R (on the application of Saha and Another) v Secretary of State for the Home Department (Secretary of State's duty of candour) [2017] UKUT 00017(IAC)

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review

Notice of Decision/Order/Directions

The Queen on the application of

Debashis Saha
Linda Saha

Applicants

v

Secretary of State for the Home Department

Respondent

Before The Honourable Mr Justice McCloskey, President and Upper Tribunal Judge Rintoul

Having considered all documents lodged and having also considered the submissions of Mr M Iqbal, of counsel, instructed by Jinnah solicitors on behalf of the Applicants and Mr S Kovats QC and Mr C Thomann, of counsel, instructed by the Government Legal Department on behalf of the Respondent at a hearing, conjoined with two related cases (*infra*), conducted on 01, 02, 04 and 16 August 2016 and 19 December 2016.

(I) It is impossible to overstate the importance of the duty of candour in judicial review proceedings. Any failings by the Executive in this respect threaten the guarantees upon which judicial review is founded and are inimical to the rule of law.

(II) A failure by the Executive to conduct judicial review proceedings with the necessary degrees of candour, efficiency and attention compromises the ability of its legal representatives to discharge their ethical and professional duties.

(III) All of the aforementioned duties are encompassed within an overarching obligation of good faith rooted in respect for the rule of law.

(IV) Failings of this kind may be reflected in various ways, including how the judicial exercise of discretion in the matter of costs is performed.

DECISION AND ORDER

McCLOSKEY J

Preface

The Tribunal having identified certain common and inter-related issued in this case, the judicial review case of Mohammad Mohibullah (JR/2171/2015)[1] and the statutory appeal of MA v Secretary of State for the Home Department (IA/39899/2014)[2], a decision was made to hear these three cases together. Having battled against every increasing and profoundly frustrating odds, the panel has at last reached the stage of delivering the third of its three judgments in these conjoined cases in which the delivery of judgments was originally scheduled for August 2016. In passing, we dismissed the statutory appeal of Mr MA and allowed the judicial review challenge of Mr Mohibullah.

I INTRODUCTION

(1) The background to the growing number of judicial review challenges and statutory appeals in the field to which these two cases belong in relation to action taken on behalf of the Respondent, the Secretary of State for the Home Department (the "*Secretary of State*"), frequently in the form of refusing to extend leave or cancellation of leave, relating to the scores purportedly obtained by some 30,000 foreign students in "TOEIC" English language proficiency tests. It is set out *in extenso* in SM and Qadir (ETS – Evidence – Burden of Proof) [2016] UKUT 229 (IAC) and in general terms in R (Gazi) v Secretary of State for the Home Department (ETS-Judicial Review) (IJR) [2015] UKUT 327 (IAC) at [2] – [4], which need not be reproduced here.

(2) As explained in R (Mahmood) v Secretary of State for the Home Department [2014] UKUT 439 (IAC), at [1] cases belonging to this sphere:

> "*… have gained much currency during recent months, stimulated by action taken on behalf of the …… Secretary of State …. in the wake of the BBC "Panorama" programme broadcast on 10 February 2014.*"

As further explained in Mahmood, "ETS" denotes Educational Testing Services –

[1] Now reported at [2016] UKUT 00561 (IAC). Permission to appeal to the Court of Appeal refused.
[2] Now reported at [2016] UKUT 00450 (IAC). Permission to appeal to the Court of Appeal was refused subsequently.

"*… a global agency contracted to provide certain educational testing and assessment services to the Secretary of State*".

In all of these cases the impugned decision of the Secretary of State is based upon an assessment that the TOEIC Certificate of the person concerned was procured by deception.

II THESE PROCEEDINGS: THE REGRETTABLE PROCEDURAL HISTORY

(3) Permission to apply for judicial review was refused initially on the papers, by Order dated 11 January 2016. An oral renewal application followed, giving rise to an *inter-partes* hearing and an Order of Upper Tribunal Judge Allen, dated 21 April 2016, granting permission to apply for judicial review. This order incorporated a series of case management directions, the first whereof stated:

> "*The Respondent …. must file and serve detailed grounds, or where appropriate additional grounds, for contesting the application …. and any written evidence, or, where appropriate, additional evidence, within 3 days from the date this decision was sent.*"

This discrete direction and the others contained in the Order were a reflection of the timetable then prevailing which was geared to an early, expedited hearing scheduled for early May 2016. Other directions fixed time limits for the provision of skeleton arguments. Another of the directions stated:

> "*Where there are genuine and compelling grounds for seeking any modification of any of the above directions, these must be communicated in writing to the Tribunal and the other party or parties at the earliest possible date, accompanied by an appropriate request for application and (where relevant) any agreement between the parties on the modification.*"

A further direction specified that any interlocutory application of any kind be filed and served not later than 7 days before the scheduled hearing date (06 May 2016).

(4) The direction relating to detailed grounds of defence may be juxtaposed with the AOS (with summary grounds of defence) dated 12 October 2015, which included the following passage:

> "*The Respondent submits that the claim is not reasonably arguable for the reasons set out herein and that permission should be refused. If permission is granted, then the Respondent reserves the right to amend and/or expand upon the arguments set out below, in Detailed Grounds of Defence.*"

The substantive hearing which was arranged for 06 May 2016, regrettably, disintegrated. The Secretary of State's case was in disarray at this stage. Further directions and orders, on that date and subsequently, had to be issued: five in total during a period of some 10 weeks. During this period there were three further listings before the Tribunal for case management and interlocutory purposes. In tandem, there was progressive disclosure of documents by the Secretary of State and ETS. Furthermore, the process whereby the three expert witnesses were seeking to agree and refine the issues was advancing.

(5) The skeleton argument provided on behalf of Mr and Mrs Saha on 29 April 2016, in compliance with the first set of case management directions, made clear, consistent with their judicial review claim form, that the basis of their challenge to the Secretary of State's decisions was Wednesbury irrationality. This was repeated when, in compliance with a direction addressed to all parties, these Applicants provided a "Position Statement" approximately one month in advance of the re-scheduled trial date.

(6) This regrettable *excursus* into procedural matters has been rendered necessary by the following facts and considerations:

(a) No detailed grounds of defence were, in the event, served on behalf of the Secretary of State.

(b) The substantive hearing, was conducted on 01, 02 and 04 August 2016.

(c) The submissions of Mr Iqbal on behalf of Mr and Mrs Saha were made on the third of these three days.

(d) The riposte of Mr Kovats QC, on behalf of the Secretary of State, was that he was taken by surprise by Mr Iqbal's submissions.

(e) The Tribunal, while making no ruling on the merits of Mr Kovats' submission, having reached the end of the third of the three scheduled hearing days, opted for the pragmatic course of directing that Mr Kovats' submission in reply be provided by close of business the following day.

(f) Within the time limit directed, the Secretary of State's legal representatives proceeded to serve and lodge the written submission directed. This was accompanied by new evidence, not authorised by any direction of the Tribunal and not previously served or, indeed, foreshadowed in any way. This included Mr Saha's TOEIC Certificates, provided for the first time. The other items consisted of an Excel spreadsheet purportedly depicting Mr Saha's TOEIC test scores: undated and unsigned and unaccompanied by any witness statement; a new witness statement of a Home Office employee dated three days before these hearings began; an "Operation Bodger Progress Report" – redacted,

unsigned and undated; and a new witness statement of another Home Office employee, prepared on the day following the completion of the hearings. The latter statement purports to be expert opinion evidence. It contains, *inter alia*, averments which are sweeping, generalised and unparticularised. All of these new materials were simply served and lodged. They were unaccompanied by any explanatory witness statement or letter. Moreover, there was no accompanying application to vary the Tribunal's previous directions. Nor was there any application to have the new evidence admitted.

