JR/2171/2015

DRAFT [01/12/16]

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review

The Queen on the application of Mohammad Mohibullah

Applicant

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 N Armstrong, of Counsel, instructed by Bindmans solicitors on behalf of the Applicant Mr S Kovats QC and Mr C Thomann, of Counsel, instructed by the Government Legal Department on behalf of the Respondent at a hearing conducted on 01, 02, 04 and 15 August 2016 and having considered the further written submissions on behalf of both parties completed on 01 November 2016.

DECISION AND ORDER

McCLOSKEY J

INDEX

APPENDICES

GLOSSARY

"CAS": Confirmation of acceptance for studies.

"ETS": Educational Testing Services - the US corporation contracted to the Home Office to provide various services relating to English language testing and certificates.

"HTS": Highly trusted sponsor status (from 6 April 2015, "Tier 4 sponsor status"), an accreditation given by the Home Office to certain approved institutions providing full time educational courses.

"IELTS": International English Language Testing System.

"SELT": Secure English Language Test.

"TOEIC": Test of English for International Communication.

"UKVI": United Kingdom Visas and Immigration, an agency of the Home Office.

I INTRODUCTION

(1) The hearing of this application for judicial review was conjoined with the related case of Saha (JR/10845/2015) and the statutory appeal in the case of MA v Secretary of State for the Home Department [2016] UKUT 450 (IAC) [39899/2014] as all three cases were considered to raise certain common issues. Judgment has been given in MA. On the date when judgment was to be promulgated in Saha, an unwelcome and unexpected evidential development on behalf of the Secretary of State intervened and, regrettably, those proceedings are not yet completed in consequence.

(2) In the course of the hearing it became necessary for the Tribunal to make certain rulings *ex tempore* and, post-hearing, to promulgate certain directions. All are contained in the Appendices hereto.

II THE BROADER CANVAS

(3) 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.

(4) 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, which is –

> "*… 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.

III **THIS APPLICANT'S CHALLENGE**

(5) Mr Mohibullah is challenging the Secretary of State's decision, dated 18 December 2014, to curtail his leave to remain in the United Kingdom. This decision was made under paragraph 323A (a)(ii)(2) of the Immigration Rules (the "Rules"). His case is that this decision was impelled and dictated by the anterior decision, some four months previously, of the third level educational establishment where this Applicant was studying, Blakehall College, to withdraw him from his course consequential upon a communication from the Secretary of State's agents that he had procured his TOEIC Certificate by fraud.

(6) The first limb of this Applicant's ensuing legal challenge is that the Secretary of State's decision was unlawful as it evaded the statutory scheme under Section 10 of the Immigration and Asylum Act 1999 (the "1999 Act") and/or paragraphs 321A and 323 of the Rules. In outline, the Applicant complains that the procedural protections enshrined within these provisions, including rights of appeal, were unlawfully circumvented by the course taken by the Secretary of State and were also in breach of the prevailing policy. The second limb of this Applicant's challenge is that the Secretary of State erred in law in concluding that he had engaged in deception on the ground that the precedent fact of deception had not been established. It is further contended that the decision was vitiated by procedural unfairness.

(7) At the outset we draw attention to one important agreed fact. It is accepted by the Applicant that the voice which is audible on the computerised voice files generated at the time when he supposedly underwent the speaking element of his TOEIC test is not his.

(8) The central elements of the Secretary of State's case are, first, the contention that the Wednesbury principle, rather than precedent fact, is the appropriate standard of review and that the impugned decision withstands this species of challenge; second, that the impugned decision is not vitiated by procedural unfairness; third, that there was no improper purpose in the communication with MM's college; and, finally, there was no illegality in pursuing the selected decision making course rather than making a curtailment of leave decision under the Immigration Acts and/or the Rules (both of which would have attracted a right of appeal). The final limb of the Secretary of State's case is that this Applicant's challenge is defeated by delay.

