R (on the application of Gazi) v Secretary of State for the Home Department (ETS – judicial review) IJR [2015] UKUT 00327 (IAC)

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review Decision Notice

In the matter of an application for judicial review

The Queen on the application of

Abu Shahdat MD Sayem Gazi

Applicant

v

Secretary of State for the Home Department

Respondent

–

Before The Honourable Mr Justice McCloskey, President of the Upper Tribunal

Having heard Mr N Armstrong, of Counsel, instructed by Bindmans Solicitors, on behalf of the Applicant and Mr M Gullick, of Counsel, instructed by the Government Legal Department on behalf of the Respondent at a hearing at Field House, London on 21 April and 05 May 2015.

A challenge to the strength and quality of the evidence underpinning the Secretary of State's decision to remove a student from the United Kingdom under section 10 of the Immigration and Asylum Act 1999 on the ground of fraud in procuring a TOEIC English language qualification is best suited to the fact finding forum of the First-tier Tribunal and is unsuitable for determination by an application for judicial review.

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Judgment

delivered on 27 May 2015

McCloskey J

I. INTRODUCTION

1. 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 00439 (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."

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".

2. The impugned decision of the Respondent, the Secretary of State for the Home Department (hereinafter the "*Secretary of State*") was initially conveyed to the Applicant by letter dated 25 July 2014, in these terms:

> "*It has come to the attention of the Home Office, from information provided by Educational Testing Service (ETS) that an anomaly with your speaking test indicated the presence of a proxy test taker …*
>
> *In light of this information it is the considered opinion of the Home Office that you have utilised deception to gain leave to remain in the United Kingdom.*"

The letter also spelled out the consequence of this assessment: steps would be taken to remove the Applicant from the United Kingdom under section 10 of the Immigration and Asylum Act 1999. Some two months following the initiation of these proceedings the Secretary of State made a fresh decision, evidently precipitated by the case made, and evidence presented, by the Applicant. This further decision, which is dated 19 January 2015, maintained the predecessor decision and replicated the passages in the earlier decision reproduced above. This is the current, operative decision which is challenged in these proceedings. This was followed by service of formal Notice of Removal.

3. Between the two last mentioned events, appropriate case management measures were taken and the Applicant applied, unsuccessfully, for interim relief in a form which would permit him to resume his studies at the relevant university. Next, following an *inter-partes* hearing, I granted permission to apply for judicial review. The Applicant was also permitted to amend his grounds of challenge. The substantive hearing ensued. In passing, I mention for completeness an even more recent decision, dated 14 April 2015, whereby the Secretary of State has certified as clearly unfounded the Applicant's outstanding human rights claim, which was made on 13 August 2014. This was accompanied by a Notice of Removal of the same date, the terms whereof encapsulate the reasons for the impugned decision:

> "*You are specifically considered a person who has sought leave to remain in the United Kingdom by deception. For the purposes of your application dated 04 November 2013, you submitted a TOEIC certificate from* [ETS] *to the Home Office and your sponsor in order for them to provide you with a Confirmation of Acceptance for Studies* [a so-called "CAS" certificate]. *…*

ETS has a record of your speaking test. Using voice verification software, ETS is able to detect when a single person is undertaking multiple tests. ETS undertook a check of your test and confirmed to the SSHD that there was significant evidence to conclude that your certificate was fraudulently obtained by the use of a proxy test taker. Your scores from the test taken on 28 August 2013 at Eden College International have now been cancelled by ETS."

The next ensuing sentence encapsulates the Secretary of State's case:

"*On the basis of the information provided to her by ETS, the SSHD is satisfied that there is substantial evidence to conclude that your certificate was fraudulently obtained.*"

II. THE EVIDENCE CONSIDERED

The Applicant's evidence

4. The Applicant is a national of Bangladesh, aged 33 years. He was lawfully present in the United Kingdom, as a student, from July 2007. During the following years, he obtained certain academic qualifications. In December 2013 he was granted a Tier 4 Visa, valid until 30 October 2015. This followed his admission to a course at Glyndwr University (hereinafter "*the university*"). He then undertook the stipulated English language ("TOEIC") tests and, in January 2014, was informed by the university that he had been successful. The advent of the first decision letter, in July 2014 (*supra*) followed his completion of the first semester. Next, in September 2014, the university informed him by letter that their Tier 4 licence had been suspended by the Secretary of State. The letter further intimated that the university was withdrawing its sponsorship of the Applicant as it had been informed that his TOEIC Certificate had been procured by deception.