(7) Given the extensive procedural history rehearsed above, these post-hearing developments were startling. Moreover, they occurred in circumstances where the Tribunal had announced during the hearing (which ended on 04 August 2016) its intention to circulate, in all three cases, draft embargoed judgments by 11 August 2016 and to list the cases for hand down purposes on 16 August 2016. This timetable was demolished as a result. The Tribunal was, instead, put to the trouble of formulating and issuing still further directions, dated 07 August 2016 (see Appendix 1), making a formal ruling, with further directions (Appendix 2) and issuing still further directions (Appendix 3).

(8) Following the events detailed in [6] – [7] above, a progressively deafening silence, bilaterally, developed. Neither party made any response to the Tribunal's ruling and directions dated 16 August 2016. This inertia remains largely unexplained. As a result, the Tribunal was driven to issuing still further directions, dated 21 November 2016, with a view to bringing these increasingly delayed proceedings to completion. This resulted in a further, and final, hearing being convened on 19 December 2016.

(9) At this, the final, stage the Applicants no longer had legal representation and neither attended the final listing. In communications with the Tribunal, they intimated their intention to rely on all submissions, oral and written, previously made. The incongruity in this stance was that the previous submissions, self-evidently, had not addressed the new evidence noted in [6](f) above. The Tribunal, as a reflection of its grave dissatisfaction with how the Respondent's case had been presented and had evolved, directed that the author of the new Home Office witness statement, Mr Sewell, attend for the purpose of formally proving the statement and responding to questions. We address this further in [52] – [59] *infra*.

III THE CHALLENGES

(10) The organic and innovative character of the challenges in the litigation belonging to this field has become one of its established features. The present cases are no exception in this respect. In the two conjoined judicial review cases, the Applicants were granted permission to apply for judicial review, approximately one year ago. Since then, there has been much activity in the matters of gathering further evidence, in particular expert evidence and disclosure of documents on the part of both the

Secretary of State and ETS.

(11) These Applicants, Mr and Mrs Saha, are challenging the decision of the Secretary of State dated 12 June 2015 whereby Mr Saha was refused further leave to remain in the United Kingdom on three grounds, namely (a) that he had engaged in deception in procuring his TOEIC Certificate in December 2011, invoking paragraphs 245ZX(a) and 322(2) of the Rules; (b) because he had not submitted a valid CAS (a Confirmation of Acceptance for Study) triggering paragraph 245ZX(c) and Appendix A of the Rules; and (c) his course fees or maintenance requirements could not be established, thus engaging paragraph 245ZX(v) and Appendix C of the Rules. The challenge is confined to (a) only. This is squarely a Wednesbury irrationality challenge, as the following pleading demonstrates:

> "*The issue …. is whether….. the Respondent's decision was within the range of reasonable responses open to her on the available evidence.*"

(12) In the second of the conjoined judicial review cases, Mr Mohibullah challenged the Secretary of State's decision made under paragraph 323A(a)(ii)(2) of the Immigration Rules, dated 18 December 2014, whereby his leave to remain in the United Kingdom was curtailed in the wake of his sponsor college withdrawing him from his course of study. This decision was challenged on the grounds of improper purpose, conspicuous unfairness, illegality and procedural unfairness.

(13) In the third of the conjoined cases, the statutory appeal of MA, the main issues which arose were whether MA undertook the TOEIC tests; whether the voice recordings which have been provided by ETS relate to the speaking test which MA apparently took; whether MA's spoken answers were properly recorded and/or correctly transferred to ETS headquarters in the USA; and whether the transmission of MA's data to ETS in the USA gave rise to a breach of the Data Protection Act.

(14) One significant feature common to the three cases is that all three claimants accept that the voice contained in the computerised voice files which have been produced are not theirs. In this context, the difference between a challenge by statutory appeal and a challenge by judicial review is thrown into sharp relief. In the case of MA, the statutory appeal, the Tribunal had to decide as a matter of fact whether the speaking test was taken by him. In contrast, in the present case (as in Saha), the ultimate question for the Tribunal is whether the Secretary of State's assessment that the speaking test attributed to Mr Saha was taken by a proxy, rather than him, is unsustainable in law by reference to orthodox public law principles.

IV THE SECRETARY OF STATE'S DECISIONS

(15) In the present case, the Secretary of State made two decisions. The first of these,

which stimulated the judicial review application, is contained in a letter dated 12 June 2015. This letter documents the determination of Mr Saha's application for leave to remain in the United Kingdom as a Tier 4 (General) Student. This application was refused in the following terms:

> "*Prior to submitting this application, on 25 October 2013 you applied for leave to remain as a Tier 4 (General) Student. For this application 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 ….*
>
> *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. ETS have declared your tests to be 'invalid' due to the aforementioned presence of a proxy tester who sat the test in your place and the scores have therefore been cancelled by ETS.* ***On the basis of the information provided to her by ETS, the SSHD is satisfied that your certificate was fraudulently obtained***."

This, the decision recited, gave rise to a refusal under paragraph 322(2) of the Immigration Rules on the ground that a false document had been submitted in connection with Mr Saha's previous leave to remain application. Two further refusal reasons, neither of which is under challenge, were provided, namely Mr Saha's failure to provide a CAS reference number with his application and a consequential failure to demonstrate that he was in possession of the requisite finances.

(16) Following the grant of permission to apply for judicial review, a review decision was composed on behalf of the Secretary of State. This affirmed the original decision. We shall examine the review decision in a little detail *infra*.

V LEGAL FRAMEWORK

(17) Paragraph 321A of the Immigration Rules (the "*Rules*") states, in material part:

> "*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;*
>
> *(1) there has been such a change in the circumstances of that person's case since the leave was given, that it should be cancelled; or*
>
> *(2) false representations were made or false documents were submitted (whether or not material to the application, and whether or not to the holder's knowledge), or material facts were not disclosed, in relation to the application for leave; or in order to obtain documents from the Secretary of State or a third party required in support of the application ….*"

By paragraph 322 (so far as material):

> *"In addition to the grounds for refusal of extension of stay set out in Parts 2-8 of these Rules, the following provisions apply in relation to the refusal of an application for leave to remain, variation of leave to enter or remain or, where appropriate, the curtailment of leave:*
>
> *Grounds on which leave to remain and variation of leave to enter or remain in the United Kingdom are to be refused*
>
> *(1) the fact that variation of leave to enter or remain is being sought for a purpose not covered by these Rules.*
>
> *(1A) where false representations have been made or false documents or information have been submitted (whether or not material to the application, and whether or not to the applicant's knowledge), or material facts have not been disclosed, in relation to the application or in order to obtain documents from the Secretary of State or a third party required in support of the application.*
>
> ……
>
> *Grounds on which leave to remain and variation of leave to enter or remain in the United Kingdom should normally be refused*
>
> *(2) the making of false representations or the failure to disclose any material fact for the purpose of obtaining leave to enter or a previous variation of leave or in order to obtain documents from the Secretary of State or a third party required in support of the application for leave to enter or a previous variation of leave.*
>
> *(2A) the making of false representations or the failure to disclose any material fact for the purpose of obtaining a document from the Secretary of State that indicates the person has a right to reside in the United Kingdom."*

VI THE CRIMINAL INVESTIGATION

(18) The fact, now well known, of continuing criminal investigations into the TOEIC saga shines brightly in the evidence. It is a matter of some notoriety that those under investigation include ETS as a corporate entity and its servants or agents. On 24 June 2014 the Government Minister for Immigration and Security made a statement in the House of Commons, the subject matter whereof was "student visas", containing the following passages:

> "*Immigration Enforcement Officers with the support from the National Crime Agency, together with officials from UK Visas and Immigration, have been conducting a detailed*

and wide-ranging investigation into actions by organised criminals to falsify English language tests for student visa applicants ….

