recorded voice files, and the training of the reviewers. At [20], Jones Day say that:

> "…the voice files 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 for the test centre to make any amendments to those responses. As such, the voice files of a test taker cannot be submitted as the speaking test of another individual."

58. At [22], the firm responds that there was no expected false negative rate and no benchmarks.

Expert evidence

59. The headline conclusion in the *Project Façade* paper was that between 18 October 2011 and 26 September 2012, which includes the date when the applicant claims to have sat his test, there was 'organised and widespread' abuse of TOEIC testing at Elizabeth College. In particular, of those ETS voice samples which were compared with the voices of candidates interviewed under caution, not one matched, suggesting the use of proxy test takers. The *Project Façade* report noted that 'financial enquiries had established' that 6 candidates had paid monies well in excess of the test fee into a named director's account. One taker of an 'invalid' test had admitted using a proxy test taker and named the agent.

JP French Associates

60. The bundles contain two reports from JP French Associates, the first dated 5 February 2015 by Dr Philip Harrison, and the second, 17 January 2017, by Professor Peter French. In JP French's website, the firm describes itself thus:

> "J P French Associates is the country's longest established independent forensic speech and acoustics laboratory. We are experts in forensic voice analysis, transcription, authentication and audio enhancement, as well as providing a number of other forensic speech and audio services. Our experience in producing reports and giving evidence is unrivalled in the UK. In criminal cases, we work for both prosecution and defence. We also provide advice and training services to law enforcement agencies and lawyers across the world."

61. Dr Philip Harrison (BEng MA PhD MIOA), who wrote the 2015 report, describes himself as is a forensic consultant, specialising in the areas of acoustics, phonetics and the analysis of evidential recordings. He has worked at J P French Associates for 18 years and has expertise in authentication, enhancement, transcription and speaker comparison. He carries out research in the fields of forensic speech and audio analysis: in the efficacy of acoustic analysis software, measuring the performance of biometric systems and evaluating methods for expressing the strength of forensic speech evidence.

62. At [7], under the heading Summary and Conclusions, Dr Harrison noted that false

positive errors can occur in automated systems, where recordings from two tests may be identified as being from the same speaker, when in fact they are different speakers. Dr Harrison continued:

> "At the level of principle, the overall method [of auditory-acoustic phonetic comparisons] 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 [the respondent's witnesses in *SM and Qadir*], concerning the specific implementation. That means that it is not possible adequately to 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. …
>
> In conclusion:
>
> 1. Given the large number of [TOEIC] 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."

63. Professor Peter French (BEd, BLing, PhD, FRSA, FIOA) describes himself as an experienced expert in the field of forensic speech and acoustics and chairman of J P French Associates. He has worked in the field for 30 years and, as well as carrying out research, has been involved in implementing quality regulation and accreditation for forensic speech science. In his 20 April 2016 report, considered and accepted in *Saha* in January 2017, the summary of Professor French's opinion is set out at [4]:

> **"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, paragraph 31), would, in my view, have resulted in substantially more false rejections [of the proxy server allegation] 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. …
> 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."

Kroll Ontrack Legal Technologies Limited: Mr Richard Heighway's report

64. A report from Mr Richard Heighway of Kroll Ontrack Legal Technologies Ltd (Kroll) is headed 'strictly private and confidential' and was prepared for *MA*'s case. I have seen no evidence that either Mr Heighway or Kroll have been approached to give permission for this report to be reused in unrelated proceedings, for which presumably no additional fee has been paid.

65. At [19], in the Conclusions to the Kroll report, Mr Heighway's opinion is that it would be extremely difficult to manipulate the audio recordings of a candidate, either deliberately or accidentally. He sums up thus:

> "19.1.19 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 taker's recording to a different candidate, or that a genuine test taker's recording would be submitted by multiple candidates."

Professor Peter Sommer

66. Professor Peter Sommer is Professor of Digital Evidence at Birmingham City University and a Visiting Professor at de Montfort University. He has previously been both a visiting Senior Research Fellow and later visiting Professor at the London School of Economics, and has held a Visiting Readership at the Open University.