IV THE IMPUGNED DECISION

(9) The impugned decision of the Secretary of State is contained in a letter dated 18 December 2014. The operative passage therein is the following:

> "*This decision has been made in line with the Immigration Rules and the Tier 4 policy guidance. You were granted leave to remain as a Tier 4 (General) student until 30 May 2015 in order to complete a course of study at Blakehall College. However, the Home Office was informed by Blakehall College on 13 August 2014 that you ceased studying with them. Home Office records have been checked and there is no evidence that you have made an application to change your sponsor or made a fresh application for entry clearance, leave to enter or leave to remain in the United Kingdom in any capacity. Therefore, as you have been excluded, or withdrawn from your course of studies, as notified by your Tier 4 sponsor, your leave is curtailed under paragraph 323A(a)(ii)(2) of the Immigration Rules until 21 February 2014.*"

This letter was the impetus for these proceedings, which were duly initiated on 20 February 2015.

(10) The Applicant is a national of Bangladesh, aged 28 years. He has been lawfully present in the United Kingdom since 25 October 2009, following which he undertook various courses of study. In 2012 it became necessary for him to secure a TOEIC English Language Proficiency Certificate. This was directly related to his application for further leave to remain in the United Kingdom, dated 13 April 2012. He duly arranged to undertake the test at one of the accredited centres, Synergy Business College of London. Two TOEIC certificates, which lie at the heart of these proceedings, were generated. These, respectively, certify the following:

(i) On 13 April 2012 the Applicant underwent the listening and reading elements of the test, obtaining scores of 495/495 and 415/495.

(ii) On 17 April 2012 the Applicant undertook the speaking and writing limbs of the test, obtaining scores of 170/200 and 190/200 respectively.

It is common case that the two certificates specify correctly the Applicant's name and date of birth.

V THE BLAKEHALL COLLEGE ISSUE

(11) The Secretary of State's decision is expressly based upon a letter dated 13 August 2014 from Blakehall College to the Applicant. This is the third level educational institution at which the Applicant was enrolled at the material time. The letter is in these terms:

> "*It has been identified by UKV and I that you have submitted fraudulent* [sic] *ETS*

Certificate prior to admission at Blakehall College, therefore you have failed to meet UKV and I requirements. Your registration at this college is now terminated …

Your sponsorship will be withdrawn and UKV and I will be informed accordingly. You have no right to appeal against this decision."

[Hereinafter described as "the withdrawal letter". "*UKV and I*" (hereinafter "UKVI") denotes United Kingdom Visas and Immigration, an agency of the Home Office.]

(12) The withdrawal letter was preceded by a letter dated 24 June 2014 from the Sponsor Compliance Unit of UKVI addressed to Mr Gardner, proprietor of Blakehall College. This states, in material part:

"*(1) As you will be aware, Educational Testing Services (ETS) have recently withdrawn a high volume of Secure English Language Test (SELT) results from students who have taken its Test of English for International Communication (TOEIC) tests at some of their approved centres. They have informed us that some of these certificates have been obtained fraudulently and this may have involved either someone taking the test for the student or the student being provided with the answers. Such widescale organised abuse of the system is unprecedented and will not be tolerated by the Home Office. …..*

(ii) According to the information we have received, you have assigned 67 CAS to students who have had TOEIC certificates withdrawn by ETS (annexe A). ***Since these students have directly and deliberately posed a threat to immigration control, we are extremely concerned that you have sponsored these students …..***

We consider this to be a breach of your sponsor duties ….

(iii) Since this activity has resulted in widespread immigration abuse, we have <u>suspended</u> your sponsor license with immediate effect."

[Emphasis supplied - hereinafter "the suspension letter"]

Continuing, the suspension letter states that "*in addition*" UKVI has a concern:

"*… that for some students you have failed to adequately assess whether there is genuine academic progression prior to sponsoring a student already in the UK.*"

Finally, the letter informed Mr Gardner that the UKVI investigations were continuing and alerted him to his right to make written representations and to provide evidence.

(13) Some two weeks later, Mr Gardner received a further letter from UKVI, dated 11 July 2014. This enclosed two lists. The first of these contained the names of 147

students at Blakehall College whose TOEIC test scores had been assessed by ETS as "invalid". The second list contained the names of 71 Blakehall College students whose TOEIC test scores had been assessed by ETS as "questionable". Each list also contained the date of birth and registration number of each student. The Applicant's name was one of those on the "invalid" list.