They have also investigated a number of colleges and universities for their failure to make sure that the foreign students they have sponsored meet the standards set out in the Immigration Rules ….

Since reforms we introduced in 2011, it has been a requirement for all student visa applicants to prove they can speak English at an appropriate level ….

All students in further education or at a university which relies on English language testing who want to extend their stay by applying for a new student visa have to be tested by one or five companies licensed by the Government ….

One of those companies – the European subsidiary of an American firm called Educational Testing Services – was exposed by the BBC's Panorama programme earlier this year following systematic cheating at a number of their UK test centres ….

Facilitated by organised criminals, this typically involved invigilators supplying, even reading out, answers to whole exam rooms or gangs of imposters being allowed to step into the exam candidate's places to sit the test. Evidently this could only happen with considerable collusion by the test centres concerned ….

Having been provided with analysis from the American arm of ETS for a number of ETS test centres in the UK operating in 2012 and 2013, they have identified …."

The Minister, elaborating, then suggested that the ETS investigations had resulted in the identification of a substantial number of suspect accredited colleges in the United Kingdom where tests had been taken. In passing, we observe that the Minister's reference to the years 2012 and 2013 is of a little significance, having regard to the formulation of these Applicant's challenge (*infra*). The criminal investigation, the so-called "Operation Bodger", features in the evidence adduced.

(19) Disclosure issues featured prominently during the pre-trial phase, to the extent that an interlocutory ruling of the Tribunal was required. This, with three other rulings, is attached at Appendices 1 - 3. ETS was actively involved, and legally represented in, these pre-trial skirmishes. While much disclosure resulted, ETS resisted producing certain materials on self-incrimination grounds. Some of the documents disclosed by both the Secretary of State and ETS took the form of witness statements and kindred materials generated by the criminal investigation. Unsurprisingly, there was much focus on disclosed materials during the hearing.

(20) We remind ourselves at this juncture that the voluminous evidence assembled does not document any prosecution, much less any conviction, of any person or corporate entity. Furthermore, we bear in mind that the "section 9" witness statements, which have been prepared with a view to deployment and scrutiny in the adversarial process of criminal proceedings, have not been subjected to any comparable testing

in this quite different forum of judicial review proceedings. We further remind ourselves that it is not our function to adjudicate, directly or indirectly, on the legality of the Secretary of State's decisions to revoke the licences of approximately five per cent (circa 100) of the "sponsor" colleges operating in the "Tier 4" sphere.

VII THE CHALLENGE OF MR AND MRS SAHA

(21) We preface our outline of the Applicants' case with the observation, uncontroversial, that the testing which underpins every TOEIC Certificate is undertaken in two parts which unfold on separate, staggered dates. On the first occasion, the skills of listening and reading are tested. On the second occasion, the subject of the testing is the candidate's proficiency in speaking and writing. The speaking test is undertaken by candidates at a computer terminal. Their responses to questions are recorded on computer files. These files are then uploaded and transmitted to the ETS headquarters in the United States. There they are assessed by ETS employees who allocate scores.

(22) It has become commonplace for the claimants in cases of this kind to request their voice recording files. Every speaking test generates multiple files of this nature. This, it appears, is because the software employed to transmit the voice recordings to ETS creates recordings of each answer rather than a recording of the whole session. The disclosure of these files stimulates an assessment by the claimant and his legal representatives and, not infrequently, an expert witness. This has occurred in each of the three conjoined cases. It is within this context that each of these claimants, while acknowledging that the files do not contain their voices, makes the case that due to some kind of manipulation or error or other contaminant the "wrong" files have been disclosed. The claimants assert that the disclosed files could not have been generated on the occasion when each of them underwent the speaking test.

(23) Mr Saha is a national of Bangladesh, aged 33 years. He was first granted leave to enter the United Kingdom in the capacity of Tier 4 (General) Student in February 2007, for a period of just over three months. Subsequently, he was the beneficiary of three grants of further leave to remain in the United Kingdom, issued in November 2010, June 2012 and December 2013. The impugned decision of the Secretary of State took the form of a refusal of Mr Saha's application for leave to remain in the United Kingdom in the capacity of Tier 4 (General) Student: see [15] *supra*. A similar decision letter, as a matter of course, issued in relation to Mrs Saha. Both then exercised their statutory entitlement to pursue the so-called "Administrative Review" procedure (introduced by statute in mid-2014), without success.

(24) The consequences of the Secretary of State's assessment that Mr Saha's TOEIC Certificate had been procured by fraud should be noted. The first consequence is that, subject to successful legal challenge, it is incumbent on Mr and Mrs Saha to

leave the United Kingdom as their status has become irregular. Second, by virtue of paragraph 320(7B) of the Rules, subject to demonstrating an infringement of rights under the Human Rights Act 1998 or the Refugee Convention any future application for entry clearance or leave to enter the United Kingdom will be refused for the following periods, each measured from the date of departure from the United Kingdom:

(a) One year, if the subject leaves voluntarily without the Government having to finance departure in whole or in part.

(b) Five years, if the subject leaves voluntarily at the Government's expense.

(c) Ten years, if the subject is removed or deported from the United Kingdom.

There are certain exceptions, the details whereof are not germane for present purposes.

(25) The application for permission to apply for judicial review which ensued was grounded on a witness statement of Mr Saha. In this he avers that his leave to remain applications made successively in September 2011 and September 2013 were based on, *inter alia*, the TOEIC Certificate in issue. His next leave to remain application made on 31 December 2014, was based on (*inter alia*) a different form of English proficiency certificate, known as the "IELTS" Certificate, which he had procured on 25 October 2014. He asserts that his TOEIC test was taken on 13 December 2011. While Mr Saha makes a bare denial of deception, it is striking that his statement contains no material whatsoever relating to the TOEIC testing and ensuing certificate.

(26) The Secretary of State's Acknowledgement of Service ("AOS"), incorporating summary grounds of defence, followed on 12 October 2015. This begins with an averment that the Applicant's case is "totally without merit", inviting a refusal of permission. Reference is made to the (now well known) "Panorama" programme broadcast by the BBC on 10 February 2014 and the ensuing exercise undertaken by ETS entailing the review of the validity of test scores awarded by it at certain test centres in the United Kingdom. The pleading continues:

> "*On 24 March 2014, ETS informed the Respondent of the results of the first phase of its testing process and has continued to update the Respondent with further results …..*
>
> *ETS informed the Respondent that the Applicant's test score, along with a large number of other test takers had been cancelled due to substantial evidence of invalidity being present. ETS has via the use of computerised voice recognition software and a further human review in each case by 2 anti-fraud staff (each of whom has determined that a proxy was used) determined that the Applicant's ETS language test score was obtained by the use of a proxy test taker.*"

The witness statements of Mr Millington and Ms Collings, which were considered extensively by this Tribunal in SM and Qadir, were attached. The whole of the remainder of the AOS is devoted to legal submissions. It contains nothing more relating to the Applicant Mr Saha.