67. He gave evidence to the Home Affairs Committee on 30 December 2016, having been instructed in June 2016 by Bindmans LLP on behalf of a client, Mohammed Mohibullah, who was challenging by judicial review a decision regarding an ETS/TOEIC test at Synergy College which ETS had designated as invalid. Mr Sommer and two other experts in that case were instructed to seek to agree a joint report, and did so. The experts identified a number of possible fraudulent methods:

- impersonation by a 'pilot' or proxy at the test centre, probably assisted by test centre staff to waive the required procedures;
- use of remote control software, a method discovered during Project Façade, an investigation into Elizabeth College, whereby the candidate appeared in person, but using TeamViewer, control of his test response was exercised in another room by a proxy test taker. As TeamViewer allows control of the host computer, the proxy could be anywhere in the world that had an internet connection;
- misleading data input by test centre staff or associates, or human error by staff;
- file manipulation, where computer records are changed by direct intervention by test centre staff or associates, either on the client or the management computer, such that fraudulent information was supplied to ETS.

68. The principal conclusions in the Sommer evidence, in relation to processes at Synergy College, are at [21]-[23] in his report:

> "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."

69. Professor Sommer considered that the respondent had not given the excluded candidates a chance to query their results, and had placed considerable pressure on the educational institutions where the candidates were registered. His opinion was that the respondent had not tested the reliability of the information ETS supplied to her and on which her decisions were based, and that an opportunity should have been given to the affected persons to retake a sound, reliable, TOEIC-like test once the unreliability of their test results was known.

Submissions

70. For the respondent, Mr Thomann relied on his skeleton argument. The chronology in this application was not in dispute. The respondent had revoked the applicant's indefinite leave because she considered that on 15 November 2011, he had caused a proxy test taker to take and pass his speaking and writing test at Elizabeth College. That decision was borne out by the evidence available to the respondent now as to how Elizabeth College operated, including specific evidence about the present applicant.

71. Mr Thomann suggested that the applicant's evidence as given at the hearing in the Upper Tribunal was consistent with that of a nervous candidate who might well have feared failing a genuine test. His written and oral evidence had been littered with grammatical mistakes, and he had never previously sat an English examination. The applicant was just 8 months away from being able to apply for indefinite leave and there was a great deal riding on the outcome of a test which would enable him to bridge that with a further period of study. The appeal of a guaranteed pass might be strong in such circumstances, whatever a candidate's actual English language ability.

72. In October 2011, when the applicant began making enquiries about an English

language test, he only had two and a half months left of his leave to remain before he needed to renew. The applicant lived near several local test centres, and Mr Thomann suggested that his choice to travel to Vauxhall from Bow, taking almost an hour, was inexplicable and unnecessary if he proposed to sit a genuine test.

73. Further, the applicant had travelled across London to Elizabeth College to make a cash payment in advance, allegedly for the examination fee. There might be many reasons for his doing that, but Mr Thomann submitted that it was another indication consistent with a fraudulent transaction. The Tribunal should consider that the journey may well have been made to pay additional sums in cash for the 'pilot' proxy test taker: the applicant had not produced a receipt for the cash payment, and there would be no electronic record of the actual sum paid.

74. Mr Thomann reminded me that the applicant had not sought to support his account by asking for the ETS voice recordings, from which he could have proved (if such was indeed the case) that he had taken the test himself. The applicant was unable to remember any of the questions set in the test, despite having a detailed (but inaccurate) recollection of the number of people at the test centre, the reception area, and so forth. That was a marked contrast to which the Tribunal should attach weight. The applicant's evidence was that he had noticed nothing untoward on the day of the test, despite the high levels of fraud which had subsequently been found to exist at Elizabeth College.

75. Additionally, Mr Thomann submitted that the Upper Tribunal in the present case was entitled to rely on the finding in *Saha* that no one, whether they sat their TOEIC test at the College or used a proxy test taker, should be regarded as having gained a genuine qualification.

76. Applying the ordinary civil standard of proof, Mr Thomann submitted that the Tribunal was entitled to conclude that it was more likely than not that the applicant did not sit the test and that his account was a fabrication. Overall, Mr Thomann submitted that the respondent had discharged the burden on her of showing that the precedent fact required to trigger section 76 of the 2002 Act was present.

77. Turning to the decisions in the lead cases, for which this application had been held back, Mr Thomann referred to the decision of the UTIAC President, Mr Justice McCloskey in *MA* at [57]:

> "(57) Second, we acknowledge the suggestion that the Appellant had no reason to engage in the deception which we have found proven. However, this has not deflected us in any way from reaching our main findings and conclusions. In the abstract, of course, there is a range of reasons why persons proficient in English may engage in TOEIC fraud. These include, inexhaustively, lack of confidence, fear of failure, lack of time and commitment and contempt for the immigration system. These reasons could conceivably overlap in individual cases and there is scope for other explanations for deceitful conduct in this sphere. We are not required to make the further finding of why the Appellant engaged in deception and to this we add that this issue was not explored during the hearing. We resist any temptation to speculate about this discrete matter."

