Neutral Citation Number: [2021] EWCA Civ 1004

Case No: C8/2020/0098

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
His Honour Judge Jarman QC

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/07/2021

Before :

LORD JUSTICE SINGH
LORD JUSTICE DINGEMANS
and
SIR NIGEL DAVIS

- -

Between :

The Queen (on the application of Sohrab Mahmud)	**Appellant**
- and -	
The Upper Tribunal (Immigration and Asylum Chamber)	**Respondent**
- and -	
Secretary of State for The Home Department	**Interested Party**

- -

Paul Turner and Zahab Jamali (instructed by **Hubers Law Solicitors**) for the **Appellant**
Colin Thomann (instructed by **Government Legal Department**) for the **Interested Party**
The Upper Tribunal did not appear and was not represented

Hearing date : 17 June 2021

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Approved Judgment

Lord Justice Dingemans:

Introduction

1. This is the hearing of an appeal against a decision dated 25 November 2019 of His Honour Judge Jarman QC, sitting as a High Court Judge, refusing the appellant, Sohrab Mahmud, permission to apply for judicial review. As this was a *Cart v Upper Tribunal* [2011] UKSC 28; [2012] 1 AC 663 application to the Administrative Court, there was no right, pursuant to the provisions of CPR 54.7A, to have an oral renewal of the application for permission to apply for judicial review following the refusal by HHJ Jarman QC to grant permission to apply on the papers.

2. The decision which is to be challenged in the judicial review proceedings, if the appeal is allowed and permission to apply for judicial review is granted, is a decision of the respondent, the Upper Tribunal (Immigration and Asylum Chamber) dated 28 June 2019. On that date Upper Tribunal ("UT") Judge Owens refused to grant permission to Sohrab Mahmud, the appellant, to appeal against a decision of the First-tier Tribunal ("FTT") dated 20 February 2019. In the decision dated 20 February 2019 FTT Judge Monson dismissed an appeal by Mr Mahmud against a decision dated 24 April 2018 of the interested party, the Secretary of State for the Home Department, refusing to grant Mr Mahmud leave to remain. The decision of FTT Judge Monson followed a hearing which had taken place on 31 January 2019 at Taylor House Tribunal Hearing Centre, London.

3. The Secretary of State's decision refusing to grant leave to remain was made on the basis that Mr Mahmud had used deception when taking an English language test on 18 April 2012 at the London College of Technology. Mr Mahmud strongly denies that he used any deception and says that he had taken and passed the English language test.

Issues on the appeal

4. As this is a *Cart* case the issue before us, pursuant to CPR 54.7A, is whether HHJ Jarman QC should have found that: (1) the application for permission to apply for judicial review raised an arguable case, with a reasonable prospect of success, that the decision of UT Judge Owens to refuse permission to appeal against the decision of FTT Judge Monson was wrong; and (2) that the claim raised an important point of principle or practice or there was some other compelling reason to hear the application for judicial review.

5. Mr Mahmud also seeks permission to adduce fresh evidence on the hearing of his appeal. There has been some movement in the position adopted on behalf of Mr Mahmud about which evidence is to be adduced. The way in which that application has been made has raised a number of procedural issues and, even at the hearing, there was not an application notice identifying the fresh evidence but there was a draft of an amended appellant's notice which sought permission to adduce fresh evidence.

6. I am very grateful to Mr Turner and Mr Jamali, on behalf of Mr Mahmud, and Mr Thomann, on behalf of the Secretary of State, and their respective legal teams, all of whom have substantial experience of the TOEIC litigation, for their helpful written and oral submissions. By the conclusion of the hearing it was apparent that the issues to be determined were whether: (1) HHJ Jarman QC was wrong to refuse permission to apply

for judicial review of the decision of UT Judge Owens; and (2) Mr Mahmud should be permitted to rely on fresh evidence at the hearing of this appeal. Before addressing these issues it is necessary to set out a bit of background about what has become known as the TOEIC litigation.

The TOEIC litigation

7. As is apparent from this introduction, this appeal forms part of what is sometimes called the ETS or TOEIC litigation. As is now well-known, the immigration rules require certain applicants for leave to remain to pass a test of proficiency in written and spoken English. One test was the "Test of English for International Communication" ("TOEIC"). The tests were provided by a United States corporation called Educational Testing Service ("ETS"). The TOEIC tests were available at a large number of test centres in the United Kingdom. The spoken test involves the candidate being recorded reading a text, and the recording was then sent to an ETS assessor, or contractor to ETS, to be marked.