(27) The AOS confirms the impression conveyed by the text of the impugned decision that the action which the Secretary of State determined to take against Mr Saha was based exclusively upon a communication received from ETS conveying its assessment that his TOEIC Certificate had been "*obtained by the use of a proxy test taker*".

(28) The case made by these Applicants is the very compact and focused one that the Secretary of State's decision to refuse Mr Saha's request to secure further leave to remain in the United Kingdom on the ground that he had engaged in deception in procuring his TOEIC Certificate is vitiated by Wednesbury irrationality. The centrepiece of the clear and economic argument developed by Mr Iqbal focused on the Secretary of State's evidence relating to the dates upon which Mr Saha is said to have undertaken the suspect TOEIC tests.

(29) The submission of Mr Iqbal on behalf of Mr and Mrs Saha was that the evidence adduced on behalf of the Secretary of State in support of the assessment underpinning the impugned decision that Mr Saha had procured his TOEIC Certificate by deception, via the mechanism of a proxy test taker, is unreliable, irredeemably so. Mr Iqbal developed this argument by, firstly, drawing attention to the bare terms of the AOS, coupled with the fact that this exhibited no spreadsheet or "lookup" tool or anything comparable. While the AOS exhibited the witness statements of Mr Millington and Ms Collings, these did not contain any evidence specific to Mr Saha.

(30) Developing his argument, Mr Iqbal drew our attention particularly to the following sources in the evidence assembled:

(i) The Secretary of State's supplementary decision letter, dated 05 May 2016, which contains an assertion that Mr Saha underwent the TOEIC speaking test on 19 October 2011.

(ii) The "GCID" notes, which state that the date of the test was 13 December 2011.

(iii) The TOEIC Certificate, which specifies the date as 13 December 2011.

Mr Iqbal suggested that his client's TOEIC Certificate is one of the earliest of the thousands of suspect TOEIC Certificates, the majority of which relate to the period 2012/2013. One of the matters highlighted in the experts' reports is the absence of any evidence that the database on which audio recordings were stored, had the

security measure of password protection. The experts also highlighted the uncertainties concerning the date of creation of individual audio files. Mr Iqbal, drawing on these sources, also pointed to the evidence that from late 2011/early 2012 there was a change in the system for the storage of audio files.

(31) In this context, we note the criminal investigation statement of an ETS employee, Mr Cline. He describes his role as that of Senior Investigator in the ETS Office of Testing Integrity ("OTI") since 2011. He recounts that once ETS had decided on the (earlier than planned) introduction of certain voice recognition technology, in the context of the storm caused by the Panorama Programme, the following steps were taken:

> "*OTI … requested all UK TOEIC exam files from the 2012 – 2014 period from the Online Scoring Network (OSN) an internal ETS Department. Each electronic file contained candidate details, their unique reference number and 6 audio files (out of 11 available) that were most appropriate for comparison …. The 6 were chosen by file size …* (which) *would contain longer and more verbose responses making them much more suitable for comparison.*"

Continuing, he explains that the ETS investigation gave priority to certain "high risk" test centres identified by the Home Office. He then describes the following methodology:

> "*ETS considered that the best way to test for 'imposters' was to look at test centres individually as it was more likely that an imposter would sit multiple tests at one test centre. Tests from a test centre were 'batched' into groups of 300 – 400 test takers in chronological order. These batches could spread across one day of testing or multiple testing days, depending on class sizes at each centre. The audio files were then processed by the voice biometrics engine. Each batch would take a minimum of two hours to analyse. The voice engine would compare each test to all other tests in that batch and flag all suspicious results (those that were a 'match'). The output would be a list of flagged cases ranked in order of the most likely match through to least likely.*"

Mr Cline continues:

> "*It is acknowledged that the technology used in both the TOEFL and TOEIC analysis is imperfect and that samples could be incorrectly flagged as matches. This could occur due to noises in the background of a recording (eg an air conditioning system) or the detection of another voice in the background which may match another test taker.*"

This is followed by a brief description of the mechanism of human verification, which appears to have been somewhat chequered in nature. The final passage of particular note in Mr Cline's statement is the following:

> "*Following this investigation, ETS provided the Home Office with lists of candidates whose test results were cancelled either because they were 'invalid' or because they were*

deemed 'questionable'. Scores were deemed to be invalid if ETS believed there was evidence of cheating, specifically that an impersonator (also referred to as a proxy) had taken the test on behalf of the true candidate. A score was referred to as 'questionable' if the analysis conducted was not as conclusive, but a significant number of test scores for a test centre at the relevant test sittings or overall had been assessed as 'invalid'."

(32) Mr Iqbal pointed out that in this detailed statement there is no mention of any ETS audit of TOEIC speaking tests undertaken during the period of relevance to his clients viz pre-2012. Furthermore, while Mr Saha's name, date of birth and certain other particulars, including a testing date of 19 October 2011, appear on an Excel sheet which seems to condemn all four elements of his TOEIC testing as "invalid", there is no indication or explanation of the origins of this document or when or how it was generated.

(33) Mr Iqbal contrasted his client's case with that of Mr Shehzad, the first of the two Appellants in Secretary of State for the Home Department v Shehzad and Chowdhury [2016] EWCA Civ 615, in which the comparable spreadsheet was served on the Appellant at the Tribunal appeal hearing stage and did not declare Ms Shehzad's test results invalid. In its consideration of the question of whether, at the appeal stage, the Secretary of State had discharged the evidential burden engaged, in the case of Mr Chowdhury, the Court of Appeal noted that the evidence available to the Tribunal included two items in particular, namely (a) a screen shot of the outcome of the ETS investigation classifying the test as "invalid" and (b) the "ETS lookup tool" which was to like effect. As regards the case of Mr Shehzad, the judgment of Beatson LJ contains the following noteworthy passage, at [30]:

"It appears that no material was put in front of the tribunal to show that Mr Shehzad's TOEIC speaking English test had been adjudged to be "invalid" as opposed to "questionable". All that the tribunal had in front of it were his results. The document at B1 of the bundle referred to by the tribunal (a screenshot) was partial in not showing the tab at the bottom which indicated that it was from the page of tests which were assessed as "invalid". That tab is also not on the extract from the "ETS Lookup Tool" attached to an email dated 4 April 2014 although the email states that the extract is "of test takers whose results have been invalidated". It thus appears that the documents before the FtT did not identify Mr Shehzad's test as "invalid". Ms Giovennetti accepted that there were problems with the way the material about Mr Shehzad had been put in front of the tribunal by the Secretary of State. She stated Mr Shehzad's case was one of the earliest cases and that matters were now handled very differently. The tribunal might be open to criticism in its treatment of the Millington/Collings evidence at the initial stage. But, in circumstances where the generic evidence is not accompanied by evidence showing that the individual under consideration's 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."