78. There was nothing unusual or untoward in the immigration decision-making context in a decision being made on deception on the documents alone, without an interview or a hearing. In relation to the applicant's allegation that it was procedurally unfair for the respondent to have revoked his indefinite leave without giving him an opportunity to be heard, that issue was academic if the Tribunal found, having heard the applicant and all the evidence today, that the precedent fact, deception, was proved. Even if the decision were remade on this ground alone, the outcome would be the same on the ample evidence of fraud now before the Tribunal and in the respondent's possession. Nothing would be gained by quashing the decision on that basis.

79. The respondent's door remained open to further material and submissions, including human rights submissions. She had demonstrated that already, by being prepared to reconsider her position following the applicant's Pre-Action Protocol letter.

Applicant's submissions

80. Mr Sharma for the applicant relied on his skeleton argument. The question for the Upper Tribunal in deciding on whether deception as a precedent fact had been proved was to be decided to the ordinary civil standard of balance of probabilities. The applicant would rely on *PS* (paragraph 320 (11) discretion: care needed) India [2010] UKUT 440 (IAC), albeit that decision dealt with an entirely different context; on *Shen* (paper appeals: proving dishonesty) [2014] UKUT 236 (IAC); and on *Shehzad v Secretary of State for the Home Department* [2016] EWCA Civ 615 which established that the respondent's generic evidence established a case to answer on ETS/TOEIC and dishonesty.

81. There was then an evidential burden on the applicant to proffer an innocent explanation which satisfied the minimum level of plausibility, and if so, the respondent would bear the burden of showing that the *prima facie* innocent explanation should be rejected, on the balance of probabilities. Even an unsatisfactory performance in oral evidence (*SM and Qadir* at [86]) might not prevent a Tribunal considering such a witness to be a witness of truth.

82. In this application, the applicant had not been given the opportunity of providing an innocent explanation. At [82] in the *Mohibullah* decision, the Upper Tribunal had criticised an appellant who was aware of the gist of the respondent's allegations for 4 months before she took her negative decision, but did nothing. The present applicant had not been given even the gist of the allegation at any time before the respondent's adverse decision was made. The challenge here was a process challenge, not a substantive challenge: the applicant would rely on *R on the application of Thapa v Secretary of State for the Home Department* [2014] EWHC 659 (Admin) at [4] and [5] in which Helen Mountfield QC considered whether judicial review was appropriate even where an out of country right of appeal existed. It does not appear to me that the decision in *Thapa* is of much assistance in the present case.

83. Mr Sharma recites the change in the judicial headnote for *SM and Qadir*. The only relevant headnote is that which currently appears. He submitted that the respondent's decision making process was flawed and reserved the right to make

submissions about the respondent's evidence. Mr Sharma sought permission to relyon the assessment by Upper Tribunal Judge Lindsley of Professor French's report in *Kadivar v Secretary of State for the Home Department* [IA/42545/2104]. The applicant would ask the Upper Tribunal to quash the decision under challenge, with costs in favour of the applicant and any other appropriate order.

84. In oral submissions, Mr Sharma accepted that the respondent had raised a case to answer and that the generic evidence in this application went further than that which was considered in *SM and Qadir* or in *Shehzad.* The applicant's witness statement had been delivered late and contained responses to the respondent's submissions.

85. Mr Sharma argued that the applicant had raised an innocent explanation which satisfied the minimum level of plausibility: he had completed an LLB degree and the Legal Practice Course, and had practised as an OISC representative for 2 years, all of which argued that he had significant English language capability. The applicant had taken a number of other examinations set and marked in English.

86. There was no reason for the applicant to remember the questions asked in this particular test. The applicant's evidence, although the Tribunal might consider it poor, was no worse than that of the applicants in *SM and Qadir,* or *Abbas,* and should be treated as credible. The applicant was one person, dealing with the case alone. The respondent had a deep-rooted, heartfelt interest in the outcome of these applications overall, and the advantage of being in contact with Jones Day, who were representing ETS in litigation between the respondent and that company.