8. There was widespread cheating at a number of test centres. In February 2014 the BBC Panorama programme reported on the cheating. The Home Office required ETS to employ voice recognition software to go back over the recordings from the test centres to try and identify cases in which it appeared that the same person had spoken in multiple tests, suggesting that the person was a professional proxy. ETS reported its findings to the Secretary of State and in 2014 and 2015 the Secretary of State made decisions in about 40,000 cases cancelling or refusing leave to remain on the basis that those persons had cheated in the TOEIC test.

9. As Underhill LJ noted in *Ahsan v Secretary of State for the Home Department* [2017] EWCA Civ 2009; [2018] HRLR 5 "although it seems clear that cheating took place on a huge scale, it does not follow that every person who took the TOEIC test in any centre was guilty of it". Indeed there have been numerous cases in the FTT, UT and High Court in which individuals accused of cheating have successfully challenged the allegation in their particular case. The TOEIC litigation has raised a number of issues.

10. The evidence adduced on behalf of the Secretary of State developed during the course of the TOEIC litigation. There was originally generic evidence from Home Office officials, Rebecca Collings and Peter Millington about the reports from ETS about tests which were reported to be "invalid" or "questionable" and the way in which those conclusions had been made. ETS provided the "ETS look up tool" to marry up the tests with the individuals taking the tests. By 2017 that evidence was supplemented by evidence from another Home Office official called Adam Sewell who identified test results from a number of test centres in London, which suggested that certain centres were what was described as "fraud factories".

11. During the course of the TOEIC litigation it became apparent that ETS had retained copies of the individual voice recordings. These were supplied, without charge, on request. If the individual can identify their own voice on the recording and it is either agreed or proved by expert evidence that it is their voice it will be obvious that the charge of fraud against the individual cannot be sustained. However even where it was common ground that the voice on the recording is not that of the individual, as it is in this appeal, some individuals, and Mr Mahmud, have continued to assert that they have not cheated. Possible explanations for the fact that the "wrong" voice is recorded on

the test include the fact that ETS have wrongly attributed someone else's test to the individual by mixing up the tapes, or because there were fraudsters running the test who decided to send in a fraudulent test rather than the actual test sat by the individual. Mr Turner points out that the first possibility is supported by the fact that ETS have not given direct evidence to the Courts or Tribunals about how they have attributed the tests to an individual or proved continuity of custody of the relevant tape.

12. There have been a number of decisions in the TOEIC litigation from the Tribunals and Courts about the quality of the evidence adduced by the Home Office. On 31 March 2016 in *SM and Qadir v Secretary of State for the Home Department* [2016] UKUT 229 (IAC) the Upper Tribunal held that the evidence adduced from Ms Collings and Mr Millington was just sufficient to transfer the evidential burden to the applicants to answer the case that they had cheated in the test. In that case the Upper Tribunal heard evidence from the individual appellants and found that they had not cheated. The Upper Tribunal emphasised that "every case belonging to the ETS/TOEIC stable will inevitably be fact sensitive", see paragraph 102.

13. On 16 September 2016 the Upper Tribunal gave judgment in *MA v Secretary of State for the Home Department* [2016] UKUT 450 (IAC). In that case it was common ground that the voice recording did not contain the voice of the individual. The Upper Tribunal acknowledged that there were "enduring unanswered questions and uncertainties relating in particular to systems, processes and procedures" about how the voices and scores were matched to each other. It was recorded that "the question of whether a person engaged in fraud in procuring a TOEIC English language proficiency qualification will be intrinsically fact sensitive".

14. There was an appeal in *SM and Qadir* to the Court of Appeal, and judgment was given on 25 October 2016 as *Majumder and Qadir v Secretary of State for the Home Department* [2016] EWCA Civ 1167. The Court of Appeal emphasised again that every TOEIC case was fact sensitive, see paragraph 27.