(34) Concluding his argument, Mr Iqbal drew attention to the evidence adduced on

behalf of the Secretary of State in SM and Qadir. In this context we highlight the evidence provided by a Home Office employee, at [12]:

> "*Mr Green, a Home Office employee, gave written evidence relating to the two spreadsheet computer printouts purporting to record the outcome of the ETS testing of the voice samples purporting to relate to the two Appellants ….. ETS devised a dichotomy of 'invalid' and 'questionable' TOEIC test results. The Home Office, in turn, has developed a system whereby upon receipt of the ETS testing analysis outcomes, these are matched to the person who has the name, date of birth and nationality of the certificate holder. This is known as the 'Lookup Tool'.*"

In the same passage this Tribunal noted the evidence that some 200,000 student visas are issued in the United Kingdom annually; there are 1700 Government approved colleges; the Home Office has made decisions that TOEIC Certificates were procured by fraud in some 33,000 cases; and ETS is one of the largest English testing organisations in the world, assessing some 50 million tests per annum.

(35) Mr Iqbal, concluding, emphasised that the aforementioned Excel sheet is the only evidence specific to Mr Saha. Its reliability, he submitted, is fatally undermined by its incorporation of the demonstrably incorrect test taking date of 19 October 2011. As this must have been the only evidence particular to Mr Saha upon which the Secretary of State's decision maker acted, the impugned decision is unsustainable and is so seriously flawed as to be irrational in the Wednesbury sense.

(36) Before turning to the issue of the new and belated evidence produced on behalf of the Secretary of State after the hearing had concluded – see [6] above – it is convenient to summarise the argument of Mr Kovats QC. Given the history of these proceedings which we have been obliged to outline above, the title of Mr Kovats printed argument, "Respondent's Skeleton Argument and Detailed Grounds for Opposing the Claim", has a particular resonance. Similarly, its date, 05 August 2016, which postdates the three day hearing. There is evident disharmony between what the Tribunal received in this way and what it had directed at the conclusion of the hearing, namely counsel's written submission in response to the oral submissions of Mr Iqbal, a measure dictated by the purely pragmatic factor of time constraints.

(37) Mr Kovats submits that the detailed critique developed by Dr Harrison in his report (considered *in extenso* in SM and Qadir) is of no assistance to Mr and Mrs Saha, given the provision in these proceedings of Mr Saha's voice recording files and his acceptance that they do not reflect his voice. Mr Kovats' submissions have two further central elements. The first is that Mr Saha has served no evidence to cast doubt on the Secretary of State's assessment (not finding) that Mr Saha procured his TOEIC Certificate via a proxy. The second is that the Secretary of State was entitled to rely on the information supplied to her by ETS, in the context of her understanding of the ETS procedures as explained in the witness statements of Mr

Millington and Ms Collings: see Shehzad and Chowdhury at [5], [10], [21] – [26], [43] and [44].

VIII THE EXPERT EVIDENCE

(38) At this juncture it is appropriate to reflect 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.

(39) 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.]

The judicial review applicants, Mr Mohibullah and Mr Saha and the Appellant in the related case, MA, claim to have undergone their TOEIC 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.

(40) 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 quality 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 Green, 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 concentrate on the illicit 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 for 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 and 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 (eg the passport number).*"

(xxiii) "*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.

(41) 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.

(42) 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.

(g) Profess Sommer, in his testimony to the Tribunal, emphasised that the evidence available to the experts was "pretty incomplete". This frustrated the expert's endeavours to reconstruct the ETS computer system. The experts were further handicapped by the unavailability of the computer system and its environs for personal inspection and surveying. The absence of any metadata in the voice recording, audio, files was emphasised. As a result, (agreeing with the panel's formulation), Professor Sommer explained that there are no available landmarks in the lifetime of the computerised files in question, with the result that a proper audit has not been possible While the evidence includes spreadsheets containing the names of these litigants, the questions which remain unanswered are how these spreadsheets were generated and what are

the origins of the data they contain. Professor Sommer emphasised that there is nothing containing Mr Mohibullah's personalised ID number, passport number or photograph.

(43) 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, from the test centres to the ETS servers, 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 statement of ETS employee, these sources are incomplete. In response to a question from the panel, Professor Sommer 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.

(44) 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.

IX THE RESPONDENT'S DUTY OF CANDOUR

(45) The circumstances in which this evidence materialised can be gauged by reference to [6] - [7] above and Appendices 1 and 2 hereto. An outline of the new evidence is contained in [6](f).

(46) No satisfactory explanation of the timing of the production of this evidence has been provided. This is a matter of substantial concern, for two main reasons. The first is the manner in which this litigation has been conducted on behalf of the Secretary of State: see especially [4] – [8] above. The second is that there appears to have been no true appreciation on the part of the Secretary of State of the duty of candour and the solemn obligations which this entails. In this context we refer to R (Khan) v Secretary of State for the Home Department [2016] EWCA Civ 416 at [35] and following and R (Mahmood) v Secretary of the State for the Home Department [2014] UKUT 00439 at [15] ff.

(47) In our judgement it is impossible to overstate the importance of the duty of candour in judicial review proceedings. The value and force of judicial review in a society governed constitutionally by the separation of powers and built on the rock of the rule of law is founded on, *inter alia*, a relationship between the executive and the

courts akin to a partnership. The executive, for its part, guarantees that the court will be fully armed and equipped to adjudicate in every case. The court, for its part, guarantees, in accordance with the judicial oath of office, independent and impartial adjudication.

(48) The mutual trust and confidence upon which these guarantees depend is threatened and undermined by the events which have occurred in these proceedings. Every failure of this kind on the part of the executive is inimical to the rule of law. The damage which is caused is not confined to the individual case. There can be a significant ripple effect. Furthermore, there is another impact which the Tribunal has witnessed at first hand in these proceedings. Where litigation is conducted in this way by the executive, the ability of its legal representatives to discharge their ethical and professional duties owed to other parties and the court or tribunal is compromised. This too undermines the rule of law and can have repercussions beyond the individual case. Government clients owe duties not only to the court or tribunal. They also have duties to their appointed legal representatives and all other parties to the proceedings. All of the duties in play are encompassed within an overarching obligation of good faith rooted in respect for the rule of law.

(49) The Tribunal, with its intimate insight into the conduct of these proceedings, entertains not the slightest doubt that all members of the Secretary of State's legal team discharged their professional and ethical duties conscientiously throughout these unnecessarily protracted proceedings. That they did so is highly creditable to all concerned, given the obvious and persistent difficulties they were clearly experiencing vis-à-vis their client. Their continuing struggles and travails were unmistakable.

(50) The resulting delays, obstructions, detours and diversions were such that the Tribunal wondered more than once whether it was being treated with contempt [in the non – technical sense]. Ultimately it was not persuaded otherwise. The events in these proceedings noted above were inexcusable and must be deprecated in the strongest possible terms. The Upper Tribunal looks forward to receiving appropriate assurance that there will be no recurrence. Meanwhile, it would be no surprise if litigants have no real faith in how the Secretary of State conducts litigation of this kind.

(51) The damage inflicted on the overriding objective was massive. The so-called "unholy trinity" of increased cost, excessive delay and multiple complexity, all pre-eminently avoidable, had a field day. Enough said.

