Upper Tribunal
(Immigration and Asylum Chamber)

MA (ETS – TOEIC testing) [2016] UKUT 00450(IAC)

THE IMMIGRATION ACTS

Heard at Field House, London	**Decision Promulgated**
On 01, 02, 04 & 16 August 2016	**On 16 September 2016**

Before

The Hon. Mr Justice McCloskey, President
Upper Tribunal Judge Rintoul

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MA
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant:	Mr S Kovats QC and Mr C Thomann, of Counsel, instructed by the Government Legal Department
For the Respondent:	Mr R de Mello and Ms J Rothwell, of Counsel, instructed by Oaks Solicitors

(i) The question of whether a person engaged in fraud in procuring a TOEIC English language proficiency qualification will invariably be intrinsically fact sensitive.

(ii) *Per curiam: where the voice data generated by TOEIC testing are those of a person other than the person claiming to have undergone the tests, there is no breach of EU or UK data protection laws.*

DECISION AND REASONS

Anonymity

(1) The Appellant continues to benefit from the protection of anonymity. Accordingly, nothing will be published or communicated which identifies or could have the effect of identifying him. Any infringement of this prohibition could result in, *inter alia*, contempt proceedings.

Introduction

(2) This is the judgment of the panel to which both members have contributed. While this is the Secretary of State's appeal we shall, for convenience, continue to describe MA as "the Appellant". The broader landscape to which this appeal belongs can be gleaned from the decisions of this Tribunal in R (Gazi) v Secretary of State for the Home Department (ETS – Judicial Review) (IJR) [2015] UKUT 327 (IAC) at [1] – [4] and SM and Qadir v SSHD (ETS – Evidence – Burden of Proof) [2016] UKUT 00229 (IAC) at [13] – [26] especially.

(3) This statutory appeal is a so-called "ETS/TOEIC" case. "ETS" denotes Educational Testing Service, a global corporation based in the US which, under contract, is one of the Home Office suppliers of so-called "Secure English Language Testing" ("SELT"). "TOEIC" denotes "Test of English for International Communication". This appeal was heard together with two related judicial review applications, Saha (JR/10845/2015) and Mohibullah (JR/2171/2015). These three cases were conjoined after the Tribunal had identified that they have certain issues in common and with a view to saving costs. A separate judgment is being delivered in each of the cases.

(4) The Appellant is a national of Nigeria, aged 49 years. He was lawfully present in the United Kingdom as a dependant of his spouse who was granted a Tier 4 Student visa and subsequent extensions thereof from 2010 until 14 October 2014, the date of the impugned decision on behalf of the Secretary of State for the Home Department (the "*Secretary of State*"). His is another of the cases involving refusal of leave to enter at port and cancellation of entry clearance on the basis of alleged deception in procuring a "TOEIC" certificate, a recognised English language proficiency qualification, which he had obtained as a compulsory element of his application for permission to enter the United Kingdom in the capacity of Tier 1 Entrepreneur. Entry clearance for this purpose was granted to him on 24 May 2013. The business enterprise to which it relates involved establishing a visa application centre, which is his business activity at an international level.

(5) The Appellant exercised his right of in-country appeal against the decision of the Secretary of State. By its decision promulgated on 27 April 2015, the First-Tier Tribunal (the "*FtT*") concluded that the Secretary of State had not discharged the

burden of proving deception and had, therefore, made a decision which was not in accordance with the law (one of the statutory grounds of appeal). The Secretary of State appealed with leave and, by its decision promulgated on 24 September 2015, the Upper Tribunal set aside the decision of the FtT. It did so principally on the ground that the FtT had erred in law by failing to properly understand and engage with certain evidence. A series of case management and interlocutory hearings having intervened, it now falls to the Upper Tribunal to remake the decision of the FtT.

(6) At the commencement of the hearing, it became necessary for the Tribunal to make a preliminary ruling on the twin issues of the permitted grounds of appeal and the admissibility of certain documentary evidence upon which the Secretary of State was seeking to rely. Our ruling is attached at Appendix 1.

(7) The final prefatory matter is the issue of dates. The two most important dates in the factual matrix are, by some measure, 28 February 2013 and 20 March 2013. The first of the two TOEIC Certificates pertaining to the Appellant recites that on the first of these dates he, having undergone the first limb of the test, secured scores of 445 out of 495 and 410 out of 495 in the skills of listening and reading respectively. The second TOEIC Certificate records that on 20 March 2013 the Appellant secured a score of 200 out of 200 for the skill of speaking and 190 out of 200 for that of writing. The spotlight in this appeal is firmly, though not exclusively, on the speaking score which he claims to have obtained.

The Secretary of State's Decision

(8) As noted above, the decision made on behalf of the Secretary of State which underlies these proceedings was made at port on 14 October 2014. The Appellant, having flown from abroad, was detained at Heathrow Airport on suspicion of having engaged in TOEIC fraud and was interviewed. This resulted in a decision of the Border Force officer concerned cancelling the Appellant's leave to remain in the United Kingdom and refusing him leave to enter under paragraph 321A(2) of the Immigration Rules, which provides:

> *"The following grounds for the cancellation of a person's leave to enter or remain which is in force on his arrival in, or whilst he is outside, the United Kingdom apply: …..*
>
> *(2) False representations were made or false documents were submitted (whether or not material to the application and whether or not to the holder's knowledge), or material facts were not disclosed, in relation to the application for leave; or in order to obtain documents from the Secretary of State or a third party required in support of the application ….."*

The error of law diagnosed in the decision of the FtT giving rise to this remaking exercise concerned the Judge's approach to this provision of the Rules.

(9) The Secretary of State's case, in a nutshell, is that the Appellant procured the second of his two TOEIC Certificates by fraud. Thus, we observe, the shifting burdens of proof outlined in SM and Qadir at [57] – [58] are engaged.

The Issues

(10) Intensive pre-hearing case management has reduced the issues to be considered. These have been formulated with some precision. Underpinning the issues is the Appellant's acceptance that the voice contained in the computerised voice files which are said to have been generated by his TOEIC speaking test is not his. The Appellant's formulation of the issues to be addressed is the following:

(i) Whether his voice was properly recorded and/or correctly transferred to ETS in the United States.

(ii) Whether the voice recordings provided by ETS in these proceedings relate to the test which he took.

(iii) Whether there was a breach of the Data Protection Act in the transmission of his data to ETS in the United States.

On behalf of the Secretary of State, it is contended that the central issue to be determined by the Tribunal is whether the Appellant used a proxy to undertake the speaking test. This effectively encompasses issues (i) and (ii).

The Expert Evidence

(11) One of the beneficial effects of combining this appeal with the two related judicial reviews was that the expert evidence generated in each case was considered in the round. One aspect of this was a pre-hearing meeting of the three experts and an ensuing joint memorandum which demonstrated a substantial measure of agreement among them.