15. Various decisions continued to be made on the facts in cases. In some cases the individuals succeeded, see *Iqbal v Secretary of State for the Home Department* [2017] EWHC 79 (Admin) and in other cases the fraud was proved, see *R(Abbas) v Secretary of State for the Home Department* [2017] EWHC 78 (Admin); [2017] 4 WLR 34. Issues of fact had to be decided by the Tribunal or Court. In *R(Abbas)* the Secretary of State relied on evidence from Mr Millington, Ms Collings and Mr Sewell and expert evidence from Professor Peter French, an expert on voice identification. Mr Abbas gave evidence and he adduced evidence from Dr Philip Harrison, an expert on speaker identification. In *Ahsan* at paragraph 33 it was emphasised that even in cases where the evidence adduced on behalf of the Secretary of State was strong, "a decision whether the applicant or appellant has cheated is fact-specific".

16. As is apparent from that short summary and the different results in various cases it became clear that although there had been widespread cheating in the taking of tests to obtain a TOEIC certificate at ETS test centres, some of those accused of obtaining the TOEIC certificate by deception had not in fact used deception. The issue acquired further prominence and investigations were carried out. The National Audit Office ("NAO") published an "Investigation into the response to cheating in English language tests" dated 24 May 2019 which looked at the Home Office response to the reporting of the widespread cheating, the All Party Parliament Group ("APPG") on TOEIC

produced a report dated 18 July 2019, and the Public Accounts Committee ("PAC") produced a report "English language tests for overseas students" ordered to be printed on 9 September 2019.

17. In 2020 applications were made in various cases and appeals to rely on the reports as evidence in support of appeals against findings of the use of deception. The issue was raised in *RK and DK (India) v Secretary of State for the Home Department* and permission to appeal to the Court of Appeal was granted. By consent of the parties the appeal was allowed and the appeal remitted to the Upper Tribunal to consider whether the reports should be admitted. In the remitted proceedings in the Upper Tribunal in *RK and DK (India)* in the Upper Tribunal issues were raised about whether the NAO, APPG and PAC reports were relevant and were covered by Parliamentary privilege, and whether transcripts of the evidence given by experts to the APPG should be admitted and a decision was given dated 20 January 2021, reported as [2021] UKUT 61 (IAC). It is not necessary for this Court to say anything more about those proceedings, which are continuing.

The hearing and judgment in the FTT

18. Mr Mahmud appealed to the FTT against the decision of the Secretary of State dated 12 April 2018 to refuse to grant him leave to remain. The decision was made on suitability grounds because the Secretary of State alleged that Mr Mahmud had used deception in his previous application made on 1 June 2012, because he had relied on a TOEIC certificate which had been obtained using a proxy test taker.

19. At the hearing the Secretary of State relied on evidence set out in a bundle purporting to show that Mr Mahmud had used a proxy test-taker in a test taken on 18 April 2012 at the London School of Technology. Reliance was placed on a written report from Professor Richard Heighway, a digital forensic analyst which had been adduced in another case *MA (ETS-TOEIC testing)* [2016] UKUT 450 (IAC). Mr Mahmud's solicitors submitted a bundle of 166 pages in support of Mr Mahmud's case that there was an innocent explanation for his speaking test result being declared invalid by ETS. Mr Mahmud also relied on an expert report dated 25 July 2016 from Professor Peter Sommer in which he examined scenarios in which another individual might have attended a speaking test at Synergy College even though the tape of that test did not contain the voice of the individual. Professor Sommer referred to administrative clumsiness as a possible explanation for mislabelling of audio files.

20. In the decision FTT Judge Monson summarised the evidence and Mr Mahmud's immigration history. This included the fact that Mr Mahmud had been granted entry clearance on the basis of an International English Language Testing System ("IELTS") where his score was 4.5. On 30 September 2011 Mr Mahmud's application for leave to remain was refused, and an appeal to the FTT was dismissed on 12 January 2012. On 1 April 2012 Mr Mahmud started classes at the London School of Business and Management.

21. The FTT Judge recorded that on 1 June 2012 Mr Mahmud made a fresh application for leave to remain while studying for an MBA at the London School of Business and Management. He relied on the TOEIC certificate issued by ETS showing that he had achieved level B2 in all compulsory tests taken on 18 April 2012. The application succeeded and Mr Mahmud received an MBA from the University of Wales on 4 April

2013. Mr Mahmud had later been a student at the London College of Technology from 3 March 2014 until 20 August 2014 when the sponsorship licence of the College had been revoked.