5. In the first of his two witness statements, the Applicant protests that his English language skills are of a high standard and he elaborates on the various qualifications obtained by him between 2007 and 2011. He also describes the circumstances and events surrounding the test which he claims to have taken, on 28 August 2013. Part of the test involved the reading of certain sentences aloud. There were some ten students in attendance. According to the Applicant:

"*Everyone taking the exam spoke loudly and it sounded like I was in a pub as we were all speaking at the same time.*"

The other elements of the test involved writing, listening and reading. Continuing, he recounts that he was able to continue his studies, completing the second semester, between September and November 2014, in spite of the university's letter, having apparently re-enrolled in error. It appears that his studies effectively came to a halt at this stage.

The Respondent's Evidence.

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.

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 net work 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 (ie false positives). This could occur due to noise in the background of a recording (eg 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 invariably accepts the deception assessment provided by ETS,without more.

The expert opinion of Dr Harrison

16. Dr Harrison was engaged by the Applicant's solicitors for the purpose of preparing an expert report. It would appear that the report was not commissioned specifically for the purpose of these, or other, proceedings. There is no issue about his expert credentials. He is a forensic consultant who obtained a First Class honours degree in the field of acoustical engineering who currently holds research and teaching appointments. He is clearly an experienced expert witness and has worked on over 1,000 cases in the areas of *"authentication, enhancement, transcription and speaker comparison*". His expertise was not disputed in these proceedings.

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 – ie 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 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.

III. THE APPLICANT'S CASE

21. The grant of permission expressly limited the Applicant's challenge to two grounds, which are reflected in the ultimate amended pleading:

(i) The Secretary of State's most recent decision (see [3] supra) is vitiated by improper purpose, in that she knew or ought to have known that there was no or insufficient evidence that the Applicant had engaged in deception.

(ii) The impugned decision is further vitiated by procedural unfairness in that the Applicant was not afforded an opportunity to make representations before the original determination of 25 July 2014, he was not provided with the material upon which the decision was made and the case made by him in the context of these proceedings was not taken into account in the making of the more recent decision.

I shall consider each ground in turn.

Improper Purpose

22. It is appropriate to begin with the statutory provisions wherein repose the power exercised by the Secretary of State in making the impugned decision. This power has been exercised in many, though evidently not all, of the cases belonging to this sphere: see, for example, Mahmood (*supra*). Section 10 of the Immigration and Asylum Act 1999, under the rubric "*Removal of persons unlawfully in the United Kingdom*", provides:

"*(1) A person who is not a British citizen may be removed from the United Kingdom, in accordance with directions given by an immigration officer, if-*

(a) having only a limited leave to enter or remain, he does not observe a condition attached to the leave or remains beyond the time limited by the leave;

(b) he uses deception in seeking (whether successfully or not) leave to remain; or

(ba) his indefinite leave to enter or remain has been revoked under section 76(3) of the Nationality, Immigration and Asylum Act 2002 (person ceasing to be refugee);

(c) directions have been given for the removal, under this section, of a person to whose family he belongs.

(2) Directions may not be given under subsection (1)(a) if the person concerned has made an application for leave to remain in accordance with regulations made under section 9.

(3) Directions for the removal of a person may not be given under subsection (1)(c) unless the Secretary of State has given the person written notice of the intention to remove him."

(8) When a person is notified that a decision has been made to remove him in accordance with this section, the notification invalidates any leave to enter or remain in the United Kingdom previously given to him."

A removal decision under section 10 attracts a right of appeal to the FtT, exercisable only out of country.

