SM and Qadir v Secretary of State for the Home Department (ETS – Evidence – Burden of Proof) [2016] UKUT 00229 (IAC)

Upper Tribunal
(Immigration and Asylum Chamber)

THE IMMIGRATION ACTS

Heard at Field House, London	**Decision Promulgated**
On 05 and 08 February and	
03, 04 and 07 March 2016	……

Before

The Hon. Mr Justice McCloskey, President
Deputy Upper Tribunal Judge Saini

Between

SM and Ihsan Qadir

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

First Appellant:	Mr M Biggs, of counsel, instructed by Universal Solicitors
Second Appellant:	Mr Z Malik, of counsel, instructed by AWS Solicitors
Respondent:	Mr R Dunlop, of counsel, instructed by the Government Legal Department

(i) The Secretary of State's generic evidence, combined with her evidence particular to these two appellants, sufficed to discharge the evidential burden of proving that their TOEIC certificates had been procured by dishonesty.

(ii) However, given the multiple frailties from which this generic evidence was considered to suffer and, in the light of the evidence adduced by the appellants, the Secretary of State failed to discharge the legal burden of proving dishonesty on their part.

Glossary of Terms

Mindful of the proliferation of jargon and acronyms in the sphere to which these appeals belong, we preface our judgment with the following short glossary:

"ACCA":	Association of Chartered Certified Accountants
"CCL":	Central College of London
"ETS":	"Educational Testing Services", the international entity which provided the Home Office with services relating to English language testing in the United Kingdom.
"False positive":	An incorrect finding that a TOEIC testing student cheated in some unspecified way.
"False negative":	An incorrect finding that a TOEIC student did not cheat in the testing.
"GCID":	General Case Information Database
"IELTS":	International English Language Testing System", one of the recognised English language qualifications in the Immigration Control system.
"Invalid":	The ETS assessment of TOEIC testing scores which must be rejected.
"LSBF":	London School of Business and Finance
"Questionable":	The ETS assessment of TOEIC scores which must be considered doubtful.
"SELT":	Secure English Language Test
"TOEIC":	Test of English for International Communication
"TOEFL":	Test of English as a Foreign Language
"UKBA":	The United Kingdom Borders Agency.
"UKVI":	UK Visas and Immigration

DECISION

Introduction

1. These appeals belong to the relatively substantial cohort of so-called "ETS/TOEIC" cases. In each case the Secretary of State for the Home Department (the "*Secretary of State*") has made a decision cancelling the Appellants' leave to remain in the United Kingdom on the ground that they secured an English language qualification, recorded in a "TOEIC" certificate, by fraud. Each Appellant appealed, unsuccessfully, to the First-tier Tribunal (the "*FtT*"), whose decisions were subsequently set aside by this Tribunal as erroneous in law. In the case of the Appellant SM, the error of law identified was, in essence, a disproportionate reliance on the Secretary of State's generic evidence without dealing adequately with the Appellant's evidence and a lack of adequate reasons. In the case of the Appellant Mr Qadir, the FtT was held to have erred in law on the issue of burden of proof. It now falls to this Tribunal to remake the decisions of the FtT.

ETS/TOEIC Cases Generally

2. The general background of this particular sphere of litigation was explained in R (Gazi) v Secretary of State for the Home Department (ETS – judicial review) (IJR) [2015] UKUT 327 (IAC) at [1] in these terms:

> *"The litigation context in which this challenge unfolds is conveniently identified in an earlier decision of this Tribunal, R (Mahmood) v Secretary of State for the Home Department [2014] UKUT 439 (IAC), at [1]:*
>
> > "*This is another of the currently plentiful crop of soi-disant "ETS" judicial review cases. These have gained much currency during recent months, stimulated by action taken on behalf of the Secretary of State for the Home Department ("the Secretary of State"), the Respondent herein, in the wake of the BBC "Panorama" programme broadcast on 10 February 2014. "ETS" denotes Educational Testing Services, a global agency contracted to provide certain educational testing and assessment services to the Secretary of State. In order to secure leave to remain in the United Kingdom, by virtue of the relevant provisions of the Immigration Rules it was incumbent on the Applicant to provide evidence that he had obtained a specified type of English language qualification. The action taken on behalf of the Secretary of State, which the Applicant challenges by these proceedings, was based on an assessment that the English language certificate on which he relied had been procured by deception.*"
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> *"The decision in Mahmood was promulgated in September 2014. At the outset, it is convenient to be aware that the vocabulary in this sphere includes in particular the following:-*
>
> *"TOEIC": this denotes "Test of English for International Communication".*
> *"ETS": this denotes the entity Educational Testing Service Limited, one of the Home Office suppliers of "secure English language testing".*

3. The "broader landscape" was outlined, at [45], as follows:

> *"Some of the decisions in the broad ETS/TOEIC category have generated a right of appeal to the First-tier Tribunal ("FtT"), in country. This has occurred typically in cases where the student concerned has been challenged at port upon returning to the United Kingdom from, for example, a visit to the country of origin, followed by an in-country appealable decision of the Secretary of State. Others have generated a right of appeal exercisable only out of country (as in the present case). Other cases, believed to be the majority, have generated judicial review challenges, as in Mahmood and the present case. Thus there is a slowly expanding body of case law in this sphere. In all of these cases, the Secretary of State has relied on evidence of a generic kind. This consists of the witness statements of Rebecca Collings and Peter Millington, both dated 23 June 2014. The statements of these two witnesses have neither evolved nor altered since then. In some cases, as in the present one, these statements are supplemented by a further witness statement of another Home Office official."*

The "evolving landscape", noted in [47], has continued to develop.

4. Notably in Gazi, there was some emphasis on judicial review providing an inadequate forum for the determination of legal challenges of this species, to be contrasted with the several advantages of such challenges unfolding within the statutory appeals framework. See in particular [36]:

> *"At this juncture it is convenient to consider the issue of alternative remedy, given the inextricable nexus between this issue and the Applicant's first ground of challenge. In my judgment the substance and contours of the Applicant's improper purpose case confirm that an appeal to the FtT, pursued out of country, is a demonstrably superior mechanism for this species of challenge than an application for judicial review which, as has been repeatedly observed, invokes a judicial supervisory jurisdiction and is not an appellate process. The presentation of the Applicant's case involved a detailed, forensic examination of the Secretary of State's evidence, coupled with a lengthy exposition of the main issues raised in the expert report of Dr Harrison. I consider it appropriate to highlight what this judicial review hearing lacked: there was no examination in chief or cross examination of the Applicant or any witness on his behalf; nor was there any live evidence from any witness on behalf of the Secretary of State; and there was no examination in chief or cross examination of Dr Harrison or any other expert witness. All of these missing factors arise in a litigation context in which the bona fides and character of the Applicant are important issues. However, there was no opportunity to evaluate the Applicant's demeanour or to assess his performance under cross examination."*

5. This area of litigation is nothing if not organic, as is demonstrated by the growing body of jurisprudence. In July 2015 the Court of Appeal promulgated two decisions: R (Mehmood and Ali) v Secretary of State for the Home Department [2015] EWCA Civ 744 and R (Sood) v Secretary of State for the Home Department [2015] EWCA Civ 831. The next landmark occurred in the several decisions of this Tribunal made in December 2015: R (Jakhu) v Secretary of State for the Home Department (ETS: legitimate expectations) (IJR) [2015] UKUT 693 and R (Roohi and Another) v

Secretary of State for the Home Department (2014 Act: saved appeal rights) (IJR) [2015] UKUT 685.

6. The present appeals are the first of several heralding a new phase in Upper Tribunal litigation in this field. They are said to raise fresh issues, not previously the subject of judicial consideration or determination. In particular, litigants are now concentrating their attentions on (in summary) the strength and quality of the Secretary of State's evidence, the exacting burden of proving deception and the range of evidence which can be adduced by litigants in aid of their cause.

The Appellants' Cases

7. Reduced to their main essentials, the Appellants' cases have four components. First, it is contended that the evidence upon which the Secretary of State's decision was taken is insufficient to discharge the burden of establishing that either Appellant engaged in deception in the matter of his TOEIC Certificate. Second, the Appellants rely on their own evidence, central to which is the claim that they have been proficient in the English language for some considerable time, are persons of good character and had no need or incentive to cheat. They also rely on their evidence relating to how they say the testing was undertaken by them and the surrounding circumstances. In addition, the Appellants pray in aid the evidence of two witnesses in particular. The first is Dr Harrison, an expert in voice recognition, whose report was considered in Gazi. The second is Richard Watson, the BBC investigative journalist who was involved in the production of the now infamous "Panorama" programme broadcast on 10 February 2014.

The Secretary of State's Evidence

8. In order to succeed in these appeals the onus rests on the Secretary of State to prove that both Appellants were guilty of deception in procuring their respective TOEIC Certificates. Appropriately, the evidence on behalf of the Secretary of State was adduced first. This is reflected in the framework of this judgment.

9. We record that on behalf of the Secretary of State a heavily delayed application was made at the beginning of the five day hearing for permission to adduce certain further evidence. In a preliminary ruling (see Appendix 1), the Tribunal acceded to this in part. When two of the five days of hearing had been completed, a further application was made on behalf of the Secretary of State. The gist of this application was that directions were sought from the Tribunal to accommodate a desire to engage an expert witness. For the reasons rehearsed in its second ruling the Tribunal refused this application (see Appendix 2).

10. The evidence adduced on behalf of the Secretary of State consisted of, firstly, certain documentary evidence. We summarise this thus:

    (a) The computerised spreadsheet entries derived from the "Look up Tool" relating to the two Appellants, with accompanying explanatory witness statement.

(b) An "Explanation of IELTS Scoring" document.

(c) Evidence relating to SELT Centres in Leeds in January/February 2012.

(d) Mr Qadir's interview record.

(e) Certain bank statements relating to an account held by the Appellant SM.

(f) A document certifying SM's attendance at a college ("Kaplan") between August and September 2006.

(g) A UKVI letter relating to the revocation of the Tier 2 and 4 licence held by the London School of Business and Finance ("LSBF").

(h) A letter relating to the revocation of the sponsor licence of the Central College of London ("CCL").

(i) Certain UKVI "GCID" case records pertaining to the Appellant SM.

11. Some of the above documents were produced piecemeal as the hearing progressed. The further evidence adduced in this way included slides originating from an international workshop in human assisted speaker recognition held in 2010, organised by the USA National Institute of Standards and Technology.

12. Mr Green, a Home Office employee, gave written evidence relating to the two spreadsheet computer printouts purporting to record the outcome of the ETS testing of the voice samples purporting to relate to the two Appellants. He did not have the expertise or qualifications to elaborate on these two brief documents. On the face of the documents ETS devised a dichotomy of "invalid" and "questionable" TOEIC test results. The Home Office, in turn, has developed a system whereby upon receipt of the ETS testing analysis outcomes these are matched to the person who has the name, date of birth and nationality of the certificate holder. This is known as the "Lookup Tool". Mr Green added that some 200,000 student visas are issued in the United Kingdom annually. There are 1,700 Government approved colleges, of which 1,300 have the kitemark of "highly trusted". ETS is one of the largest English testing organisations in the world, assessing some 50 million tests per annum. Pursuant to the mechanisms noted above, the Home Office has made decisions that TOEIC certificates were procured by fraud in some 33,000 cases.

13. The evidence adduced on behalf of the Secretary of State was completed by the witness statements and oral testimony of Rebecca Collings and Peter Milllington. As all who have any familiarity with this sphere of litigation know, the evidence of these two witnesses, in purely documentary form, has been adduced on behalf of the Secretary of State in a substantial number of "ETS/TOEIC" cases (possibly all), both statutory appeals (mainly) and judicial review challenges (see Gazi). One of the landmark features of the hearing of these appeals was that this was the first occasion upon which these two witnesses have given *viva voce* evidence. They had not previously been cross examined or judicially questioned on the contents of their

witness statements in any other case. Their two witness statements have become known as the Secretary of State's "generic evidence", rolled out in every case belonging to this cohort.