(12) At this juncture it is appropriate to reflect briefly on the expert evidence. There is evidence from three expert witnesses. Sensibly and commendably, as a result of a collaborative approach the experts produced a joint memorandum. In addition, two of them, Mr Stanbury and Professor Sommer, gave evidence to the Tribunal.

(13) The expertise of the three persons concerned belongs to the fields of computing, database programming, computer forensics and computer security, in general terms. In their joint memorandum the experts helpfully outline the task to which their endeavours were addressed:

> *"The task of the experts was to review the available material which consisted of a variety of print outs said to come from computers, handbooks which should have been used during the testing, testimonial evidence from the organisers of the events and from Home Office officials and some paper records. There was also a BBC 'Panorama' programme about the use of proxies and other frauds run by testing centres for the benefit of attendees ……*
>
> ***The issue before the experts was to consider the plausibility of scenarios which might explain how the ETS computer records could reconcile the two conflicting assertions: that the audio recordings were created by proxies and that*** [the students] ***actual recordings were incorrectly married up in the ETS records.****"*

[Emphasis added.]

(14) In order to understand what follows it is necessary to appreciate that the judicial review applicants, Mr Mohibullah and Mr Saha and the Appellant in the related case, MA, claim to have undergone their TOEIC speech testing at different test centres. These were, respectively:

(a) Mr Mohibullah: Synergy Business College.

(b) Mr Saha: Elizabeth College.

(c) Mr MA: Cauldon College.

All of these centres are located in the Greater London area.

(15) The experts, jointly, have highlighted the following matters in particular:

(i) As regards every decision such as those under challenge in the present cases, "*… everything depends on the policy of the information provided by ETS to the Home Office and the ability of the Home Office to match this with the data from other sources which they hold*".

(ii) According to the witness statement of the Home Office employee Mr Greene, the "Lookup tool" is an Excel spreadsheet. This mechanism was:

> "*.. wholly developed within the Home Office to enable the information provided by ETS of invalid and questionable test results to be checked and cross referenced against the details of those who have made applications for leave to enter and remain …..*
>
> *A search can be made on the Lookup Tool using the ETS Certificate number, the person's passport reference number or the unique number allocated to their record on the Home Office case work information and management system.*"

(iii) With the exception of the ETS "audit" of Synergy College, which is dated 16 January 2013, none of the ETS documents bears a date and "*… it is not entirely clear whether they accurately refer to circumstances as they existed in April 2012 and March 2013 when the tests were taken*".

(iv) There is conflicting evidence about whether the spoken and written responses of candidates to individual questions are stored on individual electronic files or otherwise.

(v) One of the ETS test centre administration manuals disclosed post dates the periods when the TOEIC Certificates of the Applicants were generated.

(vi) There is clear evidence that the speaking and writing test methodology was converted in late 2011/early 2012 from a web based system to a mobile delivery system. (In passing, the Tribunal records its surprise that there is no evidence of the month, much less the specific date or dates, when this rather important change was implemented.)

(vii) The manuals contemplate that each candidate will be photographed by an iPhone and/or that there will be photo registration by the Centre Administrator's personal computer. The information provided by ETS' solicitors is that ETS has been unable to locate any photographic records, cannot confirm whether the aforementioned procedure was in operation in April 2012 and simply does not know the provenance of the photograph of the Appellant MA (the only member of this group of three litigants in respect of whom a photograph has been produced).

(viii) According to ETS, the system was that each candidate was required to register on a computer relevant personal details, including a passport number, which automatically generated a computerised unique Registration Number.

(ix) The "CBT Manager application" was the computer software used to record each candidate's spoken and written responses. The computerised files thereby created were then transmitted to the "Online Scoring Network" at ETS' US Headquarters.

(x) There is a distinct lack of clarity relating to the process as described by ETS in (ix) above. The description of uploading of the data following completion of the test is not consistent: in particular, the description provided in respect of the Applicant Mr Mohibullah has not been put forward in either of the other two cases.

(xi) The integrity of the test taking procedures and systems established by ETS in its manuals depends heavily on the reliability and probity of test centre staff. Further, the ETS security precautions concentration on the elicit conduct of candidates and not test centre employees.

(xii) With the sole exception of audio files, all of the computer files produced have been in the form of "*print-out to PDF*": the effect of this "*… has been not to preserve any original date – and – time stamps or internal metadata either or both of which would have assisted analysis using digital forensic analysis and helped produce a chronology of events*".

(xiii) The test centre seating plans which have been produced are incomplete.

(xiv) A study of the spreadsheets attached to the witness statements of the Home Office employee, Mr Sewell reveals a lack of any nexus between the data supplied to him by ETS and the unique ID of individual candidates. As a result, the experts say "*We do not know the processes by which the candidate's name is linked to each test*".

(xv) The experts acknowledge the documentary evidence of "simple impersonation", with particular reference to the unannounced ETS audit at Synergy College on 16 January 2013. They express the opinion that the simple impersonation mechanism would be "vulnerable" in any speaking tests.

(xvi) While there is also some evidence of "dictated answers", "viz" answers to test questions being called out by a person in the examination room, this method would not be viable or the spoken English test.

(xvii) The investigation of a particular test centre in Birmingham established the use of the "remote control software" mechanism by the use of "Team Viewer" software whereby a person using another computer could secure access to the computer being used by the candidate. The possibility of other, covert, remote control mechanisms is acknowledged. There is no evidence of the use of any of these mechanisms in the test centres which relate to these Applicants or the Appellant MA.

(xviii) The experts also advert to the possibility of manipulation of file responses held on the local server, the CBT Manager, at the testing centre. If file responses were stored on this server, this would create an opportunity for alteration by test centre staff. Two of the experts opined that this was unlikely.

(xix) Yet another mechanism, entailing a simultaneous testing session using proxies in a "hidden room" at the test centre or elsewhere is acknowledged.

(xx) According to the experts, "*particular opportunities for mistakes appear to arise if the actual registration on the ETS system is sometimes carried out by test centre staff and not by the candidates themselves*", creating the risk of the data provided by the test centre to ETS mis-matching the candidates and their tests. There was no security precaution available to counter this risk, with the exception of an unannounced ETS audit.

(xxi) As none of the computers or data media associated with the test centres involved in these cases is available, there is no information relating to the important issues of audit, log and configuration files and related time and date stamps. This is one aspect giving rise to the recurring lament of the experts:

> *"We have been limited by the quantity and quality of material actually available to us."*

(xxii) The "naming conventions" for the digital files of the voice recordings produced do not provide an explicit link between the candidate and the recording: rather, there is only reference to the particular test being taken. Contrary to a suggestion emanating from ETS via their solicitors, the file name does not include the candidate's "unique registration code". Thus:

> *"… What this naming system does is to provide linkage between a registered candidate and the responses and recording but assumes that the unique registration code is reliably linked to the real candidate. As we have already pointed out, in the two spreadsheets exhibited by Adam Sewell there are no columns uniquely to identify candidates by reference to the ID they originally tendered (e.g. the passport number)."*

(xxiii) Next, it is observed "*The experts have examined the supplied audio files and find that there is no embedded metadata which might assist their enquiries. Time and date stamps appear to be of the most recent copying of the file and not of the point of origination*".