22. The FTT Judge noted that Mr Mahmud's leave to remain had been curtailed with immediate effect in 2015 when the allegations of cheating were made because his scores for his test had been cancelled by ETS. Mr Mahmud appealed but on 13 July 2016 the FTT held that Mr Mahmud had only an out of country appeal. Mr Mahmud had remained and applied for an in country right of appeal, following the judgment of the Court of Appeal in *Ahsan*. It was in response to this application that the Secretary of State had refused leave to remain, relying on the information from ETS. It was this background that had led to the appeal hearing before the FTT Judge.

23. Mr Mahmud gave evidence at the hearing in the FTT. Mr Mahmud had set out his immigration history. He denied the Secretary of State's allegations of deception, although he confirmed that the voice on the tape was not his. He said that the topics in the audio files were different from the test he had taken. The tape was only 4 minutes long and his test had lasted 20 minutes. Mr Mahmud pointed out that his name was not on the tape, although the file name had the same reference as his TOEIC certificate. Mr Mahmud wondered how the tape had been retrieved, given that ETS had a policy providing for retention of data for only two years.

24. Mr Mahmud had been cross-examined. The FTT Judge recorded that Mr Mahmud was living in Stepney Green, and he had said that a friend of his had recommended taking his test at the London School of Technology. It had taken him 45 minutes to travel there, and he was not aware of any nearer test centres as he had not researched where they were and he had relied on his friend's recommendation. He said that he had gone to the IELTS centre in Holborn but they did not have space and it would take too long to get a result. Mr Mahmud said that there were 18 to 20 people in the room. He had not seen anyone cheating as he was concentrating on his test.

25. The FTT Judge considered that the Secretary of State had made a strong case of deception. This was because the generic evidence in *SM and Qadir* had been strengthened by expert evidence from Professor French, who considered that the number of false positive test results would be less than 2 per cent. Further this could not be a false positive case on voice identification because it was common ground that the tape did not contain Mr Mahmud's voice. It was therefore necessary to analyse whether there was an innocent explanation which required the FTT Judge to "analyse the evidence specific to him, the evidence specific to the test centre and the generic expert evidence which is before me pertaining to the reliability of voice recordings …".

26. At paragraph 30 of the decision the FTT Judge recorded that Mr Mahmud's explanation rested primarily on the proposition that ETS had muddled his genuine voice recording with a proxy voice recording. The FTT Judge held that the fact that the voice file carried the same unique reference as Mr Mahmud's TOEIC certificate undermined the theory of a gross error in labelling and storage. The FTT Judge did not consider it suspicious that the voice recording had been retained because the Home Office had begun investigating the fraud in January 2014 and had by March 2014 requested details of all tests taken since April 2011. The FTT Judge concluded that the Secretary of State had "shown on the balance of probabilities that ETS assessed the speaking test assigned to the appellant to be invalid due to the presence of a proxy taker". The FTT Judge noted

that there was nothing to suggest that the recorded score of 160 given to Mr Mahmud was not in fact the correct score for the voice recorded on the tape attributed to the test. The FTT Judge addressed the explanation advanced by Professor Sommer about genuine tests being mixed with proxies, but noted that this depended on the evidence of Mr Mahmud about the genuineness of the test.

27. The FTT Judge stated at paragraph 34 of the decision that the information from ETS showed that of the 40 speaking tests taken that day 31 were invalid and 9 were questionable. This suggested a very high level of proxy takers being in the test centre on that day. It was also inconsistent with the mixing up of the tests explanation, because if Mr Mahmud had genuinely taken a test at least one of the tests (albeit attributed to another individual if there had been a mix up of tests) would have been reported to be genuine. This is because Mr Mahmud's voice would not have been identified as a voice of a proxy taker.

28. The FTT Judge recorded that Mr Mahmud had given a fluent account of his journey to the London School of Technology, but recorded that Mr Mahmud had been a student there in 2014 so would have known about the journey. Against this was the fact that there were closer and more convenient test centres for Mr Mahmud, which had not suffered from widespread fraud. The fact that Mr Mahmud was pressed for time supported the fact that he would use a fraud factory.

29. The FTT Judge recorded that there were numerous testimonials to Mr Mahmud's good character, and he noted that Mr Mahmud had requested his voice file, which was submitted to be inconsistent with him knowing that it would be false, although the FTT Judge recorded that other appellants had been found to have used deception even though they had applied for the file.