Ms Collings

14. A synopsis of Ms Collings' witness statement is contained in Gazi, at [6] – [8]. It is convenient to reproduce this here:

> "[6] The generic witness statement of Ms Collings is made in the context of a regulatory era wherein the Immigration Rules and/or Home Office policies require large numbers of immigrants to demonstrate English language competence to a certain standard and via prescribed mechanisms. The ETS entity is one of a small number of Home Office suppliers of so-called "Secure English Language Testing" ("SELT") and was appointed in 2011 following a procurement exercise. ETS notifies those examined of their grades by a certificate. It operates test centres where the requisite examination is undertaken. The Home Office has consistently been alert to the risk of fraud in this sphere.
>
> [7] The Home Office was first alerted to "*the potential issues with testing at ETS*" upon receipt of a letter dated 06 January 2014 from the BBC. The makers of the "Panorama" programme claimed to have uncovered evidence of fraud which included the active collusion and participation of employees at the ETS test centres. The investigation focused on two specific centres. One of these is Eden International College, where the Applicant underwent his test. On 06 February 2014 the Home Office made a public announcement that ETS testing in the United Kingdom was being suspended. At this stage ETS had been operating tests for almost three years. The Panorama programme followed, on 10 February 2014. The contents of the programme convinced the Home Office that there had been "*a serious breach of the licence and of use of the immigration system*". In particular:
>
> > "….. *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.*"
>
> Immediately thereafter, ETS interacted with the Home Office in the provision of unspecified "*data, trend analysis and other evidence*". Next, in late March 2014, the Home Office was informed by ETS –
>
> > "… *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 …*

ETS sent the Home Office the results of the analysis of the first batch of test centres on 24 and 28 March 2014."

Ms Collings averments continue:

> "*Following the provision of this data the Home Office had a teleconference with ETS on 01 April* [2014]. *The discussion focused on the first batch of test analysis. ETS described that any test 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 of impersonation in those cases.*"

[Emphasis supplied.]

It is agreed that the Applicant's case is one of those belonging to this initial *tranche*.

[8] Continuing, Ms Collings explains that ETS devised two categories, namely "*invalid*" and "*questionable*". All were subject to the same sanction: cancellation of the test certificate. At this, the initial, stage some 10,000 test scores had been analysed by ETS. The majority of these were cancelled as invalid, while the others were cancelled as questionable.

The rationale of the ensuing decisions made under section 10 of the 1999 Act is explained thus:

> "*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.*"

Ms Collings also makes the following claim:

> "*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 …. under section 10(1)(b) ….*"

It is far from clear whether this exercise entailed an examination of each case individually. The averment is opaque. As the deponent notes, upon service of such decisions section 10(8) operates to invalidate the leave to enter or remain previously granted to the

person concerned**.** While such decisions generate a right of appeal, this is exercisable from abroad only."

15. In evidence Ms Collings adopted her witness statement. Her evidence was augmented in cross examination and in response to certain questions from the panel. She explained that a Home Office delegation travelled to the ETS Headquarters in the United States in June 2014. Ms Collings was not a member. This was considered necessary in order to understand better the ETS voice testing processes. The first batch of the ETS analysis results had been received by 28 March 2014, at which stage it was acknowledged that further scientific analysis would be necessary. This would entail the use of voice recognition software. During the period January to March 2014 there were frequent Home Office/ETS communications, usually by the medium of teleconference, resulting in agreed notes of the discussions. None of these has been provided. Nor did Ms Collings bring to the hearing any of the emails and letters identified in, but not attached to, her witness statement. We observe that this is not harmonious with elementary good litigation practice and is in breach of every litigant's duty of candour owed to the court or tribunal: see R (Mahmood) v Secretary of State for the Home Department (Candour/Reassessment of Duties; ETS: Alternative Remedy) IJR [2014] UKUT 00439 (IAC), at [24] especially.

16. At this point it is convenient to identify the categorisation devised and applied by ETS in its review of the batches of test results under scrutiny:

    (i) Invalid.

    (ii) Questionable.

    In her evidence, Ms Collings disclosed that the Home Office (and not ETS) operated a third class, constituted by students whose test results were categorised neither invalid nor questionable (by ETS) but were considered illegitimate by the Home Office on the sole ground that such students had taken their test at a centre where large numbers of invalid and questionable results had been diagnosed. The existence of this further, third category had not been disclosed in the witness statements of either Ms Collings or the other principal Home Office witness, Mr Millington (*infra*). It emerged for the first time in Ms Collings' evidence. There was a vague suggestion, without any supporting evidence (such as figures) whatsoever, that some students in the "questionable" category were offered the opportunity to undergo the test a second time.

17. Ms Collings confirmed that while the Panorama programme provided the impetus for the extensive Home Office/ETS interaction from February 2014, the Home Office had previously expressed to ETS its concerns about the apparently high numbers of top score results emerging from certain TOEIC testing centres. ETS was deputed to investigate this and duly reported that no cheating was taking place. However, the Panorama documentary which focused on two TOEIC test centres (Eden College and Universal Training Centre), establish that 11 students who had achieved full marks took their tests at these centres. Ms Collings did not challenge the suggestion that this reflected adversely on ETS.

18. Ms Collings was unable to specify with precision the date upon which the Home Office and ETS agreed that a process of voice recognition analysis should be undertaken. As the results of this analysis became available, the Home Office relied on them and in all cases in which ETS made an "invalid" designation action was taken against the student concerned, subject only to consideration of whether there were human rights grounds militating against removal of the person concerned from the United Kingdom. Based on the information provided by ETS, Ms Collings and her Home Office colleagues considered it "extremely likely" that cheating had taken place. She was unable to instance any student with an "invalid" result against whom action had not been taken. Ms Collings agreed that certain shadows have been cast over the reliability of the ETS testing methods. These included in particular her evidence relating to concerns emerging in May 2013 (i.e. the previous year) about the ETS verification of suspect "top scores". Furthermore, a number of these suspect scores had been obtained at the two test centres involved in the Panorama broadcast.

19. Questioning readily identified the limitations of Ms Collings' evidence. She professes no expertise or qualifications relating to the quintessentially scientific subject matter. She is a graduate in European and Urban Regional Studies. She had no involvement in this saga until mid-January 2014. Her direct involvement terminated around June 2014. Her evidence was not supported by any of the records which evidently exist (*supra*). It is evident that she and Home Office colleagues were entirely dependent on what was relayed to them by ETS. We shall comment on this *infra*.

Mr Millington

20. The decision in Gazi contains, at [9] – [15], a synopsis of Mr Millington's witness statement, which we reproduce at this juncture:

> "[9] The second generic witness statement is that of Mr Millington. This discloses that his rank within the Home Office is that of Assistant Director, with current responsibility for the network of "*Sponsor Compliance Officers*" in certain parts of the United Kingdom. He had previously directed the unit which processed in country Tier 4 student applications. This confirms that there was a first phase, which dated from February to June 2014. At this juncture, it is appropriate to highlight the single piece of documentary evidence relating to the decision in the Applicant's case which has been produced by the Secretary of State. It consists of a photocopied excerpt from a spreadsheet taking the form of a horizontal line containing six pieces of information: the "ETS Registration ID", the Applicant's first and last names, the test date, the Applicant's date of birth and the name of the test centre. Neither the word "*invalid*" or "*cancellation*" or any derivative of either appears.
>
> [10] The active enquiries and other steps described by Mr Millington in his statement did not begin until June 2014, at which stage, accompanied by a government solicitor and a colleague, a visit was made to ETS

headquarters in the USA. ETS is described as "*the world's largest private non-profit educational testing and assessment organisation*", administering approximately 50 million tests annually in 25,000 test centres in 192 countries. Its systems allow for the scoring of around 64,000 tests daily. It is also, supposedly, a "*world leader in respect of fraud prevention and detection*". ETS receives, and stores, the electronic files relating to the spoken and written responses of each student. Random marking of individual files is undertaken by multiple accredited "*markers*". The analysis of speech recordings is one of the anti-fraud measures which ETS has developed during recent years. Conscious of the limitations attendant upon these measures, ETS had, prior to the Panorama programme, begun testing and developing so-called "*biometric voice recognition*". The mechanics of this are described in these terms:

> "*The basic technology extracts biometric features from an individual's speech to generate voice print (the voice equivalent of a finger print). This voice print 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.*"

It is claimed that in 2011 ETS procured the necessary software from a provider which had successfully operated this technology in other sectors. No particulars of the provider, software or the arrangement, have been disclosed due to a confidentiality agreement.

[11] ETS claims (per Mr Millington) that technology testing undertaken in 2012/13 entailed over 70,000 pairings of non-matching comparisons. This was a pilot testing scheme and:

> "*The results …. 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 accepted that voice biometric technology is currently imperfect … too many false positives would fatally undermine the integrity of the voice biometric system ….*"

As a result, it is claimed that the "*thresholds*" were reformulated conservatively, with a consequential reduction in "*the probability of false positives*". The trial of the technology was considered to have been "*successful*" prompting a decision to extend its use to the TOEIC arena. Making due allowance for the opacity of some of the averments which follow in the witness statement, neither the date of this decision nor the date of its implementation is disclosed. It appears, however, that the Panorama programme was the stimulus for implementation, notwithstanding 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 ….*" The precise

particulars of the decision said to have been taken in the wake of the Panorama programme are unclear.

[12] At this stage, comprehension of the terminology used is essential. The "*electronic files*" are those which contain each person's spoken responses made during the course of the test. For the purpose of the biometric voice recognition exercise:

> "*The electronic files generated at the testing stage required a two step audio conversion process ……..*"

It appears that through this conversion they mutated into "*audio files*". Continuing, Mr Millington explains that the "Office of Testing Integrity" ("*OTI*"), an internal division of ETS, were –

> "*…. provided with electronic files and for each test taken identified the six audio files which were most appropriate for comparison.*"

The most appropriate files were considered to be "*usually*" the largest/longest; those providing the clearest responses; or those where all test takers were required to read a set text. As regards the mechanics of what occurred thereafter:

> "*Tests from a test centre were batched into groups of 300 – 400 test takers …*
>
> *These audio files were then run through the voice biometrics engine. Each batch would take approximately two 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.*"

These averments conjure up the image of a sliding scale, to be contrasted with the dichotomy of "*invalid*" and "*questionable*" described in Ms Collings' witness statement.

[13] During the visit of Mr Millington and his colleagues, the briefing which they received included the following:

> "*They [ETS] 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 noise in the background of a recording (e.g. an air conditioning system) or the detection of another noise 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).*"

In recognition of the risk of "*false positives*", it is claimed that ETS "*…. subjected each flagged match to a further human verification process*". This required the recruitment of additional staff who, it is said, received "*mandatory training in voice recognition analysis*" and were "*initially mentored by experienced OTI analysts*". Neither the date when this recruitment was undertaken nor the date when it was completed is disclosed. Equally, there is no disclosure of the period during which the supervision endured. It is acknowledged that various numbers of redeployed staff were discarded "*because they did not have the necessary aptitude for the task*". Having engaged the necessary number of analysts, the process operated was that each "*flagged comparison*" would be considered by two analysts separately. Each analyst would then form an opinion. The purpose of the exercise was to establish whether, in both analysts' opinion, the samples constituted a "*match*", having been thus designated by the "*biometric engine*" initially. It would appear that this verification exercise is a purely human one.

[14] Mr Millington then describes certain demonstrations provided by ETS. Neither the duration of this exercise nor the number of individual cases considered is disclosed. He makes the following claim:

> "*It was very clear to me, from the samples 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.*"

One observes, inevitably, that this description of what actually occurred is lean in detail and, further, as noted above, Mr Millington can lay claim to no relevant credentials or expertise in the field of voice recognition. The same observations apply to his ensuing averments that non-verified matches were "*confidently*" identified by Mr Millington and his colleagues. There is a discernible element of bombast in these claims.

[15] The novel and evolving (if not embryonic) nature of the voice biometric technology emerges strikingly in the following averments of Mr Millington:

> "*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.*"

[My emphasis.]

There is an unmistakable self-serving element in the averments which follow:

> "*ETS 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 these '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.*"

[Emphasis added.]

Given the terms in which Mr Millington's ensuing averments are framed, they invite reproduction, rather than paraphrase:

> "*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 … ETS has informed the Home Office that there was evidence of invalidity in those cases.*"

The dichotomy of "*invalidity*" and "*irregularity*" is identifiable in the immediately ensuing averments:

> "*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.*"

No exhibited illustration of this distinction, even in redacted form, is provided. Finally, it is clear from the concluding averments in Mr Millington's witness statement that the Home Office <u>invariably</u> accepts the deception assessment provided by ETS , without more."

21. Mr Millington was a member of the Home Office delegation which met with ETS representatives in the United States in June 2014. He confirmed that this was the only event of its kind. He explained that he was not a first choice member of the Home Office delegation to the United States. He was enlisted only because of the

unavailability of others. The delegation did not include any voice recognition expert or, indeed, any scientist. Mr Millington was accompanied by two colleagues and a solicitor. The judicial review challenge in the case of Gazi (*supra*) was the impetus for this excursion. The information obtained, duly reproduced in Mr Millington's and Ms Collings' witness statements, was provided in the course of a single day during interaction with some six ETS representatives.