23. In brief compass, the improper purpose ground is based on evidence, or the absence thereof, of which it is said the Secretary of State had, or ought to have had, cognisance which was not taken into account, properly or at all. The ingredients of this ground of challenge consist of the following: an assortment of decisions of the FtT allowing appeals brought by persons against whom appropriate immigration action had been taken by the Secretary of State on the ground of alleged TOEIC fraud; the Secretary of State's Enforcement Instructions and Guidance ("*EIG*"); an attack on the strength and quality of the Respondent's evidence (paragraphs [6] – [15] *supra*) based largely on Dr Harrison's report; and the supposed large numbers of persons against whom immigration action has been taken in consequence of the "Panorama" programme. Mr Armstrong also prayed in aid the factor of large numbers, submitting on behalf of the Applicant that these elements combine to make good the challenge that at the time when the impugned decision was made, 19 January 2015, the Secretary of State knew or ought to have known that there was insufficient evidence of deception on the part of the Applicant in securing his TOEIC to warrant the exercise of the removal power enshrined in section 10.

24. The first element of the Applicant's improper purpose challenge consists of three determinations of the First-tier Tribunal ("*FtT*"), promulgated in December 2014 and early January 2015. While other determinations of the FtT in this sphere were also disclosed, I have highlighted these three in particular as they were in existence when the impugned decision of 19 January 2015 was made. Given the manner in which these decisions were deployed in argument – and I highlight here my formulation of this ground of challenge at the beginning of [23] *supra* – the proposition that <u>later</u> determinations of the FtT, from which one can identify something of a trend of allowing appeals in decisions belonging to this field, are irrelevant to the Applicant's case seems to me unassailable.

25. In the first of these three cases [IA/37191/2014 and Others], which has a matrix essentially the same as that of the Applicant's case, the Tribunal allowed the appeal, finding that the Appellant had not committed any act of deception in obtaining the TOEIC certificate. The Tribunal had available to it the testimony of the Appellant and her husband, together with a record of her interview by the Secretary of State's agents. Of the generic evidence (summarised above) the Judge said the following:

> "*However I am satisfied that this evidence is in effect generic and does not show the exact reason why ETS invalidated the certificate of the Appellant in particular and provides no evidence relating to the Appellant's personal circumstances.*"

As appears from the following passage, the Tribunal also had at its disposal written evidence from ETS:

> "*The ETS themselves actually confirm <u>in writing</u> that there are multiple reasons for invalidation, some of which may not involve fraud or deception.*"
>
> [Emphasis added]

The Judge noted that the generic evidence itself acknowledged this phenomenon. The appeal was allowed.

26. In another case [IA/30818/2014], the determination of the FtT notes that the Secretary of State failed to comply with the Tribunal's pre-hearing directions:

> "*….. The Respondent had failed to comply with directions of the Tribunal by not providing evidence relating to the Appellant's particular English language test and related documents ….*"

The Appellant gave evidence and was not cross examined. There was also evidence from a sentimental partner. The Secretary of State relied on the usual generic evidence. In finding in favour of the Appellant on the deception issue, the Judge reasoned that the stringent civil standard applicable in cases of fraud had not been achieved by the Respondent's evidence: see <u>RP (Proof of Forgery) Nigeria</u> [2006] UK AIT 00086. He noted the absence of individual evidence relating to the Appellant's test performance. The Tribunal was not satisfied that fraud had been established.

27. In a third case, a differently constituted FtT came to the same conclusion. The evidence includes several more recent decisions of the FtT. The total number of decisions available to this Tribunal is less than ten. In most of them the appeals have succeeded on the ground that the Secretary of State has failed to discharge the burden of proving fraud on the part of the appellant. The effect of these decisions, explicit in some and implicit in others, is that the ETS testing has yielded false positive results. In all of these cases the evidence considered by the FtT has included the witness statements of Mr Millington and Ms Collings. In one of the cases, in which the Appeal was dismissed, the Judge described the ETS testing procedures as "*extremely rigorous*": see IA/31380/2014 at [44] and [48]. Mr Gullick, on behalf of the Secretary of State, informed this Tribunal of his instructions that there are applications for permission to appeal in some of the cases to which I have referred. Furthermore, the Court of Appeal has listed two judicial review appeals for hearing in early July 2015 (*infra*). I am also aware that the Upper Tribunal has granted permission to apply for judicial review in a small number of cases none of which has been substantively determined yet. The broader landscape is, therefore, unsettled and fluctuating.