X. **THE RESPONDENT'S NEW EVIDENCE**

(52) Given the circumstances detailed above, the Tribunal determined that the new evidence of Mr Sewell warranted robust scrutiny. To this end a further hearing was convened and the attendance of Mr Sewell was ordered. Regrettably, at this late

stage, the proceedings no longer had an adversarial dimension. Those who had represented the Applicants throughout the greater part of the litigation were no longer instructed and neither of the Applicants attended. In these circumstances, absent a *legitimus contradictor,* the Tribunal assumed the role of inquisitor.

(53) It is necessary to elaborate briefly on the discrete context. This is conveniently described in the witness statement of Ms Hammond, solicitor, grounding the Secretary of State's application for the admission of further evidence:

> "*On 12 August 2016… an order* [was] *made by the Tribunal requiring the Secretary of State to explain the error in the core bundle, more specifically to explain why the wrong entry for the 'look up tool' was included within the bundle ….*
>
> *On 20 April 2016 GLD requested the 'spreadsheet extract' relating to* [Mr] *Saha for inclusion in the bundle ….*
>
> *The* [senior case worker] *returned a spreadsheet entry for the test taken on 19 October 2011 in haste and on the basis that it was the first entry to appear for Mr Saha ….*
>
> *As we now know, Mr Saha took two tests, both of which were invalid and so there were two entries on the spreadsheet ….*
>
> *An administrative error clearly occurred for which I apologise on behalf of GLD and the Respondent.*"

Continuing, Ms Hammond explains that certain items of the proposed new evidence, namely Mr Saha's two TOEIC Certificates of October and December 2011 and a witness statement of Mr Hilton, were omitted from the core bundle. Pausing, we accept that these omissions were inadvertent and we recognise that a contributory factor was a lack of interaction between the Applicants' solicitors and the GLD at that stage. We further accept Ms Hammond's uncontested averment that these three items, though omitted from the core bundle, had been served on the Applicants' solicitors previously.

(54) In her witness statement, Ms Hammond further explains that the new evidence demonstrates conclusively certain key facts. First, that Mr Saha undertook TOEIC English Language proficiency tests, all at Elizabeth College, as follows:

(i) speaking and writing, on 19 October 2011;

(ii) listening and reading, on 27 October 2011; and

(iii) speaking and writing (a second time) on 13 December 2011.

Second, the ETS assessment of both of Mr Saha's speaking and writing tests was

"*invalid*". We accept that this is indeed the effect of the new documentary evidence.

(55) At this juncture we refer to the Tribunal's ruling dated 16 August 2016 (Appendix 2). By this ruling, which illuminates further the context disclosed in Ms Hammond's witness statement, the Tribunal admitted the further evidence. The Tribunal's expectation was that this would be followed by further representations from the representatives, or an agreed order, relating to the mechanics of completing the proceedings. However, nothing materialised. While we accept that this was largely due to the apparent rupture of the solicitor/client engagement between the Applicants and their representatives, greater proactivity on the part of the Secretary of State's representatives could reasonably have been expected, not least because of the profile of these proceedings and the special treatment they were receiving in this Chamber.

(56) Of its own motion, the Tribunal sought to reignite and complete the proceedings by a further order and directions dated 21 November 2016 (Appendix 3). By this mechanism (but not otherwise) the Tribunal learned from the solicitors concerned that they were no longer representing the Applicants. Next, the Tribunal relisted the case for further and final hearing (on 19 December 2016) and directed the attendance of Mr Sewell, author of the belated witness statement (with attachments) noted in [6](f) above.

(57) In his statement Mr Sewell describes himself as an Analyst within the Home Office Immigration and Intelligence Directorate. Through questioning we satisfied ourselves about Mr Sewell's credentials to give the evidence contained in his statement. We accept that from February 2014 he has had the designation of Lead Analyst in relation to Secure English Language Testing ("SELT"), following which he completed his training in Government intelligence analysis techniques.

(58) Since February 2014, Mr Sewell and the members of the team which he leads have been engaged in analysing data provided to the Home Office by ETS. His witness statement contains the following especially material passage:

> "*Wider analysis of tests conducted by the Elizabeth College Test Centre and the results of voice analysis conducted by* [ETS] *reveals that there was widespread abuse of testing by the Elizabeth College Test Centre. Multiple candidates that reportedly sat speaking and writing tests at the same time in the same classroom as the Applicant were deemed to have used proxy test takers by* [ETS]. *This shows that the Elizabeth College Test Centre was not operating genuine tests under genuine test conditions at the time that the Applicant claims to have undertaken* [his] *tests. Therefore none of the results from these test sessions could be considered genuine even if the candidate had sat the test in person.*"

Finally, Mr Sewell confirmed that there are 12 voice recordings attributed to the speaking tests allegedly undertaken by Mr Saha – six for each test. As we have

highlighted in [15] above, it is common case that none of the voices contained in these computerised voice files is his.

(59) Having subjected Mr Sewell's evidence to careful scrutiny we find no reason to reject any of its essential tenets.

XI. OUR CONCLUSIONS

(60) We remind ourselves that this is not a statutory appeal. It is, rather, a challenge by judicial review which, as such, engages this Tribunal's supervisory jurisdiction. One aspect of this jurisdiction is that the impugned decision of the Secretary of State can be challenged on the basis of the Wednesbury principle. In this particular litigation context, there being no contention that the impugned decision is vitiated by a failure to have regard to something material or the intrusion of something alien or immaterial, the Wednesbury principle denotes the threshold of bare irrationality. The question for us is whether, taking account all the evidence, the impugned decision of the Secretary of State is unlawful by reason of this vitiating fact.

(61) The elevated hurdle which every irrationality challenge must overcome requires little elaboration. The synonyms for irrationality have, in leading cases, included perversity and absurdity. The standard of irrationality in public law has sometimes been expressed in the proposition that the only rational course for the decision maker was to make a decision favourable to the person concerned. The Supreme Court has recently affirmed this approach: see Keyu v Secretary of State for Foreign and Commonwealth Affairs [2015] UKSC 69.

(62) It is instructive to notionally stop the clock at the conclusion of the third day of hearing, 04 August 2016. The submissions of Mr Iqbal (see (28) – (32) above) to the Tribunal were made late in the afternoon. His argument pursued the following route. The centrepiece of these Applicants' case took the form of a demonstrable discrepancy. On the one hand, both the TOEIC certificates and the GCID ("General Case Information Database") records document that Mr Saha underwent his listening and reading tests on 27 October 2011 and took his speaking and writing tests on 13 December 2011. On the other hand, the Excel spreadsheet, undated and unsigned (and first produced in evidence that day) specifies only one date, namely 19 October 2011. This document consists of some 14 vertical columns and four main horizontal lines. The first entry in each of these lines is the word "invalid". In other columns Mr Saha's first name, surname and date of birth are correctly recorded. So is the college where he claims to have taken his tests. The remaining entries consist of a series of numbers and acronyms, all of which are unexplained. These include a column with the word "Update" and the date 19 August 2014, which is repeated in each of the four horizontal lines.

(63) The Excel sheet was first produced on behalf of the Secretary of State on the final day of hearing. Having regard to the timing of its provision, its contents and those of other documents with which it falls to be considered and compared, a series of legitimate questions arises. We have begun this exercise in the immediately preceding paragraph. We augment this analysis as follows. The Excel sheet is undated and unsigned. Its origins and contents are unexplained and unelaborated. Whilst some of the contents are susceptible to interpretation, others, absent explanation and interpretation, are meaningless.