87. Mr Sharma relied on the judgment of Lord Justice Richards in *R on the application of Giri v Secretary of State for the Home Department* [2015] EWCA Civ 784 at [20], which distinguished the power of the Secretary of State under section 3 of the Immigration Act 1971 from that under section 10 of the Immigration and Asylum Act 1999:

> "20. 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 (see paragraph 13 above). 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*. …
>
> 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 *R (Mehmood and Ali) v Secretary of State for the Home Department* [2015] EWCA Civ 744."

There was here a question of precedent fact, which the Upper Tribunal must

determine, that is to say, whether the applicant had used deception.

88. Mr Sharma observed that in the present case, the applicant did not have any alternative remedy. The applicant had lost his indefinite leave to remain and if that decision were upheld, he would no longer be in a position where he could show 10 years' continuous lawful leave in the United Kingdom. The applicant would not be able to reapply for indefinite leave to remain. He would be repatriated, and refused entry to the roll of solicitors in England and Wales. Mr Sharma submitted that those consequences were much greater that what faced the average unsuccessful immigrant.

89. Mr Sharma considered it unfair to criticise the applicant for not seeking copies of the recordings of his voice for the test he claimed to have taken: he submitted that this formed part of the respondent's second evidential burden, to make her case, rather than the applicant's duty to provide a plausible explanation. The respondent had not produced any copy of the ETS test certificate, nor any independent documents from ETS or voice recording of the applicant's tests, to support her allegation that the applicant had not taken the examination himself.

90. Mr Sharma argued that the applicant was a confident individual who had studied previously, and passed, difficult courses in English, including an advocacy course. He had no need to take a fraudulent TOEIC test, as his LLB degree exempted him from taking one. In January 2012, the respondent did not require such a test for a Tier 4 visa: it was the College where the applicant wanted to study which had required this qualification. Once the ETS/TOEIC test result had been used to obtain a CAS, the applicant was obliged to send it to the respondent with his application, although it was not otherwise required to evidence his English language ability.

91. I reminded Mr Sharma of the grammatical infelicities in the applicant's witness statement, and the occasions during the applicant's evidence when questions had been repeated and reframed, or where the applicant had answered a different question, or spoken too softly for his answer to be heard. Mr Sharma responded that poor English in the applicant's witness statement was nothing to the point, and everyone made grammatical errors, including some which he identified in the respondent's detailed grounds of defence.

92. Mr Sharma accepted that the applicant's actual English language ability was not necessarily determinative of the question of deception: a candidate's motive for deceiving was not limited in that way and it was not for the Court or Tribunal to seek to identify the reason why a candidate had chosen to use a proxy test taker (see *MA* at [57]). The real question was whether there was enough evidence to suggest that this particular individual did use a proxy: if so, he would never become a solicitor.

93. Despite there being no challenge to the findings of fact in the grounds for review, and not having objected to any of the post-decision evidence, Mr Sharma sought to go behind the factual matrix. He argued that:

    (i) the ETS look-up tool which was relied upon was the respondent's summary of the ETS evidence, not the evidence of ETS itself, and the underlying evidence on

which the respondent's decision was based had not been produced;

(ii) it could not be correct that over an 11-month period at Elizabeth College, 100% of the qualifications obtained were either invalid or questionable. If that were true, Mr Sharma accepted that it would be outrageous, but that finding was so stark that, on the balance of probabilities, it should be rejected;

(iii) in any event, on the day on which the applicant sat his examination, many of the qualifications were rated merely 'questionable' rather than 'invalid' (though the applicant's was rated 'invalid'); and

(iv) that the evidence about there being 10 people taking the test, when the test results showed 65 people had done so, could be explained in a number of ways, for example by the candidates being split into smaller groups, 10 to a room.

The difficulty as far as the last point is concerned is that such was not the applicant's evidence.

94. Mr Sharma relied on *Kadivar* [IA/42545/2014], an unreported decision of Upper Tribunal Judge Lindsley promulgated on 8 July 2016. No objection was taken on behalf of the respondent, and in the interests of justice, I take that decision into account. *Kadivar* was a case where the respondent's Presenting Officer accepted that the applicant gave a credible account and was a reliable witness. That applicant was able to give some details about the speaking test. At [20]-[21] in *Kadivar*, Judge Lindsley considered Professor French's report, which said that there would be a certain number of false positives; that ETS held no data on the quality of the sound on the recordings; and so on. Given the lack of evidence that Mr Kadivar had in fact cheated, and his general credibility, Judge Lindsley did not accept that the generic evidence produced was sufficient to enable her to find, on the facts and to the civil standard of balance of probabilities, that the respondent was entitled to conclude that he had used deception. If the Upper Tribunal in the present case found the applicant to be a credible and reliable witness, Mr Sharma submitted that the same approach should be adopted in this application.