28. The second element of the Applicant's improper purpose case is the EIG (noted above). Within chapter 50 of this instrument there is a discrete section dealing with "Leave to Remain by Deception", with reference to section 10(1)(b) of the 1999 Act. This contains the following passage:

> "*The evidence of deception should be clear and unambiguous in order to initiate action under section 10. Where possible, original documentary evidence, admissions under caution or statements from two or more witnesses should be obtained which substantiate that an offence has been committed before authority is given to initiate action under section 10 ….*
>
> *The evidence must always prove* ***to a high degree of probability*** *that deception had been used to gain the leave, whether or not an admission of deception is made. The onus – as always in such situations – is on the officer making the assertion to prove his case.*"

While the attention of the Tribunal was drawn to the most recent EIG, within which the relevant section is Chapter 51, it was acknowledged that this did not apply at the time when the impugned decision was made.

29. On behalf of the Applicant it is submitted that Chapter 50 of the relevant EIG is a reflection of well established principles relating to the onus and standard of proof in fraud cases. The Applicant also links this to the well known decision of the House of Lords in Khawaja v SSHD [1984] 1 AC 74. This concerned the summary removal of an allegedly illegal entrant under Schedule 2 to the Immigration Act 1971. This power was held to be exercisable in respect of persons who had obtained leave to enter the United Kingdom by deception. Their Lordships further held that the question of whether a person obtained leave to enter by practising fraud or deception is one of precedent fact. Accordingly, where there is an application for judicial review of an immigration officer's order detaining a person on this supposed basis, the detention will not be justified simply on the basis that there was some evidence on which the immigration officer had been entitled to make the impugned decision or that there were reasonable grounds for believing that deception had been practised. Rather, the court has a duty to enquire, and determine, whether there had been sufficient evidence to justify the immigration officer's belief that the entry had been illegal through deception. This enquiry is conducted within a framework where the onus lies on the executive to prove to the satisfaction of the court, on the balance of probabilities, the facts relied on by the immigration officer.

30. The Applicant's improper purpose ground of challenge is also deployed in an endeavour to defeat the contention that judicial review is an inappropriate mechanism in this case on account of the availability of an out of country appeal. In R (Mahmood) v SSHD [2014] UKUT 00439 (IAC) I reviewed the authorities on this subject, concluding at [13]:

> "*The above analysis and the conclusion it yields, namely that the Applicant can pursue an out of country appeal, do not lead inexorably to the conclusion that permission must be refused. This is so because, as acknowledged above, the effect of the relevant jurisprudence is that an application for judicial review of an appealable immigration decision lies where the test of special or exceptional factors is satisfied ….*
>
> *The out of country appeal available to the Applicant is, presumptively, an adequate alternative remedy. The displacement of this presumption will, in any given case, require suitable evidence.*"

In the same passage I referred to the "*strong general principle*" in play.

31. The Applicant's contention is that this principle is displaced in

the present case by the evidence of improper motive. It is argued that the remedy of judicial review is properly invoked in circumstances where there is reprehensible or abusive conduct on the part of the executive: R (Khan) v SSHD [2014] EWHC 2494 (Admin) at [70](ix); or, formulated in different terms, in cases where there is "*a serious abuse of power*" entailing the invocation by the Secretary of State of the deception "route" in order to stifle an appeal (the Court in that case, I observe, seemingly overlooking the availability of an out of country appeal): Anwar v SSHD [2011] 1 WLR 2552, at [24]; or in so-called "precedent fact" cases: Khan at [70](iv) – (v). In this context Mr Armstrong also relied on the decision in R (Shahbaz Ali) v SSHD [2014] EWHC 3967 (Admin), a decision in a TOEIC case dismissing the substantive application for judicial review. I consider the passages at [93] – [95], on which there was most focus, to be *obiter*. Furthermore, they express no concluded view on the issue being debated, namely whether an application for judicial review is appropriate in a case where the deception decision is unheralded and has not entailed any opportunity for the subject to respond or explain. Further, and in any event, this is a first instance decision which does not have the status of binding precedent.