22. This exercise did not entail the provision or consideration of any voice recordings. Mr Millington testified that to his knowledge the Home Office has at no time requested ETS to provide the voice recordings in respect of any individual. Nor, he added, has the Home Office ever asked for the software used by ETS. Mr Millington explained that during the one day meeting in the United States, ETS made clear its unwillingness to disclose the software on the ground that they considered it "confidential". We were informed mid-trial that ETS had communicated its unwillingness to provide any of the voice recordings, absent judicial compulsion to do so.

23. In common with Ms Collings, Mr Millington professes no expertise in the science of voice recognition. He is a graduate in geography and economics and obtained a post graduate diploma in human resources and training. He has no experience, much less any expertise, in the science of voice analysis and speech recognition. He became involved at around the time of the Panorama programme by reason of his responsibilities in the Home Office response and compliance network. He readily acknowledged the expertise and credentials of Dr Harrison.

24. Mr Millington indicated that the 2% error rate suggested in his witness statement relates to false positive results only. He was unable to elaborate on the "*conservative thresholds*" which ETS claimed to have established in its voice biometric testing system. He did not know whether, as this testing evolved, the number of false positives actually decreased. He confirmed that "invalid" and "questionable", the two classifications devised by ETS, were not the only two categories operated by the Home Office. Rather, the Home Office operated a third category, constituted by students who did not belong to either of the other categories but whose test results were considered illegitimate on the sole ground that they emanated from a testing centre where "*numerous other results*" belonging to the other two categories had been ascertained. (This is acknowledged in Mr Millington's witness statement: see the passage quoted in [20]/(15) above.) Mr Millington was unable to dilate on "*numerous*". Furthermore, while averring that persons belonging to this third category were "usually" invited to undergo a fresh test, he was unable to elaborate on "usually". Nor could he say what "*substantial evidence of invalidity*", a term used in his witness statement, denotes.

25. Mr Millington was unable to provide any evidence of the error rates in the ETS human verification process. He did not challenge or dissent from any aspect of Dr Harrison's detailed critique. He agreed that the automated testing system employed by ETS could generate false positive results in up to 22.5% of cases. He further agreed that this could be as high as 30% in the human verification analysis process. While he made these concessions with reluctance, it was manifestly clear that he had

nothing with which to counter Dr Harrison's analysis and opinion. He was unable to provide the date when ETS introduced human verification. He agreed that "contaminants" included air conditioning in the test centre room, other human voices and other sources of noise, inexhaustively. Mr Millington confirmed that ETS reported to the delegation that the 2% false positive rate which it was claiming related to the automatic voice recognition process concerning TOEFL (not TOEIC) English language tests. He was unable to address Dr Harrison's observation that the comparability of the samples used for the "proof of concept" testing and the TOEIC testing was undisclosed. He could not provide any evidence relating to the security of UK test centre voice recordings prior to transition to ETS. The witness had no involvement in the Home Office investigation of suspect test centres.

26. Mr Millington's evidence confirmed that the actual false positive error rate at the automated testing (i.e. first) stage is an *incognito*. ETS reported that at the human verification (i.e. second) stage 20% of the automated test results were rejected. Subject to the imponderable of the fallibility of the human verification results (my qualification) he agreed that this could indicate a false positive error rate of 20% at the former stage.

The Appellants' Case

27. We begin our consideration of the evidence adduced on behalf of the Appellants with the testimony of Dr Harrison, who adopted his report dated 05 February 2015 in full and amplified its contents in questioning. There is no dispute about Dr Harrison's expert credentials. He is, fundamentally, an acknowledged expert in the science of voice recognition. He describes this, in technical terms, as the "*authentication, enhancement, transcription and speaker comparison*". He is clearly an experienced expert witness. The decision of this Tribunal in Gazi contains, at [17] – [20], a précis of Dr Harrison's report which is conveniently reproduced at this juncture:

> "**[**17]. The report of Dr Harrison contains a series of assessments, commentaries and opinions which are susceptible to the following breakdown:
>
> (i) In criminal proceedings the mechanism commonly employed is that of "forensic speaker comparison analysis" which he describes as generally recognised and employed throughout much of western Europe. 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.*"
>
> (ii) The editing of audio files prior to expert analysis is standard practice.
>
> (iii) Segmental analysis of speech samples is carried out in

accordance with the methodology approved by the International Phonetic Association and is designed to identify the "*fine-grained nuances of speech*".

(iv) The mechanics of analysing voice quality, pitch, intonation, rhythm and tempo form part of the exercise.

(v) In appropriate cases, it is also necessary to examine patterns of language and grammar or to undertake acoustic-phonetic analysis or other specified forms of analysis.

(vi) Automatic speaker recognition systems have the *modus operandi* of "[taking] *the recorded voices of individuals,* [performing] *complex mathematical operations on them and* [reducing] *them to statistical representations or models.*"

(vii) "*The results produced by automatic systems are numeric scores which reflect the degree of similarity between two samples – larger numbers reflect great similarity and smaller numbers reflect a greater dissimilarity between samples …..*

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 ….. as the threshold increases the false negative error rate increases whilst the false positive error rate decreases …. Therefore the choice of threshold is crucial in determining the errors rates and performance of the system".

(viii) Thus under automatic speaker comparison systems both false positives and false negatives are possible, with the consequence that "*for a quoted error rate to be meaningful, the type of error that it refers to must be stated*". Mr Millington's witness statement does not provide this information.

(ix) The performance of automatic speaker comparison systems is affected by many factors, in particular the duration of samples and the quality of samples, which embraces surrounding and background noise.

[18] Dr Harrison is critical of the level of detail provided in the generic witness statements of Ms Collings and Mr Millington. He describes it as insufficient. The norm, he says, is that the analyst concerned, rather than a third party recipient of information, makes the statement (or compiles the report). He criticises the lack of information concerning the initial testing. He highlights that there is a dearth of information concerning the comparability of the test samples with the TOEIC samples. There is no detail concerning either duration or quality. Nor is there any clear description of the configuration of the automatic system which was used in these two separate phases. The

Respondent's evidence is silent on the issue of manufacturer's updates. The non-disclosure of the identity of the manufacturer or the model of the system erects a barrier. There is no indication of whether the files selected were combined to form a longer recording, nor is the specific duration of individual files particularised. It is possible that short, poor quality samples of reading may have been selected. It is unclear whether the selection process was conducted manually or automatically. Nor is there any indication of whether the consistency of the speaker across the six files was assessed by the automatic system.

[19] Dr Harrison also examines, with accompanying critique and commentary, the discrete issues of factors affecting performance; the typical performance of human verification; the definition of thresholds; the explicit acknowledgement of human errors; the lack of testing of the performance of analysts; the dubious touchstone of "*confidence*" (see Mr Millington's witness statement); the dearth of information about the actual analysis methodology; the lack of detail about the experience and knowledge of both the recruited analysts and their supervisors; the indication that any training of the newly recruited analysts was hurried; the shortcomings in Mr Millington's speech recognition averments; and the clear acknowledgement on the part of ETS that false identifications (viz false positive results) have occurred. One passage relating to the human verification process is especially noteworthy:

> "*… although the analysts only verified matches where they had no doubt about their validity – i.e. where they were certain about their judgments – this should not be taken as a reliable indicator of the accuracy of those judgments. This approach does not remove the risk of false positive results.*"

Dr Harrison also highlights that both the automatic system and the human analysts are capable of false positive errors. The Secretary of State's evidence does not disclose either the percentage or the volume of such errors.

[20] Dr Harrison summarises his opinion in the following terms:

(i) In principle, the ETS methodology constitutes "*a reasonable approach*". However, the specifics of its implementation are insufficiently particularised in the Respondent's evidence, which suffers from "*a lack of technical information and detail*".

(ii) The Secretary of State's evidence fails to acknowledge that the human verification mechanism "*is almost certain to have resulted in false positive results*".

(iii) The fact of an unknown number of false positive results in "*an unknown number of test takers who have been incorrectly identified as having fraudulently taken the TOEIC test*".

(iv) The accuracy and reliability of the ETS results overall cannot be gauged in the absence of sufficient technical knowledge of the process.

(v) This inadequacy could be rectified to some extent by disclosure of the audio material from individual tests, which would facilitate independent auditing through the auditory-acoustic phonetic testing methodology."

28. In addition to adopting his report, Dr Harrison relied on a witness statement. This supplemented his report in one respect only. Therein he avers that he has listened to "*TOEIC test audio files*" and, having done so, his opinion and conclusions remain unchanged. In cross examination he explained that these files contained some five or six recordings of the answers provided by a single candidate during testing. He could not recall whether there were any interruptions in the recordings. He re-affirmed that the quality of automatic voice recording systems generally is affected by several well recognised factors, in particular the duration of samples, the quality of the samples and "reference population mismatch". Elaborating in this context, Dr Harrison gave the example of a number of speakers with very different language backgrounds. He added that there is no evidence which would enable the comparability of the TOEFL pilot population with the TOEIC population to be assessed.

29. Elaborating, Dr Harrison agreed that the better the recording quality, the lower the error rate in voice analysis. He confirmed that background noise detrimentally affects quality. In this context, Dr Harrison observed that in the Panorama programme there was quite a lot of background sound, generated in particular by others speaking simultaneously. He was unable to comment on whether headphones were in use. The recordings to which he listened were of reasonable – to be contrasted with good – quality. He listened to them in their totality on two separation occasions.

30. Dr Harrison described the quality of the test material used in the ETS automated voice analysis process as "the main variable". He suggested that if a system of this kind is performing well, the generally recognised range of error will be 2% to 10%. For the best systems the error rate is typically between 1% and 3%. In "non-ideal conditions", error rates can be as high as 30%. Such conditions would be caused by very degraded recordings (for example due to background noise) and/or a significant voice recording file mismatch and/or differing directions. He highlighted the lack of technical data and particulars in Mr Millington's assertion that (per ETS) "*conservative thresholds*" had been set in the analysis exercise, thus confirming the Tribunal's reservation that this is a relatively meaningless assertion.

31. Dr Harrison described the phenomenon of recommended minimum durations of voice recording files in the voice recognition industry. This is one of the stipulations

of the software manufacturer (BATVOX4). This standard is directly linked to the accuracy and reliability of the end product. In this context he noted Mr Millington's acknowledgement that of the six audio files used by ETS in its automated voice analysis process, only three were of the requisite minimum length. Dr Harrison further observed that Mr Millington's written statement did not make clear whether these six audio files were tested separately or in unison.

32. Accordingly, the ETS automated testing of the voice samples considered was compliant with the bare minimum required in only 50% of the six audio files per suspect student. This is a minute percentage of the total audio files relating to each of the students concerned. In this context he referred to certain published empirical evidence, to which we have referred in [11] above. This involved 150 voice recognition trials. Each of the voice samples had a duration ranging from 3 to 5 minutes. In this way the analysts concerned were (in Dr Harrison's words) able to consider a "*long stretch of speech*". Dr Harrison testified that, subject to the quality of the individual recordings, testing of this kind would optimise the prospects of an accurate and reliable result. He explained further that manufacturers of voice recognition software recommend minimum durations of speech recording files to enable the analyst to gradually build up a picture and develop familiarity with the voice. He described minimum durations of 3 to 5 minutes as "*common place*".

33. Dr Harrison testified that human voice analysis systems when performing at their best can be expected to generate an error rate of some 20%. He described the subjectivity of the individual human tester as the main imponderable, adding other factors such as fatigue, distraction, indisposition and quality of training. He accepted that since human analysts were introduced by ETS in an attempt to reduce false positive outcomes, the risk of false negative outcomes was thereby created. He agreed that the human analysts were incapable of increasing the number of false positives. He criticised the apparent assumption in Mr Millington's statement of an equal error rate in false positives and false negatives, highlighting the absence of evidence of the false positives rate. In this context Dr Harrison also referred to the international workshop evidence noted in [11] above which contains, *inter alia*, the results of the analysis of human voice files by seven different systems. Of these, the best performing system had some 24% false negative results and 28% false positive results. The average false negative rate was 36%. Dr Harrison testified that this data amply supported the opinion expressed in his report.