(xxiv) The experts' consideration of the report generated by an unannounced audit of Synergy College on 15 May 2012 highlights that while the auditor expressed "*mild concern*", no specific remedies or sanctions vis-à-vis the college were proposed.

(16) In the MA appeal, two of the experts, Mr Stanbury and Professor Sommer, gave evidence to the Tribunal. Their oral evidence was confined to certain discrete issues and themes. The choreography of the judicial review cases and statutory appeal resulted in no objection to the evidence particular to one case being considered in all three cases.

(17) Mr Stanbury, in his evidence, highlighted the following matters in particular:

(a) The absence of any evidence that the security mechanism of password protection vis-à-vis candidate's test computers was in operation.

(b) The "hidden room" theory could involve the falsification of the completed tests of both genuine and fraudulent candidates.

(c) Whereas the speaking and writing TOEIC tests, which were undertaken at a single session, were fully computerised, the listening and reading tests, also undertaken at a single session, were manual.

(d) There is no evidence of any audit logs. An "audit log" is a computerised record which would demonstrate the chain of storage, handling, processing and transmission of the data generated by the speaking and writing tests (our formulation).

(e) Metadata, if they existed, would be located inside the voice recording files: there are none. As a result, these files do not contain particulars of the time, date and location of the recordings therein stored.

(f) Finally, Mr Stanbury's expectation was that there would be in existence certain contemporaneous manual records, relating particularly to the names of candidates and the desk number allocated to each: there are no such records.

(18) Professor Sommer further testified that the evidence fails to disclose whether the important act of uploading the files generated by the speaking and writing tests occurred automatically or involved some human intervention. He agreed that if human intervention was part of this process, this would have created an opportunity for manipulation of the files, particularly if there was a time lag. The latter could occur through, for example, a loss of internet connectivity, whether false or genuine. Finally, Professor Sommer focused on the issue of photographing TOEIC test candidates. His evidence was that he "*never got to the bottom*" of this. While this issue receives some consideration in the ETS test centre manuals and the witness

statements of ETS employees, these sources are incomplete. In response to a question from the panel, Professor Sommar stated that the description of the Appellant MA in evidence of group photographs following completion of the test exercises bore no resemblance to what is specified in the manuals.

(19) At this juncture, we would observe that while the joint memorandum of the three expert witnesses and the oral testimony of two of them have, inevitably, focused attention on certain discrete issues and themes, we have considered in their entirety the experts' reports and all of the documentary evidence bearing thereon.

The Appellant's Case

(20) The Appellant's evidence takes the form of two written statements and his oral testimony to the Tribunal. These fall to be considered in conjunction with a substantial quantity of documentary evidence adduced mainly on behalf of the Secretary of State, much of it emanating from ETS. While we have considered this material in its entirety, our attention shall be focused on the most salient elements.

(21) We shall consider first the issue of the Appellant's witness statements. The first of these is dated 26 February 2015 and was made with a view to the forthcoming FtT hearing approximately one week later. His second witness statement is considerably more recent, bearing the date 27 June 2016. The Appellant adopted both statements in full in his evidence to the Tribunal.

(22) The Tribunal questioned the Appellant about his first statement. He replied that this was prepared by him, at his home. He then forwarded it to his solicitor. Next, he went through the statement with his solicitor. His interaction with the solicitor in finalising the statement entailed several meetings and spanned a period of two – six weeks. Ultimately, he signed the statement and it was sent with other documents to the FtT.

(23) The Tribunal probed this issue with the Appellant with a view to securing as full an understanding as possible of both the contents of and the omissions in a statement made, with legal advice, by a person who is clearly intelligent and well educated and is a successful and experienced business man.

(24) Chronologically, the first main chapter in the Appellant's story is that of how he made arrangements to undertake the two TOEIC tests. The Appellant's first witness statement contains the following passage:

> *"When I decided to apply for a Tier 1 Entrepreneur Visa, I approached Oaks solicitors for assistance in preparing my Entrepreneur application. Prior to making my application, I decided to sit my English Language test at ETS Global UK at Cauldon College, 2nd Floor, 9 City House, Cranbrooke Road, Ilford, IG1 4DU. This was because the English language requirement was a mandatory requirement for my application. I am very fluent and conversant in the English language. I had no doubt or hesitation in passing the test. In fact, I have qualifications in Nigeria which were the equivalent of a Degree in the UK. The only difficulty was that because I was travelling so frequently in and out of the country for business, I did not have the time to obtain my qualifications from Nigeria to have it [sic] verified …. as being equivalent to a UK Degree. My*

solicitors did advise me to do this but I did not have the time and so I decided to sit the English language test in the UK. In fact, since the cancellation of my visa when my solicitors advised me to obtain NARIC verification, it has taken them from November 2014 to February 2015 to obtain the verification. It was a long winded procedure."

Oaks solicitors are the firm which has represented the Appellant throughout the litigation process, beginning with his appeal to the FtT.

(25) Oaks solicitors did not feature at all in the Appellant's evidence to the Tribunal relating to this discrete issue. Rather, his evidence was that when he was applying for his entrepreneur's visa he sought advice from a friend (largely unidentified, though the Appellant belatedly divulged a forename). This gave rise to his friend's lawyer "booking" the test for him. The test (singular) arrangements were then communicated to the Appellant by a text message. Pausing at this juncture, we observe that none of this evidence is contained in either of the Appellant's written statements. We have drawn attention to the use of the singular in the Appellant's descriptions of the "test" as it was abundantly clear to us that he was purporting to describe a single, isolated event in his evidence to the Tribunal.

(26) When the Appellant was questioned more closely about this topic by the Tribunal, his replies disclosed four noteworthy facts. First, he does not know the name of the solicitors who (he claims) made the TOEIC test arrangements for him. Second, he does not know their place of business, though he believes it to be somewhere in East London. Third, he has not communicated with these solicitors at any time since the tests. Fourth, the solicitors have not levied a professional fee for their services, the Appellant has made no enquiries in this regard and no payment has been made.

(27) Sequentially, the next issue canvassed in some depth at the hearing concerned the test centre where (per the first of the TOEIC certificates) the Appellant claims to have undertaken the first of the two tests, on 28 February 2013. In his first, detailed written statement, the Appellant states that he underwent this test at Cauldon College. This, of course, was the listening and reading test. However, in his evidence to the Tribunal, the Appellant gave the following, markedly different account, none of which is replicated even obliquely in his witness statements. He claimed that he was driven by his chauffeur to Cauldon College, where he entered the reception, paid his fee and was then given the address of another centre. He was driven to the other centre, where he presented his identification and registered using his passport. Following this he underwent a test in a room where he chose his own seat, in the presence of an unspecified number of others and an invigilator. Later, he suggested that there were some 20 candidates. He could not recall where he was seated. The invigilator did not speak to him at any time. No one asked for his passport. Why was none of this included in the Appellant's witness statements? He could not say.