32. The third, and final, element of the Applicant's first ground of challenge entails the contention that judicial review provides a suitable mechanism for challenge in the present case, notwithstanding the availability of an out of country appeal, because of the large numbers of TOEIC fraud cases. This discrete aspect of the Applicant's case is based largely on assertion, with no real supporting evidence. I shall analyse it *infra*.

33. The essence of the submission of Mr Gullick on behalf of the Secretary of State, was that the Applicant's challenge fails to displace the general principle that an out of country appeal affords an adequate remedy. The high hurdle of "*special or exceptional factors*" has not been overcome. The mechanism which Parliament has established for a challenge to the impugned decision is ideally suited for resolving the issues raised by the Applicant. Mr Gullick's submissions further highlighted that the FtT determinations extant when the impugned decision was made were few in number and fact sensitive in nature. Furthermore, Dr Harrison's report did not exist at the time and, hence, could not have been considered by the Secretary of State. As the court found in Shahbaz Ali, at [91], the evidence at the Secretary of State's disposal was sufficient to warrant the removal decision and was compatible with the EIG.

Improper Purpose: Conclusions

34. My conclusions in respect of the Applicant's first ground of challenge are, fundamentally, twofold. First, I consider that improper purpose has not been established. There is, of course, no primary evidence of this contaminant. Rather, the Applicant invites the Tribunal to infer this vitiating factor. This ground of challenge can succeed only if the Applicant establishes that the purpose for which the Secretary of State invoked the discretionary power under section 10 of the 1999 Act was motivated by a design other than furthering the policy and objects of the statute (the Padfield principle). The quest to establish improper motive in the context of this challenge engages, in my view, a relatively elevated threshold. Improper purpose, or motive, is not, as a general rule, easily proved. Furthermore, I consider that it is not to be lightly inferred. An inference on the part of any court or tribunal that a public law power has been misused in this way requires a solid and persuasive evidential foundation. In the present case, this directs attention to the evidence in existence at the time of the impugned decision, namely the decisions of the FtT allowing appeals and the Secretary of State's generic evidence. It is appropriate to highlight, in this context, that Dr Harrison's report postdated the impugned decision of the Secretary of State. Neither it nor anything comparable existed at the material time.

35. In my view, taking into account Chapter 50 of the EIG, the

Respondent's evidence, summarised in Chapter II above, was sufficient to warrant the assessment that the Applicant's TOEIC had been procured by deception and, thus, provided an adequate foundation for the decision made under section 10 of the 1999 Act. True it is that, at this remove and with the benefit of Dr Harrison's report, there may be grounds for contending that said evidence is not infallible. And there may be sufficient material for a lively debate about its various ingredients. However, this Tribunal, as emphasised above, must evaluate and determine the Applicant's improper purpose challenge by reference to the material presumptively considered by or available to the decision maker when the impugned decision was made. I find no clear or logical basis for distinguishing between the first *tranche* of decisions and those made later. Furthermore, while the policy evidential requirements enshrined in the EIG are strict, they require neither absolute certainty nor infallibility. For the purpose of disposing of this ground of challenge and bearing in mind that the jurisdiction being exercised is one of supervisory review rather than merits appeal, its suffices for this Tribunal to be satisfied that the evidence upon which the impugned decision was made has the hallmarks of care, thoroughness, underlying expertise and sufficient reliability. The cornerstone of the Applicant's case is that the evidence was insufficient for this purpose. I reject this challenge.

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.

37. Furthermore, the presentation of the Applicant's case highlighted the technical and scientific nature of the subject matter. In my consideration of the evidence in Chapter II above I have, in several places, raised questions and made observations. In the context of this judicial review hearing, there was no opportunity for this Tribunal to probe and elucidate these matters via the questioning of witnesses. I do not overlook that the pursuit of an appeal from overseas is not ideal, not least because of the cost and disruption to the individual. However, I take into account that, evidently, the only person whose evidence will be given via a medium such as video link is the Applicant. The evidence of other witnesses, including any expert such as Dr Harrison, will be received by the FtT in the conventional way. Furthermore, there is no contention on behalf of the Applicant that an out of country appeal will not entail a fair hearing.