30. In the final event the FTT Judge recorded at paragraph 41 that he had found that the Secretary of State had "proved on the balance of probabilities that the appellant used deception in a previous application for leave to remain", having rejected Mr Mahmud's explanations that there was a mix up and that he had travelled past other test centres, finding that Mr Mahmud "chose the remote test centre at a friend's recommendation because it provided a proxy-test taker package".

Further proceedings in the FTT and UT

31. Mr Mahmud applied for permission to appeal against the decision of the FTT. Permission to appeal was refused by the FTT. On 28 June 2019 UT Judge Owens refused to grant permission to appeal to Mr Mahmud.

32. In circumstances where the UT can entertain an appeal only on a point of law the decision to refuse permission to appeal was not surprising. This is because in essence Mr Mahmud was seeking to challenge the findings of fact made by the FTT Judge. Further, even if there had been jurisdiction to hear the appeal, the UT, as with any other appellate court, would have been very cautious about overturning findings of fact made by a first instance judge. This is because first instance judges have seen witnesses and take into account the whole "sea" of the evidence, rather than indulged in impermissible "island hopping" to parts only of the evidence, and because duplication of effort on appeal is undesirable and increases costs and delay. Judges hearing appeals on the facts should only interfere if a finding of fact was made which had no basis in

the evidence, or where there was a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence so that the decision could not reasonably be explained or justified.

The proceedings before HHJ Jarman QC

33. It was in these circumstances that Mr Mahmud made his *Cart* application for permission to apply for judicial review which was refused on the papers by HHJ Jarman QC on 25 November 2019.

HHJ Jarman QC was right to refuse permission to apply for judicial review – issue one

34. In my judgment HHJ Jarman QC was right to refuse Mr Mahmud permission to apply for judicial review to quash the decision of UT Judge Owens. This is because there was no arguable case, which had a reasonable prospect of success, of showing that the decision made by UT Judge Owens was wrong. In fact the decision of UT Judge Owens to refuse permission to appeal from decision of FTT Judge Monson was right. This was because FTT Judge Monson had made a specific decision on the particular facts of Mr Mahmud's case. FTT Judge Monson had correctly: (1) identified that the Secretary of State had to prove deception on the part of Mr Mahmud; (2) focused on the specific circumstances of Mr Mahmud's case; and (3) considered the possibilities that Mr Mahmud's tape had been lost or muddled up with another and rejected them. FTT Judge Monson had made a decision based on the evidence, had not misunderstood the relevant evidence and had not failed to consider relevant evidence. It was a decision on the facts which could not sensibly be challenged, no matter how strongly Mr Mahmud contended that the decision was wrong.

35. Further there was not, before HHJ Jarman QC, any important point of principle or practice engaged by the proposed application for judicial review. The issue raised by the application was a factual disagreement by Mr Mahmud with findings made by FTT Judge Monson. This disagreement was of particular importance to Mr Mahmud and the Secretary of State, but it was not to other court users and did not raise a wider point of principle or practice.

36. Further there was, in my judgment, no other compelling reason to hear the application for judicial review. Mr Turner was right to note that in some circumstances the effect on a particular individual together with the arguability of the appeal might amount to compelling circumstances to hear an application for permission to apply for judicial review, or an appeal. In this case, however, there was nothing to suggest that, however important the decision to Mr Mahmud, there was anything that could be gained by granting permission to appeal. This is because the Court would not be able to set aside the findings of fact made in this case because they were properly based on the evidence.

37. Any court will understand Mr Mahmud's frustration that he cannot have a fresh trial in circumstances where he contends that the original findings of fact were wrong, and in this respect I have read Mr Mahmud's character references and seen the photographs in the bundle of his graduation from the University of Wales. However UT Judge Owens and HHJ Jarman QC had to apply long-established principles restricting the circumstances in which appellate judges could interfere with findings of fact made by judges at first instance.

No admission of fresh evidence on this appeal – issue two

38. I turn then to consider whether the application to adduce fresh evidence on appeal might affect the result. CPR 52.21 provides a discretion to the Court to admit fresh evidence on appeal. There was no dispute before us that, in accordance with the well-established "*Ladd v Marshall* principles" (as glossed in *Terluk v Berezovsky* [2011] EWCA Civ 1534), further evidence should ordinarily only be admitted for the purpose of an appeal: (a) if it could not have been obtained with reasonable diligence for use at the trial; (b) if it would probably have had an important influence on the result of the case; and (c) if it is credible.