34. Dr Harrison highlighted the absence of any evidence relating to the duration, quality, sample matching and configuration of the system in the ETS automated testing exercise. He contrasted scientifically demonstrable accuracy in a voice identification exercise (on the one hand) and human confidence, even to a high degree (on the other), emphasising that these are not synonymous. Summarising his expert opinion, Dr Harrison testified:

    (a) While the ETS automated voice sample analysis is in the abstract reasonable, the available evidence fails to demonstrate a satisfactory level of reliability.

(b) The significant shortcomings in the technical information available mean that one cannot have confidence in the reliability and accuracy of either the automated testing results or the results, modified or otherwise, flowing from the later human intervention exercise.

35. Dr Harrison's testimony was completed by his response to certain written questions which, with the leave of the Tribunal, were addressed to him after his oral evidence had finished. He confirmed that by the methodology of multiplying the number of matches identified by the automated testing system to be the same speaker by the false positive rate, the total number of false positives can be calculated. His answer to the next question confirms what we consider to be the difficulty posed by both the first and second questions, namely the absence of any definition of "*false positive rate*". The remaining written questions addressed to Dr Harrison sought his agreement with the proposition that the false positive rate was as low as 1% and invited him to accept that the false positive rate postulated in his report is excessive. In response, Dr Harrison maintained firmly that any dilution of his evidence on this discrete issue would be inappropriate. Elaborating, he explained, in persuasive terms, that the methodology adopted by him was conservative, summarised in these terms:

> "*The calculation of the number of false positives using the method proposed* [in the questions posed] *will always result in a higher number of false positives than the method I have used because the number of non-pairs will always be greater than the true-pairs. Therefore, my method is conservative in estimating the number of false positives since this is calculated from the number of true-pairs which is always smaller.*"

36. In response to a question from the panel, Dr Harrison, following reflection, testified that all of the shortcomings, omissions, questions and reservations concerning the Secretary of State's evidence (viz that of Mr Millington and Ms Collings) highlighted in his report remain unexplained and unanswered. These are contained in the précis reproduced in [25] above and consist of the following:

(i) The technical characteristics of the TOEIC test recordings, including duration and background noise levels.

(ii) The performance of the automatic system when operated with recordings representative of the TOEIC samples.

(iii) The comparability of the TOEIC tests materials with the TOEFL materials used in the file of the automatic system.

(iv) 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.

(v) The performance of the human analysts.

(vi) The expertise, training and knowledge of the analysts.

(vii) The training given to the newly recruited ETS employees.

(viii) Details of the methods used by the human analysts.

(ix) The time spent by the human analysts on comparisons.

(x) The familiarity of the human analysts with the range of foreign accented English and specific knowledge of common features within those varieties.

Most of the components of this extensive list concern gaps in the Secretary of State's written evidence which, in the event, were not addressed or rectified in the further evidence adduced at the hearing.

37. Finally, Dr Harrison's evidence to the Tribunal confirmed the following statement in his report:

> "*Without this information it is not possible to provide a detailed objective assessment of the overall reliability of ETSs 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 ….*
>
> *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.*"

This passage embodies a useful synopsis of Dr Harrison's unremitting critique of the Secretary of State's evidence.

The First Appellant: SM

38. On 28 July 2014 an Immigration Officer, a servant or agent of the Secretary of State, made an "at port" decision concerning this Appellant in the following terms:

> "*You are seeking entry as a returning student and you were given leave to remain until 08/10/2015 as a student but I am satisfied that false representations were employed or material facts were not disclosed for the purpose of obtaining your previous leave to remain here as a student. Therefore in your case the current leave that was granted should be cancelled. This is because you were required to submit, as part of your application for leave to remain as a student, a valid certificate showing you had properly attended an English Testing Centre and taken a test is listening, speaking and writing English ……*
>
> *I am satisfied that you obtained your English Language Certificate by deception and have written evidence to substantiate this ….. After an investigation into the*

circumstances of how you obtain your particular English Certificate it has been found to be fraudulently obtained."

The Appellant's leave to remain in the United Kingdom was cancelled under paragraph 2A(8) of Schedule 2 to the Immigration Act 1971 and paragraph 321A(2) of the Immigration Rules accordingly.

39. This Appellant challenged the Secretary of State's decision by appealing to the First-tier Tribunal (the "*FtT*"). By its decision promulgated on 27 April 2015 the FtT dismissed his appeal. A further appeal to the Upper Tribunal followed. By its decision promulgated on 04 January 2016, the appeal was allowed by the Upper Tribunal to the extent of setting aside the decision of the FtT on the basis of error of law: see [1] above.

40. This Appellant is a national of Bangladesh, aged 32 years. In June 2005 he entered the United Kingdom in accordance with an entry clearance visa for the purpose of study. Several grants of further leave to remain followed. Prior to the expiry of the penultimate such grant, in November 2013, he applied for and was granted further leave to remain, valid from 15 November 2013 to 07 October 2015 for the purpose of undertaking an MBA Degree. The impugned decision of the Secretary of State occurred in circumstances where this Appellant had returned to his country of origin on a home visit and was attempting to re-enter the United Kingdom.

41. At this juncture, it is convenient to outline the evidence relating to this Appellant's proficiency in the English language and academic qualifications. In summary:

    (a) Prior to first entering the United Kingdom in June 2005 he obtained an IELTS (International English Language Testing System) Certificate, achieving an overall score of 6 out of 9. This Certificate was required to facilitate his entry to the United Kingdom for the purpose of study.

    (b) Between July 2005 and February 2006 he pursued a foundation level English course which he completed with distinction.

    (c) He then completed with distinction intermediate and advanced level English courses, in March and November 2006 respectively.

    (d) On 31 August 2007 this Appellant achieved a "pass" grade in an ACCE Level 4 course.

    (e) On 26 April 2010 he secured a Diploma in Business Studies.

    (f) On 12 April 2012 he obtained a "pass" grade in an ACCA Level 5 course.

    (g) On 08 October 2013 he obtained a postgraduate diploma in strategic management and leadership.

(h) On 26 March 2012 he obtained the TOEIC Certificate which later became the impetus for the Secretary of State's cancellation of leave decision. His grade was B2.

(i) On 20 December 2013, in accordance with a university requirement to undertake an English course, the Appellant secured a score of 77%.

(j) Between January 2014 and June 2015 the Appellant completed a University MBA (Masters in Business Administration), succeeding with "Merit".

42. This Appellant's evidence includes an account of his interaction with UKBA officials upon his return to the United Kingdom on 28 July 2014 following a visit to his parents in Bangladesh. During a period of some ten hours he was interviewed extensively by immigration officers regarding his previous history – study, work, continuing education and English language qualifications. At the conclusion of this process he was handed a letter stating that his leave was being cancelled on the ground that he had obtained his TOEIC Certificate fraudulently. His immediate response, notably, was a demand to see the supporting evidence. In his witness statement he avers:

> "*The immigration officers said that they are satisfied that I am a genuine student and that my command of English is very good. However they said that since I had taken a TOEIC exam, they had no choice but to cancel my visa. He also advised me to go to Court and to prove that I did not cheat.*"

The Appellant testified that he was so outraged that he demanded to see the Senior Immigration Officer, without success.

43. The next steps taken by this Appellant are also noteworthy. He notified his university of what had happened and made efforts to obtain advice and assistance from this quarter. He then engaged solicitors for the purpose of advice and mounting appeal against the cancellation decision. He took steps to secure confirmation from UKBA that he could remain lawfully in the United Kingdom while pursuing his appeal. Significantly, he went to considerable lengths to contact ETS in the United States, in an attempt to obtain verification of his TOEIC Certificate and copies of his voice recordings. He contacted several ETS offices in the United States and, eventually, secured the details of an ETS London office with which he then communicated. In his witness statement he avers:

> "*Someone from ETS finally assured me that they would verify my certificate but would do so only if my lawyer writes to them.*"

A solicitor's request to this end, coupled with a renewed request for copies of the Appellant's voice recordings, ensued. This elicited a response from ETS Global which was rather evasive, stating that a test could be invalidated for a number of reasons and suggesting that this Appellant make his case to the Secretary of State. The request for provision of the voice recordings was refused.

44. Leaving no stone unturned, the Appellant then turned his attentions to Mr Watson of the BBC, the investigative journalist involved in the "Panorama programme". A meeting with Mr Watson and his producer colleague materialised. The Appellant thereby had the opportunity to demonstrate his proficiency in the English language and to produce his documentary qualifications. The upshot was a communication from the gentleman concerned approximately one month later, assuring the Appellant that they found him credible and the issue of a letter of support.

45. In his witness statement the Appellant describes, in impressive detail, the steps taken by him to secure a place at one of the TOEIC testing events and his success in doing so. He provided particulars of the venue, the cost, his interview with the college's administration and other administrative arrangements. He described in detail how he travelled to the centre and the events which unfolded following his arrival. He detailed the various components of the test. He described extensively the topography of the premises, the contents and layout of the test room, the conduct of the invigilator and related matters. He also recounted particulars of questions posed, answers given and like matters.

46. This Appellant's case was supported by evidence from Mr Watson, the BBC journalist involved in the Panorama programme. This took the form of a witness statement supplemented by the witnesses' responses to some brief questions in cross examination. There was also evidence from an acquaintance. The evidence of the acquaintance was adduced through the medium of a witness statement and Mr Dunlop, on behalf of the Secretary of State, confirmed that he was not proposing to cross examine the witness. Both gave essentially character evidence strongly endorsing this Appellant's integrity.

47. There is no controversy in what is outlined in [35] – [37] above. The description of this Appellant's evidence in the succeeding paragraphs, [38] – [42], is based on his written statements and a schedule of his qualifications prepared for the purpose of the hearing. At the outset of his testimony to the Tribunal, this Appellant adopted his main (i.e. most recent) witness statement in its entirety. All of the evidence from him which followed was elicited by cross examination, questioning from the panel and some brief re-examination. We shall revisit this *infra*.

The Second Appellant: Ihsan Qadir

48. As we have done with the first Appellant, we shall begin with the written evidence of and pertaining to the second Appellant. He is a native of Pakistan, where he was born on 13 July 1979. There, having completed his higher secondary education, he secured a third level qualification, namely Bachelor of Computer Science. On 10 July 2010 he obtained a "pass" grade in the IELTS, a recognised English language test, in Pakistan. He then secured a visa permitting him to enter the United Kingdom for the purpose of pursuing accountancy studies as a "Tier 4" student. On 17 December 2010 he entered the United Kingdom accordingly. One year later the Tier 4 licence of the college where he was studying was suspended. Following some effort he successfully secured admission to another college to continue the same course. On 23 January and 22 February 2012 he claims that he underwent the TOEIC test. His two TOEIC

"Official Score Reports" are dated 23 January 2012 and 22 February 2012 respectively. Duly equipped with his TOEIC certificate, on 08 May 2012 he was granted further leave to remain as a Tier 4 student, with a scheduled expiry date of 31 December 2014.

49. At this juncture we outline this Appellant's evidence relating to his proficiency in the English language:

    (i) On 10 July 2010, in Pakistan, he passed the IELTS English language test, securing a rating of 5.5 (out of a maximum of 10).

    (ii) He has resided continuously in the United Kingdom, with the exception of home visits, since securing his leave to enter authorisation dated 17 December 2010.

    (iii) The TOEIC tests which he claims to have undertaken in January and February 2012 are the only examinations of their kind which he has undertaken in the United Kingdom.

50. Some two years later, having passed six of the ACCA exams and while awaiting the results of three others, he made a visit to his home country. On 24 August 2014 he sought to re-enter the United Kingdom. He was questioned by UKBA officials and arrangements were made to interview him on 08 September 2014. A 17 minute interview was transacted on this date, in English. The Appellant was questioned about the circumstances in which he had secured his TOEIC certificate. He provided *prima facie* appropriate answers to all questions except one asking the name of the centre in London where he claimed to have undergone the examination. He was, however, able to describe its location in general terms ("near the Stock Exchange").

51. On 14 September 2014 the Secretary of State made a "Cancellation of Leave" decision in respect of this Appellant. Its essence is ascertainable from the following passages:

> "*I have reason to believe that you made false representations in order to obtain your leave to remain, because I am satisfied on a balance of probability that you have fraudulently obtained your ETS English Language Certificate submitted as part of your application for leave to remain in the United Kingdom …. your ETS Certificate is deemed to be invalidated ….*
>
> *The Home Office were able to confirm that the passenger's English test which he had sat in the UK on 22 February 2012 had been marked as 'Invalid'. See Appendix A. The background to the HO's decision are* [sic] *explained in the witness statements provided by HO employees Peter Millington and Rebecca Collings (see Appendices B and C) …..*
>
> [The Appellant] *was unable to recall the name of the test centre except that it was in London or even which area of London. Furthermore he was unable to recall the cost of the test. He insisted he had taken the test in person and took it over a two day period.*"

Two immediate observations are apposite. First, no <u>specific</u> question relating to the area of London where the test centre is situated was put to the Appellant in

interview. Second, there is no mention of one of the Appellant's responses noted above.