38. Finally, mindful that "*bad faith*" is the terminology found in certain places in the Applicant's submissions, I add the following. In contemporary public law, bad faith and improper motive are sometimes interchangeable terms, or concepts. Fundamentally, both denote the misuse of power. See, generally, De Smith's Judicial Review (7th Edition), para 5 – 087. In SCA v Minister of Immigration [2002] FCAFC 397, bad faith is defined uncontroversially as "a lack of an honest or genuine attempt to undertake the task and involves a personal attack on the honesty of the decision maker": see [19]. The authors of De Smith continue, at

paragraph 5 – 089:

> "Bad faith is a serious allegation which attracts a heavy burden of proof."

In practice, bad faith typically (though not invariably) denotes conduct on the part of a public official which is dishonest. It "*always involves a grave charge*": per Megaw LJ in Cannock Chase District Council v Kelly [1978] 1 WLR 1 at 6. Furthermore, this serious allegation requires, in every case, ample advance notice and detailed particularisation.

39. The final element of the Applicant's improper purpose challenge is that there are large numbers of TOEIC cases. This prompts the immediate observation that the evidence relating to this issue is far from clear and comprehensive. It includes a report compiled by the National Union of Students ("NUS") which was one of the agencies invited by the Immigration Minister to form part of a working group established in June 2014. The impetus for this step was the Home Office public announcement that it was proposing to take action to revoke the licences of 57 private colleges and three universities. This large scale enforcement operation was, evidently, stimulated by the "Panorama" programme and the subsequent fall out detailed in the Respondent's evidence. The remit of the working group was to support affected students, to enable effective communication with them and to promote the interest of protecting the reputation of the United Kingdom education sector. The Working Group was effective during a period of some seven months viz to February 2015. The NUS report was published at this stage. The Tribunal has been alerted to the publication of two Home Office reports, including one published as recently as 21 May 2015. This, it is suggested, documents that the number of Home Office refusal, curtailment and removal decisions belonging to this field is now of the order of 19,700.

40. For present purposes, it matters not whether this figure is unerringly accurate. The numbers are, on any showing, of enormous dimensions. However, this circumstance, in my judgment, cannot overcome the reality that a judicial review court or tribunal is, for the reasons elaborated above, ill equipped to adjudicate in cases of this kind. Secondly, the present case illustrates that every case belonging to this field will be unavoidably fact sensitive. Each litigant will put forward his or her individual disputed assertions, agreed facts, considerations and circumstances. These will be evaluated by a fact finding tribunal, to be contrasted with a court or tribunal of supervisory jurisdiction. This analysis is, in my view, amply confirmed by the growing number of FtT decisions in this sphere. Within these one finds emphasis on self-evidently important issues such as the appellant's evident English language ability, demeanour and previous life events. Furthermore, it is trite that the assessment of each appellant's demeanour and credibility will be carried out on a case by case basis.

41. Finally, the reality of the present challenge is that the impugned decision was made on a particular date in the circumstances then prevailing. As the evidence considered by this Tribunal confirms, those circumstances have evolved subsequently. In particular, the panorama now includes the expert report of Dr Harrison and a cluster of further FtT decisions. The analysis that every decision and ensuing challenge will be shaped by their special individual context is, in my estimation, irresistible. It is, frankly, difficult to envisage how a single decision of the Upper Tribunal in a TOEIC judicial review might be determinative of large numbers of other such cases, the more so in the absence of a group or representative challenge.

Second Ground of challenge: Procedural Unfairness

42. The essence of this ground of challenge is that the impugned decision of the Secretary of State is vitiated by procedural unfairness since the decision making process did not involve a prior opportunity to the Applicant to

consider the case against him and respond accordingly. Notably, it was not argued on behalf of the Applicant, correctly in my view, that a complaint of procedural unfairness of this species gives rise to an exception to the strong general principle that the availability of an out of country appeal provides an adequate remedy. In light of my conclusion that the availability of an out of country appeal provides this Applicant with an adequate remedy, this ground of challenge is rendered moot.