39. The appellant's notice was dated 4 December 2019 and it was sealed on 17 January 2020. It was amended on 22 June 2020 to include an application to amend the Skeleton Argument "to rely upon the NAO, APPG and PAC reports as fresh evidence ….". It was apparent from the amended Skeleton Argument that this was a reference to the reports from the NAO "Investigation into the response to cheating in English language tests" dated 24 May 2019, the APPG report on TOEIC dated 18 July 2019, and the PAC report "English language tests for overseas students" ordered to be printed on 9 September 2019.

40. Lewis LJ, by order dated 10 November 2020, directed the Secretary of State to respond to that application. This was because an application for permission to appeal in the case of *RK and DK (India)* had been granted and, by consent the appeal had been allowed and the appeal remitted to the Upper Tribunal to consider whether the reports should be admitted as fresh evidence. In a written response on behalf of the Secretary of State it was made clear that it was considered that there were particular features in the cases of *RK and DK(India)* which did not apply to Mr Mahmud and that in Mr Mahmud's case, permission to appeal was resisted, and the Secretary of State would not consent to allowing any appeal.

41. By order dated 14 December 2020 Lewis LJ granted permission to appeal. A stay to await the proceedings in *DK and RK (India)* was not granted. The experience of the courts has been that granting stays in all cases in litigation such as the TOEIC litigation can create unnecessary work for the parties and the courts in identifying which points apply to which cases, and lead to delay which is detrimental to the interests of the parties and courts, in circumstances where each case is, as has been emphasised in all the TOEIC cases, sensitive to its own facts.

42. Permission was then requested on behalf of Mr Mahmud to rely on a supplementary Skeleton Argument dated 29 March 2021. In that supplementary Skeleton Argument it appeared that permission was no longer sought to rely on the NAO, APPG and PAC reports but that permission would be sought to rely on the evidence given to the APPG on 11 June 2019 by Professor Peter Sommer, Dr Philip Harrison and Professor Peter French. This approach mirrored the approach which had been taken in the Upper Tribunal in *RK and DK (India)* and the transcript of the evidence given had become available following the decision of the Upper Tribunal in that case in January 2021.

43. By an order dated 3 May 2021 Lewis LJ noted the apparent confusion about what fresh evidence was intended to be relied on at the appeal, and directed Mr Mahmud to the provisions of CPR 52.21, which provides that an appeal is limited to the evidence before the lower court unless the appeal court otherwise ordered. Lewis LJ also pointed out

that permission needed to be obtained to amend the appellant's notice, pursuant to CPR 52.17. Lewis LJ stated that an application to adduce fresh evidence or to amend the appellant's notice should be made as soon as possible.

44. By a further order dated 12 May 2021 Lewis LJ reminded the appellant of the need to make a proper application and adjourned consideration of the application to rely on the supplementary Skeleton Argument dated 29 March 2021 so that it could be considered with any application to adduce fresh evidence or to amend the appellant's notice. Lewis LJ drew attention to the need for procedural rigour in appeals in public law cases and referred to *R(Talpada) v Secretary of State for the Home Department* [2018] EWCA Civ 841.

45. By the time of the hearing before this court no formal application to rely on fresh evidence had been made on behalf of Mr Mahmud. Instead Mr Turner sought to rely on a re-amended appellant's notice dated 19 May 2021 to adduce as fresh evidence "the transcript from the APPG meetings, further to the request of June 2020". Mr Turner had also put in a document headed "Appellant's Response Further to the Application to Amend his Skeleton Argument" dated 14 June 2021. In that document Mr Turner referred to the problem in *R(Talpada)* which was an evolving challenge, and made the point that the challenge in this case remained the same.

46. As Mr Turner recognised in his oral submissions, there had been a failure to make an application on behalf of Mr Mahmud to rely on fresh evidence which complied with CPR 52.21 or an application to amend the appellant's notice which complied with CPR 52.17. In effect Mr Turner was seeking on behalf of Mr Mahmud relief from the sanction of failing to make a proper application to adduce the evidence, so that the approach set out in *Denton v TH White Limited* [2014] EWCA Civ 906; [2014] 1 WLR 3926 is relevant. This involves: consideration of the seriousness of the failure to comply with the rule; consideration of why the default occurred; and an evaluation of all the circumstances of the case.