52. This Appellant's first witness statement, though undated, was clearly made in the context of his appeal to the FtT, which was decided on 30 January 2015. As recorded by the Judge, the Appellant gave evidence at the hearing. Around one year later, he made a second witness statement, date 15 January 2016, with a view to the remaking hearing in this forum. In both statements he identifies the person who drove him from Leeds to London and he also identifies the friend who was instrumental in "booking" the test for him. The most striking feature of his second witness statement is the considerably greater detail which it contains, relating to the following matters in particular: the amount he paid for undergoing the test; the name of the college where he took it; the location of the college in London; the name of the building in question; events on the date of the examination; the approximate number of students taking the test; the duration of the test; and the various components of the examination and how these were tested.

53. In his first statement, the Appellant avers that the test was carried out "*in January 2012*". In his second statement, he provides a concrete date, namely 23 January 2012, which coincides with the date specified in the TOEIC certificate. The detailed description of the testing which follows clearly relates to this date. No second or subsequent date is mentioned, though the certificate makes clear that the examination was split between two dates. On the first, 23 January 2012, the skills of listening and reading were tested. On the second, 22 February 2012, speaking and writing tests were undertaken. In this context, it is appropriate to highlight two successive paragraphs in the Appellant's second witness statement:

> "*I remember that the test involved both speaking and listening elements. The listening and reading tests lasted for about 140 – 150 minutes (approx 02.30 hours) ….*
>
> *The TOEIC listening and reading test take* [sic] *about two hours. It was divided in two part/sections, approximately 45 minutes for listening and 75 minutes for reading. The TOEIC speaking and writing test take* [sic] *about 1 hour and 20 minutes. It was also divided in two sections, namely 20 minutes for speaking and one hour for writing.*"

It is common case that all TOEIC testing exercises have four components, namely listening and reading (examined on the first test date) and speaking and writing (examined on the second test date). This division is accurately reflected in the Appellant's witness statement.

54. In common with the first Appellant, this Appellant, in his evidence to the Tribunal, adopted his two written statements. The remainder of his evidence was elicited by some very brief examination in chief, cross examination, questioning from the panel and some brief re-examination. We shall assess all of this Appellant's evidence *infra*. His case was supported by an acquaintance, whom we shall describe as Mr A, who recounted transporting the Appellant by car from Leeds to the London test centre. Mr A was able to attend the hearing on one of the five days only and, by agreement, his evidence was adduced by witness statement.

Governing Legal Rules and Principles

55. Paragraph 321A of the Immigration Rules provides, insofar as material:

> "*The following grounds for the cancellation of a person's leave to enter or remain which is in force on his arrival in, or while he is outside, the United Kingdom apply:*
>
> *(1) There has been such a change in the circumstances of that person's case since leave was given that it should be cancelled; or*
>
> *(2) False representations were made or false documents were submitted (whether or not material to the application and whether or not to the holder's knowledge), or material facts were not disclosed, in relation to the application for leave ….*"

This is the provision upon which the impugned decisions of the Secretary of State were made in each appeal.

56. The legal principles engaged are set forth below. While we are content to proceed on this basis, we observe that there may be scope for further argument on the correct approach in law in some future case. We thus observe on account of two factors in particular. First, the Secretary of State, in all of these cases, is making the positive case that the student concerned dishonestly obtained the English language qualification by the use of a proxy test taker. Second, the Secretary of State seeks to make good this allegation to the requisite standard by adducing in evidence, in addition to the generic evidence noted above, a flimsy spreadsheet emanating from ETS which, in a single line, contains, in substance, only the name of the student concerned and the categorisation of either "questionable" or "invalid".

57. Both the applicable principles and the jurisprudence were reviewed by this Tribunal in its recent decision in Muhandiramge (Section S-LTR.1.7) [2015] UKUT 00675 (IAC), at [9] – [11]:

> "9. Burdens and standard of proof have progressively, and almost with stealth, become an established feature of decision making in the field of immigration and asylum law. Their emergence may properly be described as organic. They have featured particularly in cases where it is alleged by the Secretary of State that the applicant has engaged in deception or dishonesty with the result that the application in question should be refused. This discrete line of authority is not recent, being traceable to the decision of the Immigration Appeal Tribunal in Olufosoye [1992] IMM AR 141. In tribunal jurisprudence, the origins of this particular lineage can be traced to the decision of the House of Lords in R v Secretary of State for the Home Department, ex parte Khawaja [1984] AC 74, which concerned the inter-related issues of procuring entry to the United Kingdom by deception and precedent fact in the Secretary of State's ensuing decision making process. It is well established that in such cases the burden of proof rests on the Secretary of State and the standard of

proof belongs to the higher end of the balance of probabilities spectrum.

10. One of the more recent reported decisions belonging to this stable is that of Shen (Paper Appeals: Proving Dishonesty) [2014] UKUT 236 (IAC). This decision is illustrative of the moderately complex exercise required of tribunals from time to time. Here the Upper Tribunal held, in harmony with established principle, that in certain contexts the evidential pendulum swings three times and in three different directions:

    (a) First, where the Secretary of State alleges that an applicant has practised dishonesty or deception in an application for leave to remain, there is an evidential burden on the Secretary of State. This requires that sufficient evidence be adduced to raise an issue as to the existence or non-existence of a fact in issue: for example, by producing the completed application which is *prima facie* deceitful in some material fashion.

    (b) The spotlight thereby switches to the applicant. If he discharges the burden - again, an evidential one - of raising an innocent explanation, namely an account which satisfies the minimum level of plausibility, a further transfer of the burden of proof occurs.

    (c) Where (b) is satisfied, the burden rests on the Secretary of State to establish, on the balance of probabilities, that the Appellant's *prima facie* innocent explanation is to be rejected.

    A veritable burden of proof boomerang!

11. Shen is preceded by a lengthy line of Tribunal jurisprudence to this effect: see JC (Part 9 HC 395 - Burden of Proof) China [2007] UKAIT 00027, at [10]; MZ (Pakistan) v Secretary of State for the Home Department [2009] EWCA Civ 919, at [25]; Mumu (Paragraph 320; Article 8; Scope) [2012] UKUT 143 (IAC); and Kareem (Proxy marriages - EU law) [2014] UKUT 24 (IAC). In short, in cases of alleged deceit, the legal rules are well settled."

In this context, we highlight what was stated at [11] of Shen:

> "*At the end of the day the SSHD bears the burden of proof. This is a proposition which is uncontroversial and has been confirmed on many occasions.*"

We record here the submission of Mr Biggs on behalf of the second Appellant, with which we agree, that, doctrinally, a legal burden of proof does not "shift".

58. It is well established that proof of dishonesty on the part of the immigrant concerned is required in order to establish either "*false representations*" or "*false documents*" under

paragraph 321A of the Rules: see AA (Nigeria) v Secretary of State for the Home Department [2010] EWCA Civ 773, at [44] and [51] especially. Following the consumption of large quantities of judicial ink, the legal rule which has emerged with unmistakable clarity is that in civil proceedings there is but one standard of proof, namely proof on the balance of probabilities. One of the clearest expositions of this rule is found in the judgment of Richards LJ in R (N) v Mental Health Review Tribunal (Northern Region) [2006] QB 468, at [62]:

> *"Although there is a single civil standard of proof on the balance of probabilities, it is flexible in its application. In particular, the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities."*

In short, as emphasised by Lord Carswell in Re D [2008] UKHL 33, at [28], the fundamental judicial task is to decide whether, having regard to the context, the evidence adduced is of sufficient cogency to warrant the conclusion that the burden of proof has been discharged to the civil standard.

59. At this juncture we note Mr Dunlop's submission that the principles in Tanveer Ahmed (Documents unreliable and forged) Pakistan [2002] UKIAT 00439 are engaged. These principles are formulated at [38] of the Report in the following terms:

> *"1. In asylum and human rights cases it is for an individual claimant to show that a document on which he seeks to rely can be relied on,*
>
> *2. The decision maker should consider whether a document is one on which reliance should properly be placed after looking at all the evidence in the round.*
>
> *3. Only very rarely will there be the need to make an allegation of forgery, or evidence strong enough to support it. The allegation should not be made without such evidence. Failure to establish the allegation on the balance of probabilities to the higher civil standard does not show that a document is reliable. The decision maker still needs to apply principles 1 and 2."*

We highlight the caution with which the phrase "*the higher civil standard*" is to be treated.

60. This contention was raised for the first time in Mr Dunlop's final written submission. This implies no criticism of him. However, as a result, we have not received detailed argument on the issue. We are mindful that as this is neither an asylum nor a human rights case there are strong indications that the Tanveer Ahmed principles have no application. Second, we consider it highly unlikely that the Tanveer Ahmed principles displace or alter the legal rules enunciated unambiguously in Shen, Muhandirange and their precursors, which include MZ (Pakistan) v Secretary of State for the Home Department [2009] EWCA Civ 919, at [25]. The contention that a

claimant, or appellant, bears the legal burden of demonstrating that a document upon which he relies is reliable in a litigation context where the legal burden rests upon the Secretary of State gives rise to an evident incongruity. There is a persuasive argument that the Tanveer Ahmed principles are, as the decision itself states unequivocally, confined to asylum and human rights claims. Indeed, there may also be scope for the argument that these principles may have no enduring application in such cases. However, this issue does not fall to be determined in these appeals and we note that it did not arise in the recent Court of Appeal decision in MA (Bangladesh) v SSHD [2016] EWCA Civ 175.

61. As these appeals are crying out for expeditious determination and finality, we decline to develop or be diverted by what we have mooted immediately above. Rather, driven by pragmatism, we propose to proceed on the basis that the Secretary of State's argument on this issue is correct, without deciding whether this is so. On this issue we make one further observation, namely that the submissions of Mr Dunlop rely on both Shen and Tanveer Ahmed. That this may give rise to an infelicitous marriage is evident.

The Secretary of State's Evidence: Our Findings and Conclusions

62. As the onus rests on the Secretary of State to prove that both Appellants were guilty of fraud in the respects alleged, we shall begin with our findings and conclusions in respect of the evidence adduced on her behalf.

63. We have considered all of the evidence adduced on behalf of the Secretary of State. The evidence of Ms Collings and Mr Millington forms the backbone of the Secretary of State's case. We have interspersed our consideration of this evidence above with certain comments and observations, which do not require repetition. We are satisfied that Ms Collings and Mr Millington gave truthful evidence. However this neither counterbalances nor diminishes the shortcomings in their testimony. We summarise the principal shortcomings thus:

(i) Neither witness has any qualifications or expertise, vocational or otherwise, in the scientific subject matter of these appeals, namely voice recognition technology and techniques.

(ii) In making its decisions in individual cases, the Home Office was entirely dependent on the information provided by ETS. At a later stage viz from around June 2014 this dependency extended to what was reported by its delegation which went to the United States.

(iii) ETS was the sole arbiter of the information disclosed and assertions made to the delegation. For its part, the delegation – unsurprisingly, given its lack of expertise – and indeed, the entirety of the Secretary of State's officials and decision makers accepted uncritically everything reported by ETS.

(iv) The Home Office has at no time had advice or input from a suitable expert.

(v) There was no evidence from any ETS witness – this notwithstanding the elaborate critique of Dr Harrison compiled over one year ago.

(vi) The test results of the 33,000 suspect TOEIC scores, coupled with the information disclosed and assertions made to the Secretary of State's delegation during a one day meeting, constitute the totality of the material provided by ETS.

(vii) 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.

(viii) While the judgment of this Tribunal in Gazi, promulgated in May 2015, raised significant questions about the witness statements of Ms Collings and Mr Millington, these were not addressed, much less answered, in their evidence at the hearing. See in particular Gazi at [9]-[15] (reproduced in [19] above).

(ix) While certain documentary evidence, highlighted in [15] above, might have fortified the Secretary of State's case, none was produced.

(x) Similarly, although requested, none of the voice recording files pertaining to the Appellants was provided for analysis and consideration by Dr Harrison.