(28) It is true that in the Appellant's first detailed statement he describes undergoing two separate tests on the two dates specified in the TOEIC certificates. However, in his description of the events and circumstances pertaining to the tests, he makes no distinction between them. This extends to saying nothing whatsoever about different venues. Furthermore, his estimate of 20 candidates contrasts with his inability to (even) estimate any number in his oral testimony, initially. Nor can one reconcile his

oral testimony that he had no recollection of where he was seated with his written evidence that on one of the test dates (unspecified), he was seated "next to a window".

(29) The Appellant's assertion about the events of 28 February 2013, concerning the first limb of the TOEIC test, was, inevitably, probed in a little detail. The kernel of his story was that he was driven to Cauldon College, where he registered and paid the requisite fee and was redirected to Queensway College, to which he was driven by his chauffeur. At one stage of his evidence the Appellant was asked several times by the Tribunal: to where was he driven? In response, the best he could manage was "a different location". He was unable to identify any landmarks of any kind, the area in general terms, the district or the street name. He was unable to provide any physical description of the building in question or its surroundings. He could not estimate the journey time. His explanation was that he was busy working in the back seat of the vehicle.

(30) In this context, it is appropriate to highlight the Appellant's evidence concerning events at Heathrow Airport on 14 October 2014 (to which we shall return). The Appellant testified that, following his detention, he telephoned his chauffeur "to find out where he took me for the first test": the chauffeur was unable to tell him anything. While we weigh in the balance the Appellant's claim that the chauffeur's initial response was that he was parking the car and would call back, the Appellant gave no evidence about a returned call. Furthermore, the Tribunal heard no evidence from the chauffeur. Thus the incognito of why parking a car prevented a reply to a quintessentially simple questions endures.

(31) The next issue concerns the tests themselves. In his main witness statement, the Appellant, without any differentiation between or among tests, avers that everyone was wearing ear phones. We readily infer, fortified by the absence of any evidence to the contrary, that ear phones were not required for all four limbs of the TOEIC test. Specifically, we find that ear phones were not required for two of the four elements, namely reading and writing.

(32) We now turn to consider certain documentary evidence and the Appellant's testimony pertaining thereto. We preface this with the observation that the TOEIC certificates do not record either the time or the venue of the tests purportedly taken. The data which they do record are the claimed candidate's name, date of birth, registration number, date of testing, expiry date of certificate (invariably two years later) and the candidate's scores in the two English language skills tested.

(33) The names of both the Appellant and Queensway College appear on certain official documents bearing the date 28 February 2013, which coincides with the first of the two TOEIC certificates. The Appellant's passport number is recorded on two of these documents. One of the documents is a seating plan, signed by an invigilator, which allocates a total of 30 surnames to individually specified seats in a room apparently containing 48 work stations. The seat linked to the Appellant in the seating plan does not tally with what is contained in a related attendance list. These materials also include the two-page document purportedly completed by the candidate in providing the answers to the listening and reading questions. The

second page purports to bear the candidate's signature and the date of testing. The Appellant asserts that the hand writing in which his signature appears is not his.

(34) The Appellant testified that upon arrival at Queensway College, he signed a roster of sorts at reception. While his signature appears on an attendance list containing particulars of his forename, surname and identification number, coupled with an allocated seat number, he "did not think" that this is what he signed. He confirmed that the identification number corresponded with his passport number. He suggested that the signature was not in his handwriting. He could not remember anything of the invigilator's conduct. He confirmed that the test documents which he claims to have completed and signed were comparable to the two pages containing the signature which he disowns. When asked why Queensway College is not mentioned in either of his two written statements, the Appellant was unable to explain.

(35) We turn next to the discrete issue of photographs. The ETS test centre manuals make clear that every candidate should be photographed on every occasion of testing and that the photographs should be taken and stored in a specified manner. Neither ETS nor the Secretary of State has produced any photograph of the Appellant pertaining to the first limb of the test which he claims to have undertaken at Queensway College on 28 February 2013. Nor does the Appellant's photograph appear in the box specially designated for this purpose in the corresponding TOEIC certificate.

(36) The Appellant's photograph does, however, appear in the TOEIC certificate corresponding to the second (speaking and writing) limb of the test, dated 20 March 2013. Furthermore, precisely the same photograph was provided by ETS's solicitors during the pre-hearing phase in response to requests for specified information and documents. The solicitors stated:

> "*It is standard practice, and a requirement, for all test takers to be photographed at the test centre on the day of the test. A copy of the photograph in respect of [the Appellant] is set out below. This was a task undertaken by the test centre not ETS Global although the information in its records shows that the photograph was taken at 11.17.17 on 20 March 2013 and uploaded at 11.21.01 on the same day.*"

The centre where TOEIC tests were taken on this date is Cauldon College. ETS's solicitors further assert that the test began at 10.10 hours and there were 37 candidates. On the basis that timings noted are correct, which was not a contentious issue, the photograph was taken 67 minutes later.

(37) The Appellant testified that after completing the speaking and writing tests at Cauldon College, the candidates queued to have their photographs taken. They lined up in groups of eight in a gap in the middle of the room. Strikingly, he described no mechanism for separating and identifying the individuals in this communal fashion. The experts gave evidence that this description does not correspond remotely with the photographing procedure specified in the ETS manuals.

(38) Having canvassed with Counsel the specific issue of the evidence bearing on the Appellant's photographs, on the final day of the hearing, the Tribunal gave

permission for the adduction of further evidence on his behalf. The evidence initially included a single copy of the Appellant's passport photograph. The Tribunal was anxious to explore the origins of and context surrounding this discrete evidence. The further witness statement (with attachments) of the Appellant duly addressed this issue. This evidence was uncontentious and, having considered it, we are impelled to the view that nothing of substance turns on the discrete issue of photographs

(39) The next significant evidence to be considered concerns the record of events at Heathrow Airport on 14 October 2014. These events, it will be recalled, precipitated the decision of the Secretary of State giving rise to this appeal.

(40) First, there is the landing card completed by the Appellant. This also contains notes made by a Border Force official. These document the Appellant stating that he had undergone an English language proficiency test for the purpose of securing an Entrepreneur visa. The record continues:

> "[He] *had to ring home to get details of his test date and place ….* [and] *…. provided name of the test centre as Claudon College in 3/2013.*"

It is convenient to interpose here the Appellant's evidence to the Tribunal concerning this issue. The Appellant testified that his driver was waiting to collect him at Heathrow Airport. He telephoned the driver for the purpose of ascertaining where he had taken the test (singular). The driver was unable to provide him with this information, but stated that he would have to park the car and would then call the Appellant. According to the Appellant, he then remembered the text that had been sent to him by his friend Ahmed. He produced this text to the Tribunal. It is dated 19 March 2013 and timed 14.26 hours. Its contents consist of the name Cauldon College and its address, including the postcode. The Appellant did not provide any satisfactory explanation of why, on 19 March 2013, he needed this information having regard to his claim that he had been to Cauldon College and had spent some time there just three weeks previously.