(64) We turn to consider the other important document in which the test date of 19 October 2011 appears, namely the Secretary of State's second decision letter of 05 May 2016. As noted above, this letter documents the outcome of a review of the impugned decision undertaken on the Secretary of State's initiative following the grant of permission to apply for judicial review. This letter contains the following inter-related passages:

> "…. *On 31 October 2011, Elizabeth College wrote to state that* [Mr Saha] *was registered for an ETS English Language Programme there with an exam date of 19 October 2011. ETS subsequently identified the speaking test result obtained from this sitting as being invalid due to the use of a proxy ….. On 12 June 2016* [Mr Saha] *was refused leave to remain on the basis of the deception practiced on 19 October 2011 to obtain an English Language Certificate and on the basis that he had not provided a CAS. His wife was refused leave to remain as his dependant.*"

The year 2016 is plainly erroneous, the principal decision letter being dated 12 June 2015. This kind of error is unimpressive. We shall comment *infra* on the quality of the two decision letters.

(65) Strikingly, the author of this supplementary decision makes no reference to four key pieces of documentary evidence: the two TOEIC Certificates, the Excel spreadsheet and the GCID notes. The inference that the author did not take any of this evidence into account seems to us strong and persuasive. We do not overlook the supplementary nature of this decision. However, precisely the same analysis applies to the principal decision of 12 June 2015, under challenge in these proceedings. The latter, we note, does not contain any suggested test date or dates. Furthermore, the Elizabeth College letter was not attached to the supplementary decision.

(66) We consider that the Secretary of State's two decision letters fall to be assessed together. They merge with each other. No argument to the contrary was formulated by Mr Kovats. They are of extremely poor quality. They obfuscate rather than illuminate. They fail to attach basic, key documents which would have provided necessary explanations and clarification. Ultimately they required the kind of interpretive exercise contained in Ms Hammond's witness statement. They lacked the standards of care, professionalism and attention demanded in a context entailing

draconian consequences for the person alleged to have engaged in deception. In this context we note the recent comments of the Court of Appeal in Caroopen v SSHD [2016] EWCA Civ 1307, at [22] – [24].

(67) The clock, however, did not stop at the conclusion of the third day of hearing. The case made on behalf of the Applicants at that stage had clear persuasive value. However, the evidential landscape altered dramatically with the advent of the Secretary of State's new evidence and the Tribunal's decision to admit this.

(68) The route to the Tribunal's principal conclusion has been unnecessarily protracted and complex. It is, however, easily made. The Applicant's succinct and focused challenge to the impugned decisions of the Secretary of State is confounded by the totality of the evidence. It falls manifestly short of establishing the only public law misdemeanour asserted, namely irrationality. The Secretary of State's decisions have a demonstrably rational basis and readily withstand the species of challenge which the Applicants have elected to mount. While the Tribunal had certain misgivings about the Secretary of State's evidence at the conclusion of the third day of hearing and while we take into account what was acknowledged on behalf of the Secretary of State before the Court of Appeal in Shehzad and Chowdhury at [30], our concerns have been, ultimately, addressed via the further evidence adduced.

(69) Finally, it is appropriate to recall that the Secretary of State's assessment that Mr Saha had practiced deception was, as [11] above makes clear, only one of the three grounds upon which his leave to remain application was refused. There was no challenge to either of the other two grounds. It was acknowledged on behalf of the Secretary of State from the outset that this was not an academic challenge, having regard to the consequences flowing from the fraud refusal reason: see [10] above. If the Applicant's challenge had succeeded, declaratory relief would have been the appropriate remedy.

XII ORDER

(70) For the reasons given, the application for judicial review is dismissed.

XIII COSTS

(71) The power of the Upper Tribunal to award costs is statutory, deriving from Section 29 of the Tribunals, Courts and Enforcement Act 2007 (the "2007 Act") and Rule 10(3A) of the Tribunal Procedure (Upper Tribunal) Rules 2008. This power entails the exercise of judicial discretion. The exercise of this discretion is less prescriptively regulated than in the High Court, where CPR 44.3 prescribes the general rule that an unsuccessful party will pay the costs of the successful party and that consideration of the party's conduct, particularly compliance with the pre-action protocol, will be a material factor. These regulatory provisions are illustrations of previously well

established principles. The Upper Tribunal, in the exercise of its discretionary power, gives effect to these principles and others. The result is that the approach to costs in the High Court and in the Upper Tribunal (judicial review division) is in substance the same.

(72) With the progressive pre-eminence of the overriding objective during the past two decades there has been an increasingly acute focus on how parties conduct proceedings. This is reflected in decisions such as R (Soylemez) v Secretary of State for the Home Department [2003] EWHC 1056 (Admin) and R (Kemp) v Denbighshire Local Health Board [2006] EWHC 181 (Admin). Decisions of this kind, *inter alia*, give effect not merely to the overriding objective but also the specific duty imposed on parties to help the court or tribunal to further to overriding objective and to cooperate with the court or tribunal generally: see Rule 2(4) of the 2008 Rules and CPR 44, Rule 1.3.

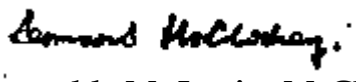
(73) In applying this general approach to the present case we refer to, but do not repeat, the sad tale to which a substantial segment of this judgment is directed: see [45] – [51] above. We refer also to [62] – [67]. At the conclusion of the hearing of these three conjoined cases, the Tribunal set a very strict timetable for the delivery of judgments. As a result, at the stage when a formal application for the reception of fresh post-hearing evidence and the adjudication thereof materialised the Tribunal's draft judgment was at a very advanced stage. The draft judgment reflected our statement in [67] above that the case made on behalf of the Applicants *"had clear persuasive value"*.

(74) It is no exaggeration to state that the Secretary of State's belatedly produced evidence altered the landscape dramatically, decisively so. At the stage when the Tribunal made its ruling to admit the new evidence, viewed broadly the bulk of both parties' costs had been incurred, while the further costs incurred thereafter were a relatively small fraction of the whole. While there are clear grounds for making a wasted costs order against the Secretary of State, we prefer, in the exercise of our discretion, to adopt a rather simpler formula. The Secretary of State shall pay all of the Applicants' costs incurred during the period up to and including 16 August 2016. The further costs incurred by the parties subsequently were directly referable to the Secretary of State's unacceptable conduct of these proceedings. These further costs shall fall where they lie, sometimes expressed in the somewhat misleading formula that there shall be no order as to these costs *inter-partes.*

XIV PERMISSION TO APPEAL

(75) While there is no application for permission to appeal to the Court of Appeal, it is nonetheless incumbent on the Tribunal to consider this matter at this stage (i.e. hand down of judgment), by virtue of Rule 44(4A) of the Tribunal Procedure (Upper Tribunal) Rules 2008. We consider that the grant of permission to appeal is inappropriate as this is a highly fact specific case involving no new, complex or

controversial legal principles.

Signed: 

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

Dated: **26 December 2016**

APPENDIX 1

FURTHER ORDER AND DIRECTIONS, 07/08/16

(1) At the conclusion of the three day hearing on 04 August 2016, the Tribunal directed that Counsel's response to the oral submissions of Mr Iqbal on behalf of the Applicants be provided in writing by 17.00 hours on 05 August 2016.