64. The frailties in the Secretary of State's evidence are thrown into still sharper relief when juxtaposed with the expert evidence of Dr Harrison. Until the hearing of these appeals Dr Harrison's evidence had been considered by tribunals in documentary form only. Perhaps unsurprisingly, given the factors we have highlighted above, there was no challenge of substance to Dr Harrison's analyses, opinions and conclusions. We consider that his evidence was balanced, measured and truthful, containing no hint of exaggeration or conjecture. He engaged impressively with the Tribunal, providing forthright answers to all questions. Furthermore, following the hearing, he provided prompt, lucid and comprehensive answers to the written questions which the Tribunal permitted to be addressed to him.

65. We refer particularly to those aspects of Dr Harrison's critique outlined in [25]-[35] above. Dr Harrison's report has been available to the Secretary of State for a period exceeding one year. It raises profound questions about the witness statements of the Secretary of State's officials and the information emanating from ETS rehearsed therein. At this remove, the Secretary of State has failed to deal with the main criticisms, satisfactorily or at all, either in the evidence adduced at this hearing or in cross examination of Dr Harrison. His main criticisms continued to feature in his evidence to the Tribunal. While it is essential to consider each of these individually, as we have done, they are conveniently summarised in [31] – [34] above, culminating in the conclusion expressed by Dr Harrison in [35]. In our judgment Dr Harrison's criticisms and reservations continue to hold good. He was unshaken in cross examination and we have no hesitation in accepting his expert opinion and conclusions.

66. While we do not overlook the evidence of Mr Green, summarised in [12] above, it was, as we have observed already, intrinsically limited. Nor do we overlook the documentary evidence adduced on behalf of the Secretary of State, listed in [10] above. This adds little of substance, an analysis reflected by the fact that it barely featured during the hearing or in counsel's submissions. Furthermore, some of it, a paradigm example being the "SELTINFO" document, is so incomplete and opaque as to be virtually meaningless. Finally, we find nothing in the Secretary of State's other documents to offset our assessment above.

The Appellants' Evidence: Our Findings and Conclusions

67. We begin by asking ourselves whether the Secretary of State has discharged the evidential burden of proving that the Appellants were, or either of them was, guilty of dishonesty in the respects alleged. Bearing in mind that, as noted above, all of the Secretary of State's evidence was adduced first, reflecting the burden of proof, it is appropriate to record that at the stage when the Secretary of State's case closed there was no submission on behalf of either Appellant that the aforementioned evidential burden had not been discharged. We draw attention, *en passant*, to a procedural issue which may be worthy of fuller consideration in an appropriate future appeal, namely the question of whether in a case where the Secretary of State bears the evidential burden of establishing sufficient evidence of deception and, at the hearing, goes first in the order of batting, the Tribunal should invite submissions from the parties' representatives at the stage when the Secretary of State's evidence is completed.

68. As our analysis and conclusions in the immediately preceding section make clear, we have substantial reservations about the strength and quality of the Secretary of State's evidence. Its shortcomings are manifest. On the other hand, while bearing in mind that the context is one of alleged deception, we must be mindful of the comparatively modest threshold which an evidential burden entails. The calls for an evaluative assessment on the part of the tribunal. By an admittedly narrow margin we are satisfied that the Secretary of State has discharged this burden. The effect of this is that there is a burden, again an evidential one, on the Appellants of raising an innocent explanation.

69. We turn thus to address the legal burden. We accept Mr Dunlop's submission that in considering an allegation of dishonesty in this context the relevant factors to be weighed include (inexhaustively, we would add) what the person accused has to gain from being dishonest; what he has to lose from being dishonest; what is known about his character; and the culture or environment in which he operated. Mr Dunlop also highlighted the importance of three further considerations, namely how the Appellants performed under cross examination, whether the Tribunal's assessment of their English language proficiency is commensurate with their TOEIC scores and whether their academic achievements are such that it was unnecessary or illogical for them to have cheated.

70. We begin with the expert evidence of Dr Harrison upon which both Appellants rely. We have already made our assessment of Dr Harrison's evidence in the context of our evaluation of the evidence on behalf of the Secretary of State: see [58] – [61]

above. There is nothing of substance to add to this. In short, the evidence adduced on behalf of the Secretary of State emerged paled and heavily weakened by the examination to which it was subjected. By the stage when Dr Harrison's evidence was completed, the Secretary of State's evidence had paled and wilted. In the sporting world a verdict of no contest would have been appropriate at this juncture. The Appellants' cases are enhanced and fortified by Dr Harrison's evidence, which we accept in its entirety.

The First Appellant: SM

71. At this juncture, we turn to consider the case of the first Appellant, SM. In his two witness statements this Appellant makes a reasonably impressive case. His account of what he claims to have done at the conclusion of the interview giving rise to the impugned decision was unchallenged. Nor was there any challenge to his description of the various steps taken by him subsequently: see [41] – [42] above. We have no reason to doubt any aspect of this evidence, all of which points towards a finding of honesty rather than deceit. However, we must of course consider this purely documentary evidence with all the other evidence, including this Appellant's testimony under cross examination, bearing on the question of deception.

72. Next we turn to the evidence of this Appellant's proficiency in English relating to the period preceding the date of the TOEIC Certificate, 26 March 2012. This evidence focuses particularly on the years 2005 and 2006: see the summary in [39] above. The authenticity of this evidence was not seriously challenged and, having considered it critically, we have no reason to doubt it. The IELTS Certificate obtained by this Appellant prior to first entering the United Kingdom in June 2005 is one of the recognised qualifications in the system of immigration control. The Appellant's score was impressive.

73. We find that subsequently, during a period of around 16 months, this Appellant participated in an intensive English language programme, securing both intermediate and advanced qualifications, with distinction (85%). Thereafter, during a period of some four years, he attended a series of colleges, underwent various examinations and obtained qualifications in the realms of accountancy and business studies. All of these courses and modules were conducted in the English language. Furthermore, throughout these years he was, in essence, permanently resident in the United Kingdom.

74. While we acknowledge that certain documents were explored and probed in Mr Dunlop's cross examination, this was undertaken in hopeful and speculative mode. In our judgment there was no serious suggestion that any of the documents was falsified or forged. Nor was any direct evidence of such impropriety adduced. We find, further, that there is no evidence from which this could be properly inferred. We find that they are genuine. We elaborate on this finding below.

75. The letters and certificates relating to this Appellant purporting to emanate from Kaplan College were challenged in cross examination. It was highlighted that the various dates do not tally. Furthermore, the Appellant's suggestion that during this

period he pursued a ACCA course at Kaplan and, simultaneously, an English language course at CITEC was challenged as being implausible. It was suggested that he was unclear about the precise level of the Kaplan course and the ACCA examinations he had undertaken. Certain discrepancies in his witness statements were also highlighted in this context and, further, in relation to the documentary evidence that he had studied at London Reading College. There was a similar challenge relating to his evidence of having studied at the London School of Business and Finance and the London School of Management Education.

76. We consider it important to recognise that this Appellant was at all material times a student, a person having no reason to anticipate a penetrating forensic dissection of the documentation bearing on his sojourn in the United Kingdom some ten years after it began. We take note that various pieces of correspondence were issued in anticipation of studying a course, or having been accepted provisionally to study a course, or having commenced a course, or with a view to completing courses to move to a further college, or simply for the purpose of having secured a place at a college and using the college's documentation to obtain an extension of his student leave to remain. Given the multiplicity and variety of letters produced, it does not seem plausible to us that a package of this sort could have been concocted or created to assist the Appellant in defrauding the Secretary of State during such a protracted period. In this respect, the significant limitations in the Panorama documentary as persuasive evidence must be recognised.

77. While the cross-examination of this Appellant and Mr Dunlop's final submissions included a suggestion that some of the documentary evidence is not reliable, there was no frontal or sustainable challenge to its authenticity. Having taken the precaution of calling for original documents to be produced and having perused the same, we have no basis for questioning their authenticity. In this context, we remind ourselves that Judges are not expert document examiners. There was no evidence, expert or otherwise, suggesting that the documents in question were fabricated and none from which such finding could properly be inferred. We find specifically that this Appellant, who was sufficiently proficient in English to be admitted to the United Kingdom for the purpose of study in 2005 and, further, demonstrated an elevated level of proficiency by 2007 was, during the ensuing years, expanding and enhancing his English language abilities via his studies and daily living. The probabilities are that he was highly proficient in English by the time he underwent the TOEIC examination in 2012. He had no reason whatsoever to jeopardise his career and future by cheating in the test.

78. The events of 2012 are of obvious significance. The TOEIC Certificate was, on its face, obtained by this Appellant after undergoing the necessary testing on two separate dates, 20 and 26 March 2012. We acknowledge that, in the abstract, his score in the modules of listening and reading is very high indeed, being 930 out of a possible 990 (circa 90%). In the modules of speaking and writing the scores recorded are also high, being 160/200 in each instance (circa 80%). Duly armed with his TOEIC Certificate, this Appellant applied for leave to remain in the United Kingdom. His application was refused, giving rise to a hearing before the First-tier Tribunal ("*FtT*") on 05 September 2012.

79. We consider this aspect of the evidence to be of some significance. From the Tribunal's determination one learns that this Appellant attended the hearing, gave evidence, was cross examined and was re-examined. No interpreter was required and there is no indication of the slightest difficulty in communication or comprehension. We note further that during the period of (approximately) September 2010 to February 2012 this Appellant claims that he was pursuing courses at two colleges simultaneously, which we accept. We infer from this fact, coupled with the successful outcomes, that his mastery of English was of a high and progressively improving level.

80. We consider that in appeals of this nature evidence of this kind is likely to be of substantially greater force and cogency than the tribunal's own assessment of an appellant's English language proficiency based on performance at the appeal hearing. This is especially pertinent in the present case, given that some three years have elapsed since this Appellant claims to have secured his TOEIC certificate. In some of the FtT decisions in this field one finds observations concerning the appellant's apparent fluency in, and command of, the English language. We consider that Judges should be cautious in adopting this approach for at least three reasons. The first is the passage of time. The second is that Judges are not language testing or linguistics experts. The third is that, to date, there has been no expert linguistic evidence in any of these cases.

81. Our quest to determine where the truth lies (within the parameters of burdens and standards of proof) is further illuminated by the documentary evidence relating to one of the Appellant's two bank accounts. This records the various movements in the account during the period early February to early April 2012. As highlighted above, the two important events which unfolded during this period were the TOEIC tests and, at the end of the period, the Appellant's application for further leave to remain in the United Kingdom. Given the requirements of the Immigration Rules which this latter application had to satisfy, the relatively substantial credits to the Appellant's bank account are readily understandable. Furthermore, we accept the Appellant's evidence that the person whose deposit transaction (on 27 February 2012) credited the account in the amount of £4,000 is someone well known to him and his family who, on occasion, was given money for the Appellant upon her visits to Pakistan. The specific point put to the Appellant in cross examination was that the withdrawal of £1,500 from the account on 27 February 2012 is indicative of him paying the necessary price to secure a bogus TOEIC Certificate. The Appellant denied this vehemently and, in general, dealt with the questions relating to this particular issue firmly and persuasively. This was one of the more important passages during his evidence.

82. This Appellant was also questioned closely about his BTEC Edexcel certificate in strategic management and leadership. Discrepancies in the Appellant's written and oral evidence were highlighted in this context. His account was that he was asked to submit certain documentation when seeking a visa to study for his MBA course. He claimed that he had travelled to Glasgow to attend an interview with a Home Office caseworker regarding that application. He further asserted that he duly submitted

documentation from Opal College and London School of Technology to the caseworker. He identified this person by name. The Appellant claimed that several days passed, after which the caseworker called and told him that she had confirmed the accuracy of his studies with the various colleges and Edexcel, the independent examining body. That detailed account was not rebutted by any countervailing evidence from the Secretary of State.

83. It is distinctly possible that a frontal challenge to this aspect of this Appellant's case, supported by evidence, would, in principle, have been available to the Secretary of State. However, none materialised. There was no rebutting evidence and nothing concrete was put to the Appellant in cross examination. Having considered the Appellant's account with care, we are satisfied that it is plausible.