47. In my judgment the failure to make an application to adduce the fresh evidence was a serious procedural failing. This is because Lewis LJ had pointed out in two separate orders the importance of complying with the rules, and yet by the time of the hearing there was still no application which complied with the rules. Mr Turner was right to note that this was not an appeal in which there were evolving grounds of challenge, but what has been said in cases such as *R(Talpada)* about the need for procedural rigour goes beyond that particular issue and the procedural requirements set out in the Civil Procedure Rules apply to all cases including public law cases. The requirements are designed to achieve fairness for both sides, and to enable the Court to deal with the case justly in accordance with the overriding objective.

48. There was no reason advanced to justify or explain why these serious procedural defaults occurred. It is apparent that Mr Mahmud himself does not appear to have been responsible for the failings, because it is apparent that from June 2020 that Mr Mahmud had been intending to rely on fresh evidence. By way of mitigation for those representing Mr Mahmud, it might also be pointed out that it appears that they were attempting to pick up developments from the case of *DK and RK (India)* in the Upper Tribunal where it had been held that some of the reports were covered by Parliamentary privilege, and this might have made some contribution to the current procedural difficulties. After the hearing of the appeal Mr Turner sent in a witness statement dated

28 June 2021 from a lawyer assisting with the preparation of the appeal. It appears that in a previous case no objection had been taken to the amendment of the appellant's notice without permission, and an email had been sent to the office following the order made by Lewis LJ. This does not amount to a good reason for failing to make a proper application to rely on fresh evidence.

49. I turn then to evaluate all of the circumstances of the case. These circumstances include the merits of the application to adduce fresh evidence in this case, and the *Ladd v Marshall* criteria. In this respect it is apparent that there was no good reason for not applying to adduce the reports before HHJ Jarman QC when he was considering the *Cart* application for judicial review. All of the reports had been published, and the evidence and submissions on which the reports were based had been heard in public. Mr Turner, who was not representing Mr Mahmud at that stage of the proceedings, was unable to offer any explanation for the failure to seek to adduce the evidence before HHJ Jarman QC. There is no witness evidence to explain the failure. It is difficult to resist the inference that it was not thought at this time that the existence of the reports, which was well-known to all involved in TOEIC litigation, was relevant in the particular circumstances of this case.

50. Further, in my judgment, the fresh evidence on which Mr Mahmud seeks to rely on the hearing of this appeal, namely the transcripts of evidence given to the APPG, would not have an important influence on the appeal. It is apparent that some of the evidence in the transcripts is directed to the process by which the evidence on behalf of the Home Office came to be presented, and there was evidence directed to the failing of ETS, and those contracted to ETS, and the consequences for the reliability of the evidence from ETS. Although the evidence did identify the absence of information provided from ETS, and although Mr Turner highlighted the absence of continuity evidence relating to the voice tape from ETS, none of the evidence in the transcript descended into detail about the coincidence of the numbering of the voice file in Mr Mahmud's case with the numbering on the test result, which was a point which had been relied on by the FTT judge. The evidence on which Mr Turner sought to rely was at a high level of generality and did not, for understandable reasons, descend to explain away the evidence which the FTT Judge had considered decisive. In the case of Mr Mahmud this included the journey which took him past other English language test centres and to a test centre where every result that day was either invalid or questionable. This was a case where the FTT Judge had heard Mr Mahmud's explanations for taking his test at a College where there were a very significant number of invalid tests and did not accept it. In these circumstances the fresh evidence would not have afforded a basis for allowing the appeal. It might be noted that, even if the fresh evidence had been admitted the court might, as a matter of fairness to the Secretary of State have had to consider taking account of the fact that it was common ground that Mr Mahmud had not scored sufficient marks to pass the earlier English language test referred to in paragraph 20 above. As it is this point does not arise because the fresh evidence is not admitted.

51. In these circumstances, in my judgment, the fresh evidence should not be admitted on this particular appeal. This is because, even if all of the procedural failings are ignored, it would not affect the fact specific outcome in this case. As noted above when I referred to the history of the TOEIC litigation, the result in any TOEIC case will be fact specific, and this decision is specific to Mr Mahmud's case.

Conclusion

52. For the detailed reasons given above I would refuse to admit the fresh evidence on appeal and I would dismiss the appeal.

Sir Nigel Davis

53. I agree.

Lord Justice Singh

54. I also agree.