(41) The second document generated by events at Heathrow Airport on 14 October 2014 is the record of the Appellant's interview. According to this he confirmed that he was "fit and well and happy to be interviewed". The interview had a recorded duration of 10 minutes. When asked about his English language proficiency test, the Appellant is recorded as having replied:

> *"I think March 2013 … in Ilford, Cauldon College."*

The next question and answer were:

> *"Which English language test did you sit? ……*
>
> [Answer] *I can't remember."*

The Appellant's evidence to the Tribunal was that this question was not clear and he did not understand it. This question was followed by:

> *"What did the test consist of? ……*

[Answer] *Writing, listening and speaking.*"

The Appellant was asked in cross examination why he had not mentioned reading. He replied "*I don't know*".

Next, he was unable to state the amount he had paid in order to undertake the test. We contrast this with the fact that that in his first written statement, made four months later, he stated "*I believe I paid approximately £200 for the test*".

(42) The ensuing question and answer were:

"*How many people were there when you sat the English test? ….*

[Answer] *Full, in my room there were around 20 people.*"

At the hearing the Appellant was asked to indicate which of the two test centres to which this answer applied: he replied "*I can't remember*". As the interview progressed, he asserted that the test (notably, singular) lasted roughly one hour and was undertaken at a computer terminal, after he had provided his passport. He added "*They took our photo*". His answers made no mention of Queensway College and contained no suggestion of two separate testing exercises.

The Main Factual Issues: Findings And Conclusions

(43) We are conscious that the only TOEIC invalidated is the second one and, further, that the impugned decision of the Secretary of State is founded on the speaking element of the second certificate. However, given the run of the hearing we consider that the main factual issue to be determined by the Tribunal in this appeal is whether the Appellant underwent the four English language proficiency tests on the separate dates and occasions to which the two TOEIC certificates relate. We deduce from the submissions of both parties' counsel that there is no disagreement about this approach. The discrete factual issues upon which we have focused above are those which emerged as the most important during the hearing and received most attention. All of them have a bearing, directly or indirectly, on the central issue.

(44) We remind ourselves of the correct approach to the issue of burden of proof and, in particular, the "burden of proof boomerang" discussed in Muhandiramge (Section S-LTR.1.7) [2015] UKUT 00675 (IAC), at [9] – [11]. In SM and Qadir this Tribunal, at [91], described the Secretary of State's case against both Appellants as "*non-specific and generalised*". This contrasts with the present appeal in which the production of a markedly greater volume of evidence, both general and specific, has contributed significantly to the presentation of a more focused and considerably more substantial case against the Appellant. At the general level, there is, *inter alia*, clear *prima facie* evidence of TOEIC corruption at the two test centres where the Appellant claims to have been examined. At the specific level, one has in particular the TOEIC certificates and the documentary records linked to the Appellant in respect of the date and place where he claims to have undergone the second part of the test, namely 20 March 2013 at Cauldon College. The specific evidence also includes the records of the events at Heathrow Airport on 14 October 2014.

(45) In SM and Qadir, the following was stated by this Tribunal, at [102]:

> *"We take this opportunity to re-emphasise that every case belonging to the ETS/TOEIC stable will invariably be fact sensitive. To this we add that every appeal will be determined on the basis of the evidence adduced by the parties."*

This is echoed in the statement of Beatson LJ in Secretary of State for the Home Department v Shehzad and Chowdhury [2016] EWCA Civ 615, at [23]:

> *"I do not address the question of what evidence will be sufficient to enable a Tribunal to conclude that there has been no deception. That is likely to be an intensely fact-specific matter."*

We draw attention to two further statements in SM and Qadir. First, the tentative prediction in [103]:

> *"We take note of the indications in the conduct of these appeals that, in some future case, the Secretary of State may seek to adduce further evidence, likely to be expert in nature."*

This type of "*entirely new ingredient*" has materialised in these three conjoined cases, in the shape of three experts' reports. Finally, this Tribunal stated at [80]:

> *"In some of the FtT decisions in this field one finds observations concerning the appellant's apparent fluency in, and command of, the English language. We consider that Judges should be cautious in adopting this approach for at least three reasons. The first is the passage of time. The second is that Judges are not language testing or linguistics experts. The third is that, to date, there has been no expert linguistic evidence in any of these cases."*

(46) We have considered what Beatson LJ said regarding the issue of burden of proof in Shehzad and Chowdhury, at [30].

> *"….. In circumstances where the generic evidence is not accompanied by evidence showing that the individual under considerations test was categorised as 'invalid', I consider that the Secretary of State faces a difficulty in respect of the evidential burden at the initial stage."*

We observe that this evidential frailty does not arise in the present case. In this context, we have given consideration to one particular issue. While we infer that the action taken against the Appellant by Border Force officials at Heathrow Airport must have been based on some information capable of being reproduced in documentary form and/or detailed in a witness statement, there is no such evidence before us. Thus there is a gap in the Secretary of State's case in this respect. This discrete issue did not form part of the Appellant's case and, while mindful that this is not determinative, we consider that the effect of this *lacuna* is neutral in the context of the present appeal.

(47) We must also balance the expert evidence, summarised in [11] – [18] above. This evidence highlights that there are enduring unanswered questions and uncertainties relating in particular to systems, processes and procedures concerning the TOEIC

testing, the subsequent allocation of scores and the later conduct and activities of ETS. While we bear this evidence in mind, ultimately it was largely remote from the centre of the Appellant's case.

(48) We have identified in [20] – [42] above those factual issues which, as the hearing progressed, emerged as the most significant. Our exposition of them has been interspersed with certain comments and asides, which we do not repeat. We make the following discrete findings, some of which are self-explanatory:

(i) There are significant gaps in the Appellant's witness statements and, related to this, notable discrepancies between these statements and his evidence to the Tribunal. This is what prompted the Tribunal's exploration of the circumstances in which the statements were compiled. The Appellant has failed to provide any satisfactory explanation of the gaps and discrepancies.

(ii) The Appellant's abject failure to provide even the most basic description of the car journey which he claims to have undertaken from Cauldon College to Queensway College or <u>any</u> physical feature of the latter college or its surroundings significantly undermines his account of events on 28 February 2013, the date of his first TOEIC certificate. There is no documentary evidence supporting the Appellant's account of events, even obliquely and no evidence was adduced from two potentially supporting witnesses, namely the Appellant's chauffeur and the (unidentified) solicitor who, he claims, made the test arrangements for him. We find his vague and hesitant account of events on this date wholly implausible. We conclude that this evidence was fabricated in its entirety.