84. In this context Mr Dunlop drew to our attention the decision of the Administrative Court in *R (Cranford College) v SSHD* [2015] EWHC 1090 (Admin). Having juxtaposed this decision with this Appellant's certificates, we consider that it provides little sustenance to the Secretary of State's quest to discharge her legal burden of proof. We note in particular that while Edexcel certificates were evidently obtained by students at Cranford College, no aspersions were cast against the Edexcel organisation. Moreover, the coursework and testing which generated the certificates awarded to students were orchestrated and marked undertaken in a purely internal context, involving no independent examiner: see [27] and [28] especially. This falls measurably short of demonstrating that all Edexcel certificates are tainted irredeemably by fraud. Furthermore, we accept this Appellant's evidence that the tests he underwent with Opal College and London School of Technology were exported to be marked externally, by Edexcel. In this context we highlight further the absence of any concrete evidence adduced by the Secretary of State, on whom the legal burden of proof rests. In summary, this is a paradigm illustration of the tilting at windmills which characterised much of the Secretary of State's case.

85. We must consider also the evidence contained in the Panorama programme. There is no specific evidence relating to either Appellant. The programme focused on TOEIC testing centres. It suggested that an unspecified number of TOEIC certificates was procured by the use of so-called "proxies". Furthermore, it demonstrated that such certificates could be purchased (on a black market of sorts) by payment of an appropriate sum and, further, that the commodity of an entire package of visa documents was also available for purchase. This programme was the stimulus for the evidence upon which the Secretary of State relies in these appeals. In this context it is appropriate to recall the supportive evidence of Mr Watson, the journalist concerned, noted in [46] above.

86. We now turn to consider this Appellant's performance when giving evidence. We had the advantage of assessing him during a period exceeding one day. In several respects his evidence to the Tribunal was unsatisfactory. Many of the questions put to him related to the Certificates, letters and other materials emanating from the series of colleges concerned and were of an intricate and detailed nature. Comprehensive and accurate replies to all of the questions would have required a mastery of a substantial body of documents. The Appellant plainly – and

understandably enough – did not have this command. However, he rushed into answers; attempted to answer every question put to him; failed to acknowledge that he was truly not able to answer certain questions; and also failed to state, where appropriate, that he simply was not certain or confident of the correct answer. In addition, many of his replies, frequently to very simple questions, were of such prolixity, quite unnecessarily, as to be difficult, sometimes impossible, to comprehend. Intermittent advice and warnings from the Tribunal to the Appellant had little or no impact. Furthermore, he had a clear tendency to attempt to provide answers which he thought the Tribunal would like to hear. All in all, therefore, this Appellant was an unsatisfactory witness.

87. The key question to be addressed is whether, taking into account the shortcomings and frailties listed above, and bearing in mind the burdens of proof and standard of proof in play, this Appellant's evidence on the core issue of whether he was guilty of deceit in procuring his TOEIC Certificate is believable. Some measure of credit is due to the Appellant for confronting every question put to him. He sought to evade nothing. He also sought to engage with the panel at all times. Some credit is also due for the efforts to which he went following the first day of his evidence to search for and obtain certain further material documents. In addition, while the dates in certain documents were not easily explained, in common with certain sequences of dates, we must bear in mind that the Appellant was not the author of any of the documents concerned. Many of them were bureaucratic and formulaic in nature and, further, used codes and abbreviations which complicated the task of assimilation and comprehension. The Appellant cannot be faulted for his inability to deal with some of the questions relating to these materials. We must also take into account that he has been studying in the United Kingdom for a very long time, almost 11 years, throughout which period he has pursued a veritable proliferation of courses and modules. Furthermore, much of the questioning of the Appellant related to events which occurred many years ago. Thus, to summarise, the imperfections in this Appellant's evidence to the Tribunal are tempered and mitigated in several ways. Ultimately, we find that he was a witness of truth.

88. Having reviewed all of the documentary evidence with care we are satisfied that it accords with the Tanveer Ahmed principles. The specific challenge to the reliability of some discrete documents has not been made out. We find that through his oral and documentary evidence this Appellant has discharged the evidential burden of raising a satisfactory explanation for the various matters which are advanced as constituting dishonesty on his part.

89. The final question is whether the Secretary of State has discharged the legal burden of establishing on the balance of probabilities that this Appellant procured his TOEIC certificate by deceit. The answer to this question requires a balancing of all of the findings and evaluative assessments rehearsed above. We are satisfied, objectively, that at the stage when this Appellant took the tests in question there was no need for him to engage in any form of cheating. He would have been sufficiently proficient in English to secure the necessary qualification legitimately. Furthermore, given his extensive familiarity with the immigration system, he would have been aware of the grave consequences of any form of deception. To have cheated would have entailed

engaging in a game of risk with very high stakes indeed. Furthermore, having considered all the evidence, we have no reason to question the Appellant's good character generally.

90. In addition, as already highlighted, this Appellant's case is fortified by the unchallenged evidence of the steps which he took in his own defence from the moment when the illegitimacy of his TOEIC certificate was first questioned. We find no reason to doubt this evidence. Moreover, there was very little exploration in cross-examination of the Appellant's account of the tests undertaken and the surrounding circumstances. Finally, we must weigh our findings concerning the marked shortcomings in the Secretary of State's evidence, coupled with our acceptance of the Appellants' expert evidence.

91. The non-specific and generalised nature of the Secretary of State's case against both Appellants is emphasised by the four hypotheses canvassed in Mr Dunlop's written submissions. These are:-

(i) The Appellants may have bought their TOEIC certificates as part of a package of false documents.

(ii) Alternatively, they may have attended a test centre with *bona fide* intentions and then, upon discovering "*the fraud*", voluntarily participated therein.

(iii) In the further alternative, even though likely to succeed on their own merits, they opted to cheat in order to secure a guaranteed result.

(iv) Finally, their command of English may have improved between the date of the tests and the hearing of their appeals.

We observe that while we have been consistently open to all reasonable possibilities, as Mr Biggs emphasised in his submissions none of these theories was canvassed in any substantial or detailed manner in the cross examination of either Appellant. Having regard to our analysis of all the evidence and the findings rehearsed above, we find that none of the first three scenarios has been established. As regards the fourth, we have placed no reliance on the apparent English language proficiency of either Appellant as displayed in their evidence to the Tribunal.

92. Our overarching conclusion is that the Secretary of State has not discharged the legal burden of proving that this Appellant's TOEIC certificate was procured by dishonesty.

The Second Appellant: Mr Qadir

93. It is unnecessary to rehearse those assessments, findings and conclusions above which apply as fully to this Appellant as to the first Appellant.

94. We shall now switch our focus to the case of the second Appellant, Mr Qadir. In cross examination, this Appellant was questioned in particular about the following issues

and topics: the contents of his two witness statements; his qualifications obtained in Pakistan; his employment history in Pakistan; his IELTS English language test; his primary motivation in coming to the United Kingdom; colleges attended and courses pursued since his arrival in late 2010; his places of residence in England; his choice of the centre where he claims to have taken the TOEIC test; the details of the test and the surrounding circumstances; his full marks (200/200) in the speaking test; the content of the four test components; the financing of his education in the United Kingdom; and, finally, certain answers provided by him during interview. As in the case of the other Appellant, the issues canvassed with this Appellant in cross examination, both individually and collectively, sounded on his character, reliability and veracity.

95. Generally, the evidence given by this Appellant and adduced on his behalf was simpler and less voluminous than that of the other Appellant. This is, in the main, a reflection of this Appellant's substantially shorter period of sojourn in the United Kingdom. While both Appellants obviously rely on the expert evidence of Dr Harrison, this Appellant, like the other Appellant, also relies substantially on his own evidence both oral and documentary. Furthermore, as in the case of the first Appellant, the Tribunal requested this Appellant to produce as many original documents as he could and he too did so overnight.

96. Addressing the main issues canvassed in Mr Dunlop's final submissions, which contain an impressive forensic analysis of the evidence:

    (i) Objectively, it is relatively unsurprising that, following a period of two years living and studying in the United Kingdom, this Appellant's proficiency in English was substantially better than during his second level education. Furthermore, we formed the clear impression that he is a serious and studious individual. While he did not undertake any English foundation course following arrival, there is no evidence to suggest that his English was not of a sufficient standard to participate in and progress through various third level education courses. We take note of this Appellant's full score (200/200) in the English speaking component. However, the Secretary of State, on whom the legal burden rests, has adduced no benchmark or comparative evidence or, indeed, expert evidence to cast shadows over this discreet score. There was, for instance, no suggestion that only a tiny elite of brilliant students could genuinely achieve this mark.

    (ii) This Appellant provided impressive evidence when questioned about the substance of the various components of the TOEIC testing. We are satisfied that he was not prevaricating in his descriptions of reading a passage, identifying the gist of the passage concerned, describing a picture, responding to short questions and solving a problem. Further we take judicial notice of the subjectivity of language examiners, a factor which is capable of giving rise to apparent imbalances and surprisingly high – or surprisingly low – marks.

    (iii) The Appellant's evidence about why he chose to take his TOEIC test at the particular centre in London, namely because of waiting lists and delays, was plausible. The Secretary of State led no evidence to counter it.

(iv) It was not possible for the Appellant to adduce evidence from the acquaintance who recommended the centre concerned whom he identified, as he is no longer in the United Kingdom.

(v) Having studied the TOEIC "Official Score Reports" with care, we are satisfied that all of the formal entries (name, registration, date of birth *et al*) were made by an official at the centre and not the Appellant. While his first name is misspelt in one of these two documents, we find no basis for making an inference adverse to the Appellant accordingly.

(vi) We acknowledge that this Appellant's witness statements do not spell out the different dates upon which the testing occurred. However, they clearly identify the multiple components. Furthermore, the Appellants first witness statement was made in a context in which the Official Score Reports formed part of his documentary evidence to the FtT. We incline to the view that any deficiency in the witness statements is to be attributed more to the solicitor or case worker concerned than the Appellant.

(vii) We consider it unremarkable that, given that he made only two relatively brief visits to the test centre in London during the whole of his sojourn in the United Kingdom, the Appellant was unable to provide a precise address or name.

(viii) We find nothing adverse to this Appellant in the "port" interview record. The questioning of him was objectively, entirely capable of eliciting the response made, namely his description of securing the IELTS English language qualification. Furthermore, we consider it obvious that the interviewer was adhering strictly to the prepared, pro-forma text, with the result that there was no spontaneity in reacting to any of the Appellant's responses. We further take into account that, as is recorded, the Appellant was somewhat indisposed at the time of interview.

(ix) Finally, we construe this Appellant's description of his first semester of study and the later revocation of the college licence as benign, giving rise to no major or objectively demonstrable discrepancy.

In summary, we prefer the submissions of Mr Malik on these issues.

97. We are satisfied that in the explanations, illuminations and elaborations provided by this Appellant in response to detailed and penetrating questioning no significant discrepancy or inconsistency emerged. Without attempting a comprehensive inventory of how this Appellant fielded the main interrogatories put to him, we are satisfied that he provided adequate explanations of the main issues canvassed with: him his English language and academic qualifications; his reasons for coming to the United Kingdom; the location of some of his course examinations; the centre where he arranged to undertake the TOEIC test; his reasons for taking the test at this centre; the descriptions of the test provided in his witness statements; the spelling of his name in the two "Official Score Reports"; his familiarity with the area where the test

centre is located; his full marks in the speaking test; and his answers during interview.

98. We take into account the submission that this Appellant's grammar appeared to be less than perfect. Having done so, we would highlight that this contention was advanced through the medium of counsel's submissions, rather than any evidence adduced on behalf of the Secretary of State. Furthermore, it is undermined by our various findings rehearsed above. We further remind ourselves in this context of the cautionary approach espoused in [76] and [80] above. While no tribunal will turn a blind eye to the obvious, we find no basis for concluding that this Appellant's apparent English language proficiency, based on his oral evidence, whether on its own or in combination with other factors, contributes to the Secretary of State's quest to discharge the legal burden of establishing that his dishonesty was instrumental in procuring his TOEIC certificate.

99. Finally, our task of evaluating the cogency and veracity of this Appellant's evidence in its totality has been assisted by the opportunity which we had to study his demeanour and presentation during a period of some two hours when testifying to the Tribunal. We found no indications of invention, exaggeration or evasiveness. This Appellant was attentive to all questions and provided his answers in a careful, pensive fashion. He at all times sought to engage with the Tribunal and clearly realised the importance of telling the truth. His answers to the vast majority of questions were of appropriate length, comprehensible and intelligible. In demeanour this Appellant consistently presented as a witness of truth.