43. It will be open to the Applicant to pursue his complaint of procedural unfairness as a freestanding ground of appeal to the FtT, since this raises an issue of whether the impugned decision was in accordance with the law: see section 82(1)(ii) of the Nationality, Immigration and Asylum Act 2002. The FtT will be well equipped to consider arguments based on the context of the impugned decision, which includes the gravity of the allegation (fraud), the severity of the consequences for the affected person, the ability of the affected person to make representations post-decision (as in the present case) and the availability of an out of country appeal. As this brief summary demonstrates, the emphasis on individual context at once points up the reality of having to consider evidence, resolve disputed issues of fact and make findings accordingly. These functions belong to the appellate jurisdiction of the FtT, rather than the supervisory review jurisdiction of the Upper Tribunal.

44. The question of law for the FtT in this and other cases will be whether the context engaged the Doody principles, in particular the requirement that the affected person be accorded an opportunity to make informed representations in advance of the impugned decision: see Doody v Secretary of State for the Home Department [1994] 1 AC 531. In deciding this question the FtT will take into account the entirety of the context, including the possibility of post-decision representations and the availability of an appeal (which the prisoners in Doody did not have). The FtT will also have to decide whether the recent decisions of this Tribunal in Miah (Interviewer's Comments: Disclosure: Fairness) [2014] UKUT 515 (IAC) and Mushtaq (ECO – procedural fairness)(IJR) [2015] UKUT 224 (IAC) apply. The FtT should also take into account the fundamental principle that the requirements of procedural fairness vary according to the individual decision making context. Thus what is considered essential in any given case will not slavishly apply to others.

A Footnote: The Broader Landscape

45. 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.

46. Repeated attempts have been made in the Upper Tribunal to establish the number of judicial reviews belonging to this field which are "in the system" at any given time. These endeavours have been assisted by the co-operation of the solicitors representing the Applicant in the present case. This firm is retained by NUS and represents both judicial review applicants and FtT appellants in a number of cases. This Tribunal is grateful to all who have co-operated in this endeavour. It is estimated that in the Upper Tribunal some 100

judicial review permission applications have been processed, with permission refused or a totally without merit certification in the large majority. There are approximately 70 undetermined cases in the system at present. There have been two transfers to the High Court. The total number of decided appeals to the FtT, at this juncture, appears to be around 20. As regards the Court of Appeal, there are several extant cases. It is appropriate to highlight that the grant of permission to appeal, accompanied by the highly desirable measure of expedition, has materialised in some cases which have the potential to provide some generic guidance. These include:

R (Mehmood) v SSHD [C4 / 2014/1300]
R (Ali) v SSHD [C4/2014/4122]
R(Giri) v SSHD [C4/2014/1475]
R (Sanyaniya) v SSHD [C4/2014/1473]

These appeals are listed for hearing (at least provisionally) on 06 and 13 July 2015.

47. The landscape is, therefore, evolving. I have considered it appropriate to deliver this judgment now rather than await the outcome of the Court of Appeal decisions since this challenge has assumed the status of lead case in the Upper Tribunal, has entailed the investment of considerable resources and further delay cannot, in my judgement, be justified. I would add that, to my knowledge, this is the first substantive decision of the Upper Tribunal in this category. Taking into account the imminence of the Court of Appeal hearings, permission decisions in certain other cases in this Tribunal have been deferred.

CONCLUSION

48. I conclude:

(i) The Applicant's improper purpose ground of challenge is not established.

(ii) The general principle that an out of country appeal provides an adequate remedy in cases of this kind applies.

(iii) This renders moot the Applicant's second ground of challenge based on procedural unfairness. This ground can be fully explored before the FtT in any event.

Signed :

Edward McCloskey.

The Honourable Mr Justice McCloskey
President of the Upper Tribunal, Immigration and Asylum Chamber

Dated: 22 May 2015

Applicant's solicitors:
Respondent's solicitors:
Home Office Ref:

Decision(s) sent to above parties on:

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a question of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was given (Civil Procedure Rules Practice Direction 52D 3.3(2)).