(iii) The Appellant sought to distance himself from the contemporaneous records <u>apparently</u> relating to test taking at Queensway College on 28 February 2013. We find, on balance, that these records were generated on the date and occasion specified. The Appellant gave a description of his seat which does not accord with either of the records. He asserted that the signatures purporting to be his in the attendance sheet and on the second page of the reading and listening test itself were not made by him and do not reflect his handwriting. We accept his claim in this respect. We consider that he was driven to acknowledge this on the ground that these signatures could not withstand comparison with his signature on other documents, for example his two witness statements. However, these are the only documents relating to the Appellant, Queensway College and the date in question. There was no suggestion from any quarter that other comparable documents containing his true signature must exist but have not, for some unexplained reason, been disclosed by either ETS or the Secretary of State. The explanation for all of this, we readily find, is that the Appellant did not attend Queensway College on the date claimed and did not undertake either of the tests in question. It follows from this that what is represented in the first of the TOEIC certificates is wholly false.

(iv) While we take into account Mr De Mello's submission that the Secretary of State's deception case against the Appellant relates to the second, and not the first, test, this does not preclude us from, firstly, considering the evidence

relating to the first test, particularly as it bears directly on the Appellant's credit generally and, secondly, making appropriate findings of fact. Taking into account also the other unsatisfactory and unpersuasive aspects of the Appellant's evidence, we find specifically that the TOEIC certificate dated 28 February 2013 is not the product of any test undertaken on that date on this date and occasion or at all.

(v) This finding is reinforced by the absence of a photograph on the first of the two TOEIC certificates. It is further reinforced by, *inter alia*, (a) the Appellant's consistent description in his witness statements of having attended one test centre only, namely Cauldon College, (b) his consistent description of a single test occasion when interviewed at Heathrow Airport, (c) his failure to mention Queensway College in the span of two witness statements and (d) his mentioning of Queensway College for the first time when he gave evidence to the Tribunal. Under questioning, he was unable to account for his failure to do so in any of the earlier contexts detailed.

(vi) There are self-evident gaps and discrepancies in the account which the Appellant gave to Border Force officers at Heathrow Airport (see [39] above). We bear in mind the Appellant's explanation to the Tribunal for these shortcomings, which was that he found himself in a situation of detention without advance warning and was feeling stressed. However, we must balance this with the following facts and factors: the Appellant did not make this claim in either of this witness statements; in his main witness statement he claimed that he "*told them everything*"; he was able to communicate by phone with his chauffeur and the immigration attaché of the Nigerian High Commissioner in London; and he signified at the outset of the interview that he was "*fit and well and happy to be interviewed*".

(vii) We are prepared to accept that the Appellant found himself in a stressful situation at the airport. On the other hand, in addition to the matters highlighted immediately above, there was every incentive and opportunity for this intelligent and experienced business man, in a context where there was no language barrier, to make fully and candidly his case in respect of the two TOEIC certificates, both reactively and proactively. He manifestly failed to do so and his claim that he "*told them everything*" is demonstrably unsustainable. We do not accept the Appellant's explanation for the gaps and discrepancies identifiable in the Heathrow records. We consider that these count against his credibility.

(viii) We have considered with particular care the Appellant's account of events at Cauldon College on the second of the two material dates, 20 March 2013. We acknowledge that his photograph appears on the TOEIC certificate linked to this occasion and, further, that this photograph tallies precisely with that produced via third party disclosure by ETS. It is common case that these two photographic representations depict the Appellant. We find that this photograph was created at Cauldon College on 20 March 2013.

(ix) On the balance of probabilities, the Appellant, therefore, attended Cauldon College on the date to which the second TOEIC certificate relates. While there are apparently contemporaneous records of events at Queensway College dated 28 February 2013, there are no corresponding records relating to Cauldon College on 20 March 2013. This is unexplained from all quarters. We consider that there is no consequential inference adverse or positive to either party which can reliably be made.

(x) In this context we refer also to the "CD properties screen shots" said to relate to the CD containing the Appellant's voice. These appear to have emanated from the Secretary of State via pre-hearing disclosure. The references to the "documents" are a clear indication that these documents were generated in the course of and for the purpose of these appeal proceedings. We note that they contain the Appellant's registration number and his surname. We have also considered the dates that are visible. The most significant feature of this evidence is that it is not self-explanatory (quite the opposite) and is unexplained and unilluminated, particularly in the absence of a suitable witness statement. We conclude that this evidence does not advance the Secretary of State's case.

(49) While the evidential foundation of our main finding of fact that neither of the TOEIC certificates is the product of tests undertaken by the Appellant is already substantial, still further reinforcement is found in other parts of the evidence. First, there is the unchallenged evidence on behalf of the Secretary of State arising out of analysis of all candidates' scores related to the listening and reading tests undertaken at Queensway College on 28 February 2013. The majority of the results lie within a very narrow band, with a score range in the middle of the B2 level. The report of the Intelligence Analyst concerned states:

> *"This pattern is not consistent with genuine candidates at other SELT providers. This patterns is consistent with other ETS TOEIC test centres where results were manipulated and reported incorrectly by test centre staff ….."*

The author characterises the scoring patterns as "abnormal and statistically improbable", contrasting them with the scoring patterns of test centres not belonging to the suspect category. The same assessment is made in respect of the scoring patterns in speaking and writing tests at Cauldon College. It is also noteworthy that the Appellant's TOEIC certificates belong to what may be described as the peak period of cheating and manipulation in the ETS/TOEIC saga.

(50) In contrast with other cases there is cogent evidence in this appeal explaining the "lookup tool". The evidence is that this consists of an Excel spreadsheet which has the capacity to search a list of thousands of test certificates provided by ETS with a view to connecting the certificates with persons who have made applications for leave to enter and remain. This mechanism was wholly developed within the Home Office. The data used for this purpose are the name, date of birth and nationality of the person identified in the TOEIC certificate, combined with the certificate number and the person's passport reference number or Home Office unique number.

(51) In this Appellant's case, the use of this tool generated an Excel spreadsheet, included in the evidence, in familiar form relating to the second of the TOEIC certificates. This contains the ETS assessment of the scores recorded as "invalid". While we take into account the questions and doubts expressed by the experts these focus more on the ETS and test centre methodologies than the ETS mechanisms and processes for the analysis of the computerised files holding suspect speaking tests. We record further that there was no frontal challenge to this particular piece of evidence. The "invalid" assessment is also supported by our findings above. Overall we are satisfied that we should treat the "invalid" assessment as reliable.