(14) The UKVI letter of 11 July 2014 to Mr Gardner contains the following material passages:

> "*At some point each of the students listed have* [sic] *directly and deliberately circumvented immigration control. Whether as part of an application to study with you, or with an earlier or later sponsor. We are extremely concerned that you have sponsored students who would be prepared to take part in such dishonest activity …. We believe that each of the students listed, along with your institution since you were prepared to sponsor them, has contributed to this unprecedented threat to immigration control ….*
>
> *Before assigning a CAS to a student, you should be making a robust assessment of their ability and intention to follow the course of study; this would include fully assessing their English language ability. You are not obliged to accept <u>any</u> student, particularly if you have identified concerns about their language ability, regardless of what their SELT score may show ….*
>
> *Since the majority of the students you recruit are already in the UK and therefore could have been interviewed in person, we believe such disparities would have been apparent.*"

This letter also expressed the concern of UKVI in relation to <u>one</u> further issue, namely "Attendance monitoring and management", the suggestion being that the college had, from 2012, become lax in this respect, citing four individual cases of students with unacceptably low attendance.

(15) On 14 July 2014 Blakehall College submitted its comprehensive response to the UKVI suspension letter. This contained, *inter alia*, Mr Gardner's assurance of full co-operation in the UKVI investigation, together with his assertion that:

> "*Blakehall College is a bona fide educational institution and was unaware of any fraudulent activity under ETS, TOEIC or elsewhere.*"

An individual response was made in respect of each of the 218 students listed in the UKVI schedules. This described the Applicant as a student of BA(Hons) Business Studies who had completed two of the four modules and whose English language proficiency had been demonstrated in an IELTS (denoting "International English Language Testing System") Certificate.

(16) The Blakehall College response to the UKVI suspension letter coincided with a

meeting of both parties held on the same date, 14 July 2014. The brief minutes of this meeting attributed to one of the UKVI officials include the following passages:

> "[Mr Gardner] *stated that Blakehall College want to work with UKVI to help resolve this issue and restore the college's licence and that he hopes this meeting today proves they want to take this matter seriously also as he believes that Blakehall College is a good college who have always tried to abide by the Rules ….*
>
> [A UKVI official] *said he understood this and can see that this was not a deliberate attempt to abuse the immigration system which is why he has agreed to this meeting today. But the fact still stands that you do have ETS cheats studying at your college.*"

Certain action points were noted. No other issue of concern, other than the "ETS issue" is documented in the minutes.

(17) This meeting was followed by a further UKVI letter to Mr Gardner, dated 08 August 2014. This notified the continuing suspension of the college's licence. The first reason given was explained under the rubric of "ETS issues". The second concern expressed related to the assignation of a CAS to four named students and, specifically, the evidence upon which these students were assessed as having the ability to follow their chosen course of study. The third matter raised in the letter was that of "academic progression" in respect of one named student. Fourth, the issue of "attendance monitoring and management", raised in a previous letter, was reiterated, in relation to three named students. The letter, finally, indicated that Mr Gardner could continue to make representations and provide evidence in response to the concerns expressed.

(18) This letter was followed by a second meeting between the parties, held on 13 August 2014. One of the UKVI officials in attendance was Mr Turner, described as "Senior Sponsor Compliance Manager". The record of this meeting indicates that, from the outset, the ETS issue was prominent. After Mr Gardner had provided an overview, Mr Turner, per the record:

> "*…. reiterated our continuing areas of concern, as per our letter of 08/08/14,* ***highlighted that the ETS issue is of major concern***."
>
> [Emphasis added.]

Those in attendance were informed that 33 students had been "withdrawn" by the college. Our construction of the record of the meeting, unaffected and unchallenged by the evidence of Mr Turner (*infra*), is that the ETS issue was the only matter of concern addressed. This is reinforced by the four action points noted at the end of the record, all of which relate exclusively to this issue.