Omnibus Conclusions

100. The evidence adduced on behalf of the Secretary of State suffers from the multiple frailties and shortcomings identified above. The oral evidence of the first Appellant, SM, was a classic curate's egg. We have exposed its mix of strengths and imperfections above. Having done so, we have concluded that the core elements of his case are plausible. The oral evidence of the second Appellant, Mr Qadir, was, in contrast, impressive in its entirety. We have accepted the central thrust of his case also. The documentary evidence adduced by both Appellants contains no significant flaws. While certain questions deserving of consideration and reflection have been raised (reflected in our conclusion that the Secretary of State's evidential burden has been satisfied), these are insufficient to displace our omnibus conclusion that, viewing all the evidence in the round and having subjected the Appellants' testimony to the Tribunal to critical scrutiny, the core of their respective cases is truthful and plausible. Finally, the expert evidence of Dr Harrison significantly undermines the Secretary of State's case, fortifies and reinforces the case of both Appellants and, ultimately, has emerged not merely unshaken but enhanced .

101. We have already held that the evidential burden of proof resting on the Secretary of State has been narrowly discharged. For the reasons which we have given, we are satisfied that both Appellants have discharged their burden of raising an innocent

explanation of the *prima facie* indications of deception on their part in the Secretary of State's evidence. For the reasons elaborated, we conclude, without hesitation, that the Secretary of State has failed to establish, on the balance of probabilities, that the Appellants' *prima facie* innocent explanations are to be rejected. The legal burden of proof falling on the Secretary of State has not been discharged. The Appellants are clear winners.

102. We take this opportunity to re-emphasise that every case belonging to the ETS/TOEIC stable will invariably be fact sensitive. To this we add that every appeal will be determined on the basis of the evidence adduced by the parties. Furthermore, the hearing of these appeals has demonstrated beyond peradventure that judicial review is an entirely unsatisfactory litigation vehicle for the determination of disputes of this kind: see Gazi at [36] – [37].

103. We take note of the indications in the conduct of these appeals that, in some future case, the Secretary of State may seek to adduce further evidence, likely to be expert in nature. Should this eventuate the evidential framework of future appeals will not merely be fact sensitive but may include an entirely new ingredient. As we have emphasised, all appeals will be decided on the basis of the evidence actually adduced.

104. The factors which were of particular significance in the exercise of making our findings and conclusions in these appeals are evident from what we have written in this judgment. We are conscious that some future appeals may be of the "out of country" species. It is our understanding that neither the FtT nor this tribunal has experience of an out of country appeal of this kind, whether through the medium of video link or Skype or otherwise. The question of whether mechanisms of this kind are satisfactory and, in particular, the legal question of whether they provide an appellant with a fair hearing will depend upon the particular context and circumstances of the individual case. This, predictably, is an issue which may require future judicial determination.

Decision

105. We re-make the decision of the FtT in each case by allowing the Appellants' appeals.

Postscript

106. We consider it appropriate to record that, following the circulation of this judgment in draft in the usual way, having considered the response on behalf of the Secretary of State the author of the judgment took the precaution of listening to the recording of Ms Collings' evidence in particular. This was an arid exercise since (notwithstanding repeated judicial exhortations) Ms Collings failed consistently to speak sufficiently audibly to enable her evidence to be efficaciously recorded.

107. Finally, we take the opportunity to emphasise strongly the caution and respect with which parties and representatives must treat embargoed judgments. All forms of unauthorised dissemination will be met with rigorous measures. Any slightest doubt should be proactively and timeously raised with the Tribunal.

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Date: 31 March 2016

APPENDIX 1

Upper Tribunal
(Immigration and Asylum Chamber)

THE IMMIGRATION ACTS

Heard at Field House
05 February 2016

Ruling given orally on 05 February 2016

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Before

THE HON. MR JUSTICE McCLOSKEY, PRESIDENT
DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

SM
(Anonymity Order made)
&
IHSAN QADIR

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

First Appellant: Mr M Biggs, of counsel, instructed by Universal Solicitors
Second Appellant: Mr Z Malik, of counsel, instructed by AWS Solicitors
Respondent: Mr R Dunlop, of counsel, instructed by Government Legal Department

RULING

1. The following is our ruling on the Secretary of State's application for the admission of belatedly served evidence. By 'belatedly' I mean served on the Appellants' legal

representatives yesterday and brought to the attention of the Tribunal for the first time this morning.

2. The evidence consists of two basic categories. The first category is the police materials. This aspect of the application is particularly contentious. The second category is the remaining materials which gives rise to substantially less controversial issues.

3. As regards the first category, namely the police reports, the main features or issues to be highlighted are, first of all, the lateness *per se* and related to that the absence of any appropriate application, timeous or otherwise, to the Tribunal on behalf of the Respondent in advance of today's hearing, taking into account the specially convened CMR on 17 December 2015. It is difficult to conceive of evidence being served any later than this was. Linked to this there is the absence of anything even approaching a satisfactory explanation. There is, indeed, a detectable element of the cavalier in approaching the hearing in this way.

4. The next main issue is linked to the first and that is fairness to the Appellants. Having regard to the nature of this evidence, it is fundamentally and manifestly unfair to expect the Appellants to deal with it, quite irrespective of timing. This requires no elaboration.

5. The third and fourth points are interrelated, as are the first and second. They concern the content of the evidence, its potential probative value and its likely prejudicial effect. The evidence is not produced in any conventional or acceptable form. It is, properly analysed, multiple hearsay. It contains mere allegations and assertions. Its likely probative value is as close to zero as one could imagine, while its potentially prejudicial effect could be quite significant. Given that, if it is to be admitted by the Tribunal that can only be for the purpose of persuading the Tribunal to make inferences adverse to the Appellants and indeed to simply smear them.

6. Furthermore, it is not without good reason that in legislating in matters of this nature, Parliament has for many decades made a very careful distinction between criminal convictions on the one hand and anything falling short of a criminal conviction on the other. Evidence of criminal convictions can be adduced by statute in civil proceedings only if certain conditions are satisfied. We are not even at that level in relation to this evidence as it consists of mere hearsay allegations, comment and speculation. Even if there were formal charges or indictments evidence of these too would be inadmissible. The consideration that these are <u>tribunal</u> proceedings does not affect this analysis, particularly given the gravity of the misconduct, namely fraud, alleged by the Secretary of State against both Appellants.

7. For this combination of reasons the application to adduce the Police Reports falls to be refused without any hesitation whatsoever.

8. I turn now to address the remaining materials which are, firstly, the witness statements of Mr Green and the two attachments, each in what is now familiar form in this sphere of litigation, namely a spreadsheet entry. Secondly, there is the interview of the second Appellant at port. Thirdly, there is a document entitled "Explanation of ILETS Scoring". Fourthly, there is evidence relating to the SCLT Centres in Leeds in January and February 2012.

9. The various shortcomings and objections pertaining to the Police Reports do not apply, by and large, to this other category of evidence. We shall, accordingly, admit Mr Green's witness statements and attachments. That will, of course, be subject to any submission which may properly be made concerning the timing of this evidence and the weight to be attached to it. With some reluctance and subject to precisely the same qualification, which could potentially be more important in this instance, we shall admit also the document entitled "Explanation of ILETS Scoring". Further, we can see sustainable objection to admitting the port interview of the second Appellant.

10. We have considered also the nature of the evidence provided under the rubric of "Evidence Relating to SELT Centres in Leeds in January and February 2012". There may, legitimately, be substantial reservations about the probative value of this evidence and the weight to be attached to it. However, on balance, we take the course of admitting this evidence with that important qualification, thereby leaving the Appellants in the following position. As regards the admission of the various components of what we have identified as the second category in the Secretary of State's belated bundle, the Appellants will be at liberty to advance such submissions relating to timing, fairness and probative value and weight as they see fit.

11. One further preliminary issue was raised faintly and without notice to either the Tribunal or the Appellants' representatives. An enquiry was made by Mr Dunlop as to whether one member of the judicial panel, Deputy Upper Tribunal Judge Saini, had previously acted as an advocate in any case of this kind. As I pointed out, this was an inappropriate and misconceived enquiry, for two reasons. First, it was based on the unspoken premise that, without advance notice or formality of any kind, it was open to a representative to direct questions of this kind to a Judge in open court. The impropriety of such a procedure requires no elaboration. Second, on its merits, the issue raised was devoid of substance. As the leading authority on this topic, Locabail – v – Bayfield Properties [1999] EWCA Civ 3004 makes clear, a part time Judge's previous involvement in a comparable case does not, without more, justify recusal. Lord Bingham MR stated, at [25]:

> "*We cannot, however, conceive of circumstances in which an objection could be soundly based on ……. **previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him** ….*"
>
> [My emphasis]

12. I also consider it appropriate to draw attention to the statutory oath of office which must be sworn or affirmed, by all deputy judges and, in particular, the words "*without fear or favour*". Finally, the Locabail issue has arisen in a very recent decision of the Court of Appeal, which considered it *in extenso*. See Watts v Watts [2015] EWCA Civ 1297 and, in particular, the following passages in [28]:

> "*(i) The notional fair-minded and informed observer would know about the professional standards applicable to practising members of the Bar and to barristers who serve as part-time deputy judges and would understand that those standards are part of a legal culture in which ethical behaviour is expected and high ethical standards are achieved, reinforced by fears of severe criticism by peers and potential disciplinary action if they are departed from: Taylor v Lawrence [2001] EWCA Civ 119, [33]-[36]; Taylor v Lawrence [2002] EWCA Civ 90; [2003] QB 528, [61]-[63]. These aspects of the legal culture of the Bench and legal professionals are not undermined by the fact that some litigation is now funded by means of CFAs;*
>
> *(ii) The notional fair-minded and informed observer would understand that a part-time judge's approach to the case she is trying and to her relationships with other professionals will be governed by these professional standards. There is no reason to think that a judge would allow her professional training and ethics to be overridden by a concern not to upset a junior counsel she is leading in other litigation. Moreover, the judge would know that the junior counsel would himself understand that she is bound by strict professional standards, and hence would have no expectation that she would do anything other than act in accordance with them. So the judge would not expect any disgruntlement or difficulty to arise in her relationship with the junior counsel even if she makes a decision adverse to him in the case she is trying. Accordingly, the idea that the judge would adjust her behaviour as judge to avoid upsetting the junior counsel is far-fetched indeed. The notional fair-minded and informed observer would not consider that there was any genuine possibility of this occurring;*"

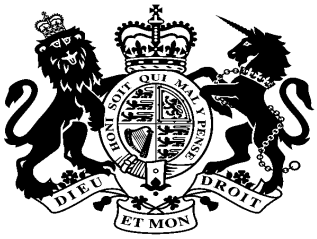
13. As it happens, Deputy Upper Tribunal Judge Saini has indeed acted as an advocate in a couple of "*ETS*" cases at first instance and, notwithstanding the two fundamental defects identified above, this was immediately broadcast by me in open court.

Edward McCloskey.

THE HON. MR JUSTICE McCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Date: 09 February 2016

APPENDIX 2



Upper Tribunal
(Immigration and Asylum Chamber)

THE IMMIGRATION ACTS

Direction Promulgated

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Between

SM and Ihsan Qadir

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Ruling / Direction of The Hon Mr Justice McCloskey, President

1. The Secretary of State brings this application for Directions in circumstances where all of her evidence has been adduced, pursuant to a sequential framework approved by the Tribunal, and her case has now closed in consequence. This follows two days of evidence, which has included the testimony of two of the Appellants' witnesses, including their expert witness, on 05 and 06 February 2016. On the latter date, a necessary third day of hearing, 03 March 2016, was arranged and agreed by all representatives. Only the two Appellants remain to give evidence and thereby complete the trial.

2. These appeals have been in gestation for some considerable time and have been the subject of pre-trial management.

3. The trial has already been disrupted and delayed by the Secretary of State's belated quest to have new evidence admitted, on the first day.

4. The essence of this further application is to permit new evidence, not yet in existence, to be adduced from an expert. This application is made far too late. No satisfactory explanation for its lateness has been provided. The Appellants' expert report has been in the public and litigation arenas for over one year. To accede to the application will, as a matter of high probability, significantly disrupt and delay the trial further. Having regard to [1] above, it will also skew the trial unacceptably. The overriding objective impels strongly to refusal.

5. Insofar as it is suggested that the expert's report could be ready by 03 March 2016, this fails to address [2] – [4] above. Furthermore, I have grave concerns about such indecent haste, given the extensive and protracted preparations and research which would, in my judgement, be required of a serious expert witness.

6. The Secretary of State may, of course, seek to adduce such evidence in some future case.

7. For the reasons elaborated above, the application is refused.

8. Finally, I make clear that I discern no impropriety in the conduct of the Secretary of State's legal representatives.

Signed: *Bernard McCloskey*

PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Date: 25 February 2016