(52) The arguments of Mr De Mello and Ms Rothwell, inter alia, focussed on a letter from ETS responding to a request for information by the Appellant's solicitors. The context and import of this letter are illuminated by the evidence that there were 37 candidates purportedly taking the speaking and writing tests at Cauldon College on 20 March 2013. The outcome of the ETS assessment was that none of the scores contained in the related TOEIC certificates was considered free of suspicion. The Appellant was one of 31 candidates whose scores were assessed as "invalid". The assessment of the remaining six candidates' scores was "questionable".

(53) The aforementioned letter from ETS, unsurprisingly, deals only with the Appellant's case and the cancellation of his scores. It is clear that this does not extend to phase one of the tests, namely the earlier listening and reading modules. Nor, in our judgment, was it designed or intended to do so. We discern no inconsistency between the ETS letter and the detailed report of the Home Office employee on which the evidence summarised in [48] above is based. We note further the evidence, which we accept, that the specific reason for the "invalid" assessment in this Appellant's case was that analysis of a batch of 280 speaking tests from Cauldon College spanning the period 27 February to 30 March 2013 revealed that the voice purporting to be that of the Appellant was the same as the voice analysed in at least one other component of the batch. It is convenient to recall, in this context, that the voice recorded in the speaking and listening tests attributed to him is not his.

(54) At this juncture we switch our focus to the Appellant's evidence to the Tribunal. We heard and observed the Appellant studiously during some 2 ½ hours. We scrutinised in particular response times, hesitation, spontaneity and engagement with the Tribunal generally. We found the Appellant surprisingly hesitant. If he had truly undertaken the tests we would have expected him to have been much more assured and assertive in his evidence. These qualities were, however, strikingly lacking. We would also have expected greater spontaneity in his evidence. In particular, we consider that, if genuine, he would have been anxious to disclose, spontaneously or otherwise, matters of detail relating to the two days and occasions under scrutiny with a view to demonstrating his innocence of the charge of deception. This too was strikingly absent from his evidence. Furthermore, on occasions, the simplest of questions had to be repeated, sometimes more than once, a paradigm illustration being the quintessentially simple, but crucial, question: to where did he travel from Cauldon College on the first occasion, 28 February 2013? The Appellant dealt with this repeated question in a wholly unsatisfactory way.

(55) These features of the Appellant's demeanour, presentation and the delivery of his evidence generally must be considered within their contextual framework and, in particular, the background that the Appellant, prior to giving evidence to the Tribunal, had enjoyed ample time for reflection, recollection and preparation. We recognise that a party or witness whose evidence partakes of these characteristics is not, *ipso facto* and inexorably, unworthy of belief. However, context is everything and we consider that in this particular appeal these factors, coupled with the findings and considerations highlighted above, impel ineluctably to the conclusion that the Appellant's case is a fabrication in all material respects. Finally, we have already highlighted above, and do not repeat, his unconvincing and implausible explanations of material discrepancies and inconsistencies canvassed with him in questioning.

Omnibus Finding and Conclusions

(56) We make two concluding observations. First, we are conscious that our assessment of the Appellant's credibility differs radically from that of the FtT. While we take this into account, we are not of course bound by another judicial assessment. Furthermore, it is clear that the content and contours of the appeal which we have considered differ markedly from those of the first instance appeal.

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

(58) Our overarching finding is that the testing and scores to which the two TOEIC certificates relate are not the product of any corresponding English language proficiency tests undertaken by the Appellant on either of the occasions in question or on any other occasion. The Appellant's claims to the contrary are demonstrably false. They are wholly unworthy of belief in every material respect. We make this overarching finding on the grounds and for the reasons elaborated above.

(59) This finding is dispositive of all issues in the appeal. Bearing in mind the legal issue of the burden of proof, it follows inexorably from this finding that we are satisfied that the Secretary of State has discharged the evidential burden of establishing that the Appellant procured his TOEIC certificates by deception. The Appellant, for the reasons explained, has manifestly failed to raise an innocent explanation of any element of the *prima facie* case of deception established against him. It follows that there is no further transfer of proof to the Secretary of State. We make clear that there is no hesitation in our overarching finding. In our judgment the evidence points persuasively and decisively to this conclusion.

(60) It follows that the first and second of the issues formulated on behalf of the Appellant – see [10] above – do not arise. They are extinguished by our principal finding that the Appellant did not undertake any of the tests to which the TOEIC certificates relate. This finding is also dispositive of the third of the Appellant's issues, since there was no transmission of any of his data to ETS headquarters in the United States.

(61) Notwithstanding, we shall record briefly our views on the data protection issue. The interlocking elements of this argument are that the Appellant's voice constitutes personal data; the recording of his voice represents the processing of such data; the processor was Cauldon College; ETS and the Secretary of State are the data controllers or ETS is the Secretary of State's agent in this respect; and the Appellant's personal data were transferred to the United States without his knowledge and consent. The central pillar of the argument appears to be that the college processed the Appellant's personal data unlawfully by engaging a proxy test taker without his consent or knowledge. The effect of our principal finding above is that a proxy test taker was indeed employed. However, this did not occur without the Appellant's consent or knowledge: on the contrary, he connived actively in the fraud. The argument founders accordingly.

(62) On the hypothesis that the essential factual ingredients in this argument had been established, the question of the liability of the data controller (the Secretary of State) for the breach of data law by the data processor (Cauldon College) under Article 17 of Directive 95/46/EC would have arisen. Equally the Tribunal might have had to explore the related question of the transfer of the Appellant's personal data to the United States in breach of the safeguards enshrined in Article 25. However, assuming the determination of all of the factual and legal issues in the Appellant's favour in this hypothetical scenario, it is far from clear that the consequential illegality asserted, namely a breach of the Appellant's rights under Article 8 ECHR and Articles 8 and 2 of the EU Charter of Fundamental Rights would have been demonstrated. *Inter alia*, given the admitted fact of a proxy test taker it is difficult to see how the voice data can conceivably be described as the Appellant's. We decline to say anything more on this subject.

Decision and Disposal

(63) We reverse the decision of the FtT and allow the Secretary of State's appeal, thereby affirming the underlying decision of the Secretary of State, dated 14 October 2014, to cancel the Appellant's leave to remain in the United Kingdom.

Signed

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

Date: 02 September 2016

APPENDIX 1. Ruling No 1

(1) There are three preliminary issues requiring our consideration. The first relates to the scope of the appeal. As Mr Kovats QC has candidly acknowledged, this is determined decisively by the terms of paragraph 44 of the decision of Deputy Upper Tribunal Judge Monson. In very brief compass indeed, the issue under paragraph 321A(2) of the Rules was the subject of the Judge's finding that a material error of law had been established. In contrast, the Judge unequivocally affirmed the decision of the First-tier Tribunal on the issue relating to paragraph 321A(1) of the Rules. The ineluctable consequence of that is that only the first of these issues is live at this remaking stage.

(2) The second issue concerns the documents that are found in Section E of the Appellant MA's bundle. Without conducting a disproportionately lengthy tracing exercise two things are reasonably apparent. The first is that their genesis can be traced to paragraph 45 of the decision of Deputy Upper Tribunal Judge Monson. The second is that in the profusion of correspondence which has characterised the last few months of these proceedings further documents have been provided and some may not be easily attributed to specific categories or issues.