(2) The response of the Secretary of State's legal representatives is not authorised by the aforementioned direction or any previous case management direction or order of the Tribunal. The Tribunal has received counsel's submission (authorised), together with a substantial quantity of new evidence (all unauthorised). Remarkably, this is not accompanied by any explanatory witness statement, any letter of explanation or, most fundamentally of all, any application to the Tribunal to vary previous case management directions and to permit reception of new evidence.

(3) The new evidence is, therefore, not properly before the Tribunal.

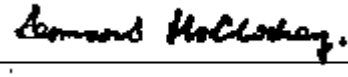
(4) If the Secretary of State wishes to pursue an appropriate application to the Tribunal, whether to vary previous directions and/or to extend time and/or for admission of the further evidence, any such application will be made by 16.00 hours on 10 August 2016.

(5) Any application of the kind mooted in [4] above will, *inter alia* (a) be supported by a witness statement setting out in full all relevant explanatory and exculpatory facts and considerations, (b) attach a draft order which will, *inter alia*, make provision for the further conduct of these proceedings, (c) indicate why all further costs which may be incurred in consequence of these unexpected developments should not be borne by the Secretary of State in any event and (d) show cause why a wasted costs order should not be made against the Secretary of State.

(6) In light of the above, the Tribunal's timetable for the circulation of an embargoed draft judgment and handing down the same in the three inter – related cases is no longer viable. A new timetable will follow at the appropriate stage.

(7) Liberty to apply.

(8) Costs reserved.

Signed: 

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

Date: 07 August 2016

APPENDIX 2

ORDER AND DIRECTIONS, 16/08/16

IN THE UPPER TRIBUNAL

EXTEMPORE JUDGMENT GIVEN FOLLOWING HEARING

JR/10845/2015

Field House,
Breams Buildings
London
EC4A 1WR

16 August 2016

THE QUEEN
(ON THE APPLICATION OF)
DEBASHIS SAHA

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

BEFORE

THE HONOURABLE MR JUSTICE MCCLOSKEY, PRESIDENT

- - - - - - - -

Mr M Iqbal, Counsel, instructed by JS Solicitors appeared on behalf of the Applicant.

Mr S Kovats QC, instructed by the Government Legal Department appeared on behalf of the Respondent.

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ON AN APPLICATION FOR JUDICIAL REVIEW

JUDGMENT

- - - - - - - - - - - - - -

THE HONOURABLE MR JUSTICE McCLOSKEY: This is a rather unorthodox application. It is unorthodox because it has been brought following the conclusion of three conjoined cases which were heard on 01, 02 and 04 August 2016. Reference to the direction which the Tribunal issued on 07 August 2016 provides the context for this unconventional application.

By this application the Secretary of State seeks the permission of the Tribunal to adduce further documentary evidence. The documents are identified in the application notice.

There are well established principles which govern the determination of an application of this kind. Inexhaustively and in summary, they are the following. The court must take into account inter alia whether the evidence could by reasonable diligence have been provided timeously. Next, the court must examine the explanations given for the timing of the production of the new evidence. Thirdly, the various ingredients of the overriding objective must be balanced. Fourthly, prejudice to the judicial review applicant, Mr Saha, must be taken into account. The court must also weight the mechanisms available to limit the prejudice to him. Some assessment, albeit not profound or complete, of the probative value of the new evidence is also required. These are the main ingredients in the mix in adjudicating upon this application.

I accept the submission of Mr Kovats that the Applicant's case did not crystallise fully and clearly until Mr Iqbal made his submissions towards the end of the third day of the three day hearing. The timing of this was self-evidently important.

I further accept the submission that the Applicant's case has evolved notably. Initially there was a focus on the evidence of Dr Harrison in SM and Qadir which pointed up the real risk of a false positive result of the ETS review of

suspect TOEIC scores. But this faded as the proceedings evolved.

It became apparent to the Tribunal during the pre-hearing review exercises that Mr Saha's case was evolving. Ultimately a 'Position Statement', which itself was belated, made this quite clear. While the Secretary of State's detailed grounds of defence were unquestionably very late indeed, they could not properly have been compiled until receipt of the latter. Even then there is a detectable disharmony between this final pleading and the very focussed case which, ultimately was presented on behalf of the Applicant.

In its ultimate incarnation (viz via Mr Iqbal's submissions) the Applicant's case had one central focus, namely the discrepancies which were clearly identifiable in the evidence adduced on behalf of the Secretary of State. The Excel sheet unambiguously made the case that Mr Saha's leave to remain application, which was the impetus for the action taken against him, was refused on the ground that he had practised deception by the use of a proxy in undertaking his language test on 19 October 2011. This date was of not less than crucial importance for a whole host of obvious reasons. The Secretary of State now seeks to advance a different date for this critical event. This application seeks to explain a serious discrepancy and to illuminate in particular a fundamental error which is said to have occurred.

These are public law proceedings. There is no *lis inter-partes*. It follows that the general principles which I have articulated will not be applied to this application with the full rigour which would arise in conventional private law civil litigation. I must also take into account the pace at which these proceedings have been driven by the Tribunal, in the interests of expedition and finality.

Weighing all the foregoing, I have concluded that the new evidence will be admitted. I accede to the Secretary of State's application. The consequences of this are not capable of being forecast. Appropriate directions will follow which will have the effect of restoring order and discipline to the proceedings. There has been a recent lack of order and discipline which will not be tolerated henceforth.

I return to what was said by the Tribunal at the conclusion of the conjoined hearings. I made clear that judgments in embargoed form would be produced by 12 August and that today's listing would be designed for hand-down purposes. Mr Kovats' response to Mr Iqbal's submission arrived (timeously) on 05 August. It was followed by the application notice which is dated 12 August.

Judgment writing has been undertaken energetically, in all three cases, since the conclusion of the hearing. Regrettably, on account of the interplay of the three conjoined cases, a decision was made that we would not hand down any judgment today. But for the intervention of this application judgment would have been handed down today in the cases of Mr Saha and MA.

I make clear that we have not quite got to the conclusion of the judgment in the case of Mr Mohibullah. That would have had to be delayed a little come what may. Furthermore, the holiday arrangements of his representatives and those of the judges contribute to the deferral of this judgment until early September 2016.

For obvious reasons judgment will not be delivered in the case of Mr Saha and further developments will have to be awaited. This will bring me in a moment to the case of Mr MA and after I have heard from Mr De Mello and Ms Rothwell a further order will issue in that case.

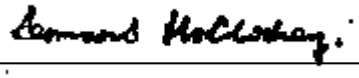
ORDER

(i) New evidence application of the Respondent allowed.

(ii) Judgment deferred.

(iii) Costs submissions by 31 August 2016.

(iv) Liberty to apply.

Signed: 

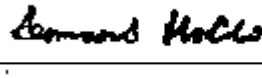
The Honourable Mr Justice McCloskey
President of the Upper Tribunal
Immigration and Asylum Chamber

Dated: **16 August 2016**

APPENDIX 3

FURTHER DIRECTIONS 21/11/16

Further to The Tribunal's Order & Directions of 07/08/16 [reproduced below] and its ruling & directions of 20/08/16 [attached] the parties shall file an agreed draft order/directions for the completion of these proceedings or, alternatively, their competing proposed draft orders **by 02 December 2016 at latest.**

Signed: 

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

Dated: **21 November 2016**