95. Mr Sharma relied on the evidence of Professor Sommer in relation to Synergy College, which indicated that ETS' process in dealing with proxy test taking was imperfect and that even genuine candidates could fall foul of procedures used to determine who had used a 'pilot' or proxy test taker.

96. Mr Sharma expanded on his skeleton argument as to procedural fairness. The applicant was not told, before the revocation decision was taken, that he was considered to be a person who had used deception by using a 'pilot' at Elizabeth College. The applicant had been given no opportunity to suggest an interview or provide other evidence. Had he had that opportunity, the applicant could have made the arguments he made now. In the Pre-Action Protocol reply, the respondent had indicated that she was prepared to consider further submissions, which was surely an indication that she accepted that her decision making was inadequate.

97. In reply, Mr Thomann for the respondent submitted that this was not a case where an applicant had provided a plausible explanation for the difficulties in his evidence. The

applicant's Counsel had produced an ingenious suggestion as to why the applicant said 10 people were there on the day, when the College's records showed 65 people, but the difficulty was that such submission did not reflect the evidence which the applicant had given.

98. As regards fairness, *Mohibullah* held that fairness was context-specific. There was nothing to be gained, on the facts of this application, by a fairness dispute.

Discussion

99. I begin by considering the guidance of Mr Justice William Davis in *Abbas* as to the correct approach to be taken:

> "7. It is agreed that the relevant principles to be applied are as follows:
> - …
> - Whether deception was used by the Claimant in this case is a precedent fact for the court to determine because the very existence of the Secretary of State's power as exercised in this case depended on deception having been used.
> - The legal burden of proving that the Claimant used deception lies on the Secretary of State albeit that there is a three-stage process. The Secretary of State first must adduce sufficient evidence to raise the issue of fraud. The Claimant has then a burden of raising an innocent explanation which satisfies the minimum level of plausibility. If that burden is discharged, the Secretary of State must establish on a balance of probabilities that this innocent explanation is to be rejected.
> - There is one civil standard of proof (which is the standard to be applied). The seriousness of the consequences does not require a different standard of proof but flexibility in its application will involve consideration of the strength and quality of the evidence. The more serious the consequence, the stronger must be the evidence adduced for the necessary standard to be reached."

100. Mr Sharma does not dispute that the first stage of the three-stage process is met. The next question is whether the applicant has raised an innocent explanation which satisfies the minimum level of plausibility, to the civil standard of proof of balance of probabilities.

101. The applicant says that the respondent's decision is unfair procedurally, and that he should have been given an opportunity to explain and comment on the evidence before his indefinite leave was cancelled. He has had that opportunity today: but a full opportunity to give whatever evidence he considered might assist him, the applicant has not produced a satisfactory explanation. The respondent was entitled to rely on the evidence before her that the applicant had taken a test at the 'fraud factory' Elizabeth College and there is no unfairness in her taking account of that in the present application.

102. The standard of English required by the College from whom the applicant sought to obtain a CAS was CEFR B2, which requires him to show the ability to understand the main ideas of complex text, on both concrete and abstract topics, including technical discussions in his field of specialization; to interact with a degree of fluency and spontaneity that makes regular interaction with native speakers quite possible

without strain for either party; and to produce clear, detailed text on a wide range of subjects and explain a viewpoint on a topical issue giving the advantages and disadvantages of various options.

103. It is right that this applicant had successfully obtained qualifications on a number of courses taught in English, and examined on paper. He had also practised as an OISC representative for 2 years. However, in his witness statement, as in his oral evidence, the applicant made multiple grammatical errors. His oral evidence was given very quietly, with the applicant having to be reminded to speak clearly, and the applicant misunderstood questions on a number of occasions, giving answers to a different question. It could not be said that interacting with the applicant during his evidence was without strain for either party.

104. I remind myself that the applicant's actual English language competence, whether at the date of decision or now, is not determinative of this application. It is not for the Upper Tribunal to seek to establish for itself the level of competence which the applicant has in the English language, or what other reason he might have had for choosing to pay someone else to take his test for him, as the respondent and ETS say that he did. As stated in *Abbas,* there are many reasons why a person might choose a dishonest, rather than an honest, way to obtain an English language qualification. This applicant had much to gain from a guarantee of a successful English language test, given how close he was to obtaining indefinite leave to remain in the United Kingdom.