(3) We must bear in mind that we are a tribunal in which the conventional rules of evidence of civil proceedings are not applied with full rigour. The first question for us is whether these documents might have a bearing on the issues. We will be unable to provide a concluded answer to that until all of the evidence and arguments are completed. However, we can provide a provisional answer which is affirmative. This assessment can if necessary be revisited and reopened if there are proper grounds for doing so at a later stage of the hearing. If this discrete ruling stands then the conventional consequence will follow, namely that the main issue for the Tribunal will be the weight, if any, to be attached to the documents in question.

(4) We bear in mind also that the documents under scrutiny have been in the possession of the Appellant MA's legal representatives for some time, albeit not in satisfactory form as regards some of them and we deduce from Mr De Mello's submissions that there is no element of ambush or surprise and he will be able to deal with the documents by examination-in-chief of the Appellant. Accordingly there is no issue of unfairness.

(5) We propose to adopt precisely the same approach to the final document to which our attention has been drawn on behalf of the Appellant. This is a new document in the context of these appeal proceedings: the data transfer agreement, the parties whereto, we note, are ETS Global on the one hand and ETS on the other.

(6) We are cognisant of the Secretary of State's submission in relation to the data issue, having been alerted to it on more than one occasion previously and having considered the Secretary of State's skeleton argument. Nonetheless we shall admit this document on the ground that it is of potential relevance to one of the Appellant's grounds of appeal and shall in due course rule in our final decision on

its relevance and, if it is accorded any degree of relevance, the weight and significance, if any, which flow therefrom.

APPENDIX 2. Ruling No 2

Having considered all documents lodged by the parties and having heard the parties' respective representatives, Mr N Armstrong, of Counsel, instructed by Bindmanns Solicitors, on behalf of the Applicants and Mr S Kovats QC, of Counsel, instructed by the Government Legal Department, on behalf of the Respondent, at a hearing at Field House, London on 02 August 2016.

(1) As we have observed at a number of stages of these proceedings and in particular in the reserved interlocutory order which was promulgated on 17 July 2016 there has been much pre-trial activity in these combined proceedings. Today's has as its main focus the issue of disclosure of documents from both the Secretary of State and also ETS, the interested party whose activities form an important part of the actual framework.

(2) At this stage of the combined hearing, namely at the beginning of the hearing of the two conjoined judicial review applications we are required to rule on a discrete issue relating to the reception of oral evidence.

(3) The origins of this issue can be traced to the order of Mr Justice Green in the High Court dated 21 March 2016. His Lordship ordered inter alia in paragraph 3 that the parties shall prepare for the final hearing on the basis that there will be oral evidence and cross-examination of the applicant, Hermanis Gardner, Roxanna Crann and Bernard Everdince but it should be a matter for the trial Judge whether such oral evidence is required.

(4) This very wise and pragmatic order has had the consequence that we are in a position to deal with the question of the reception of oral evidence without any unwelcome obstruction of or delay in the transaction of this hearing.

(5) The reception of oral evidence in judicial review is undoubtedly a comparatively unusual occurrence just as an application for permission to cross-examine any party or witness equally is. These are, however, unusual proceedings. Furthermore, as a matter of general principle it may be said that in the contemporary world of judicial review the reception of oral evidence and the phenomenon of cross-examination are likely to be approached a little more flexibly than they would have been during a previous era.

(6) Hence when it is stated by the Divisional Court in the case of Harris at page 596 to 597 that the principles for the reception of oral evidence in judicial review are the following, and the relevant passage then ensues, one is likely to construe that passage as rehearsing applicable principles which were not necessarily intended to be exhaustive nor indeed have that effect.

(7) We have considered the written submission of Mr Armstrong on behalf of the applicant Mohammad Mohibullah and the very helpful response of Mr Kovats on behalf of the Respondent. These challenges have been organic. The organic dimension of the proceedings may not yet be at a conclusion and we are

particularly conscious that this is the second set of combined hearings which are likely to have an impact on a substantial quantity of other cases.

(8) Adopting that approach and bearing in mind that without the aid of a crystal ball we cannot hope to predict precisely the course which the admission of oral evidence is likely to take. We propose to accede to the application. We shall not do so in rigid terms but any particular type of evidence adduced will be received de bene esse. Ultimately that might well prove to be the correct approach. However, we shall receive the evidence and in the unusual way shall then decide following such argument as may be received what weight should properly and rationally be attached to it.

(9) We must make abundantly clear that as in previous instances where oral evidence has been adduced in the forum of judicial review it will have a very narrow focus. Witnesses will not be giving evidence at large and in an open-ended manner and we shall identify clearly with Mr Armstrong in advance of each witness the proposed scope of any examination-in-chief.

APPENDIX 3. Ruling No 3

(1) We determine these two interlocutory matters in the following way. First there is an application on behalf of the Respondent to adduce further evidence. The further evidence takes the form of a second witness statement of one of the Respondent's deponents, namely Mr James Turner. It is represented to the Tribunal by Mr Kovats QC that this further evidence is designed to establish as a fact that Mr Mohibullah has attended a number of educational establishments during previous years which have been the subject of inter alia licence revocation. We refuse this application for the following reasons.

(2) First of all, if this evidence had been relevant it would have had to form part of the Secretary of State's response ideally initially and, at the latest, during the subsequent phase of the proceedings in the discharge of the Secretary of State's duty of candour. Secondly, there is absolutely no evidence before us that this new evidence was taken into account by the decision-maker. Thirdly, this new evidence has not been put to the applicant Mr Mohibullah. One could of course devise a mechanism for dealing with that problem. The difficulty with that is that the disruption and delay which that would inevitably generate would be disproportionate. For that combination of reasons we refuse the application.

(3) Second, we rule on the Respondent's objection to the witness statement of Miss Patel, the Applicant's legal representative. Miss Patel's witness statement is dated 26 July 2016. She is a paralegal in the firm of solicitors representing the applicant Mr Mohibullah. Her witness statement contains certain averments relating to the layout of a room in premises which are of relevance to these proceedings. Objection is taken on the grounds that this purports to be expert evidence and has not been adduced in accordance with the requirements of evidence of this species.

(4) Having reflected on this we acknowledge that the issue to which the witness statement is addressed is a relevant issue in the proceedings, though its full importance cannot be measured at present. Next, we note that the author of the witness statement does not have the expertise of an architect or engineer or someone of that ilk. However, evidence of this rather limited kind in our judgment does not necessarily require expertise of that order and the main question from our perspective will be the weight to be attached to it. We take into account further that there is no prejudice to the Respondent and no suggestion of inappropriate timing or being taken by surprise.

(5) We shall admit this evidence and in due course shall form a view on the weight if any to be attached to it.