105. The applicant's proffered explanation is no more than an assertion that he did indeed sit the test himself and had confidence he could pass it. His explanation for choosing Elizabeth College, now a known 'fraud factory', to which he travelled across London to sit the test, is unsatisfactory: there was a test centre locally, with available test dates just a few weeks later and if the applicant was as confident of his English language competence as he now asserts, he could more conveniently have taken his test there.

106. The applicant has not explained why he has not put in evidence the receipt for his cash payment, which he says he still has at home, and which could establish that he did indeed pay only the test fee, and not any additional money for a 'pilot' test taker to take the test on his behalf. Further, the applicant has not taken the opportunity to call for the voice records of his test and prove (if he can) that the voice on those records is his.

107. The applicant has been aware since November 2015 of the gist of the case against him, and he has been legally advised. I bear in mind that the applicant is not a layman: he has two law degrees and the Legal Practice qualification, and has practised as an OISC representative. The applicant can be taken to know the value of evidence. The applicant's evidence comes to this: that he chose a college far away from home, went there to pay in cash for his test in advance but has not produced a receipt for that payment, remembered incorrectly how many people attended the College on the day of his test, cannot remember any of the questions he was asked on the day and that he 'has confidence he can do the test himself'.

108. Overall, I am not satisfied that the applicant has provided an explanation which meets even the modest test of evidential plausibility required to shift the burden of proof to the respondent at the third stage.

109. Even if there were such a burden on the respondent in this application, I have no doubt that she would be able to discharge it. Having regard to the evidence before her in relation to Elizabeth College, and the finding that the applicant was one of those whose test was rated 'invalid', the respondent was entitled to conclude that the applicant had used deception. At the date of decision, the respondent had available to her the 2014 interim *Project Façade* report which indicated that an ongoing criminal inquiry relating to Elizabeth College had established that not one of the speaking and writing tests for TOEIC at that College was regarded as reliable. 69% of the tests were identified as invalid, and the remaining 31% were considered by ETS to be questionable.

110. The evidence which has become available since the respondent made her decision, that of Mr Sewell and the *Project Façade* report, is that the results from Elizabeth College were so unreliable that no test result from that College, even if an applicant sat the test himself, could be regarded as genuine. I place weight on the evidence of TDI Carter of *Project Façade* that none of the ETS voice samples matched the voices of candidates being interviewed under caution; that money had passed into a director's account, far in excess of the test fee, from 6 identified TOEIC candidates; that one test taker had admitted using a 'pilot' (a proxy test taker) and that on 15 May 2012, ETS had conducted an audit and found someone who appeared to be a 'pilot' actually sitting a test. The evidence of fraud at Elizabeth College, both in the materials before the Secretary of State, and the later materials produced under cover of the statements of Ms Green and Mr Sewell, and in the evidence of Professor French and Mr Heighway, is overwhelming.

111. It follows that, even if the applicant had satisfied me that the decision taken on the evidence before the respondent at the date of decision was unsafe, if the decision were taken again today and the respondent had regard to the evidence now known to her, the outcome would be the same. The applicant claims to have taken a test at Elizabeth College where the evidence is that there were no genuine tests at all. The respondent would be entitled to regard that as evidence of deception. Judicial review is a discretionary remedy and it would be inappropriate to quash the present decision if the outcome would certainly be the same, as I find to be the case here.

112. For all of the above reasons, this application fails and is dismissed.

Costs and appeal

113. As the applicant appeared in person, I have explained to him that under paragraph 44(4A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended), he could ask the Upper Tribunal to consider granting permission to appeal to the Court of Appeal.

114. I explained that in any event, I am required to consider for myself whether I should

grant permission to appeal to the Court of Appeal, pursuant to paragraph 44(4B) Upper Tribunal Rules. I also explained to the applicant that he may, if he wishes, seek to renew his application directly to the Court of Appeal but that the time for so doing is **28 days** from the date when my decision on permission to appeal is given.

115. The applicant told me that he did not wish to seek permission to appeal the Upper Tribunal's decision and would accept the outcome of the application.

116. I have refused permission, because I am not satisfied that there is any arguable error of law in the judgment I have just handed down.

117. Costs will follow the event. The applicant will pay the respondent's reasonable costs of these proceedings, to be assessed if not agreed.