(19) Paragraph [10] of the UKVI letter of 08 August 2014 stated:

> "*We do not believe that you have effectively responded to our concerns regarding 60 of your students' cohort who continue to study with you. You have failed to explain what action, if any, you intend to take with these students who obtained a SELT by deception.*"

As the record indicates, this issue was specifically ventilated during the meeting held five days later. Mr Gardner's concern to address this issue is evident from the exchange of emails on the eve of the meeting, in the course of which one of the UKVI officials stated:

> "*The 60 students quoted in our letter of 08 August refers to the student list provided with your representations, which was in response to the students listed as a concern in our Annexe A. There are 60 students on your list that you state are continuing to study with you.*"

In short, as of 13 August 2014, the Home Office position was that the college's response to the suspension of its licence had consisted of the "withdrawal" of 158 (only) of the 218 students in the UKVI list (*supra*).

(20) As the exchanges between the college and UKVI continued, Mr Gardner asserted (*inter alia*) that, with regard to a discrete group of 41 students whose TOEIC scores had been declared "invalid", 28 were withdrawn within 24 hours of the relevant notification. Withdrawal action was not taken against the remaining 13 students on the basis that their admission to the college had not been based on TOEIC certificates. Mr Gardner expressed his belief that, in consequence, this gave rise to a group of 13 students arranged under the umbrella of "unable to take further action". A similar assessment was made in respect of 9 students belonging to the "questionable" category.

(21) Notably, in the immediate aftermath of the *inter partes* meeting held on 13 August 2014, one of the UKVI officials directly involved, and who had attended the meeting , sent the following email to Mr Gardner later on the same date:

> "*Thank you for your time today. As discussed, the number of ETS students of concern detailed in our letter of 08/08/14 was 60. However, this was incorrect as 33 of the students had already been withdrawn from their studies by you and reported by SMS on 15/07/14.* ***The students who continue to study with*** [sic] ***and of concern are …. 13 students with invalid ETS scores …. 9 students with questionable ETS score*** [sic] …
>
> *I have attached a list of the 22 students. We will provide you with further advice on the 9 students with questionable scores once James* [Mr Turner] *has sought advice on this point.*"
>
> [Emphasis added.]

The college's withdrawal decision was communicated to the Applicant the following day, 14 August 2014.

(22) We deal briefly with the succeeding events. By letter dated 11 September 2014 UKVI confirmed the continuing suspension of the college's licence, based on "*new information*" which had emerged. None of this relates directly to the "ETS issue". Mr Gardner replied accordingly. This was followed by a further (third) meeting, held on 18 September 2014. Within the minutes of this meeting one finds a clear acknowledgement by the senior UKVI official (with emphasis added):

> "*GS acknowledged the commitments made by* [the college]*, the implementation of additional process* ***and the withdrawal of the ETS students.***"
>
> [Our emphasis.]

The particulars of the "*remaining concerns*" in the record of meeting confirm that the ETS issue was no longer a live one.

(23) Soon afterwards, the UKVI decision to revoke the licence of Blakehall College was communicated to Mr Gardner, by a letter dated 03 October 2014. Of the six issues identified in this letter, the ETS issue received the least treatment, being addressed in the past tense. The following passages are of particular note:

> "*We explained in our earlier letter that you had assigned 147 CAS linked to TOEIC certificates identified as invalid and a further 71 CAS to students with questionable scores. Of these, 41 students with invalid scores and 14 students with questionable scores continued to study at your institution at the time of suspension ….*
>
> ***Following our meetings with you on 14 July and 13 August and subsequent correspondence we have received, we are now satisfied that these students have been expelled from your institution and reported appropriately to the Home Office.***"
>
> [Our emphasis.]

The specific misdemeanour attributed to the college, again belonging exclusively to the past, was an asserted failure to "*thoroughly assess their ability, intentions and previous academic progress*" at the time of deciding to assign a CAS to each of the students concerned.

(24) As contemplated by the order of Green J at an interim hearing postdating the grant of permission, we received, unconventionally in this sphere of litigation, a quantity of oral evidence addressed to certain discrete issues. This included evidence from Mr Gardner. In this context we begin with the official record of Mr Gardner's evidence to the House of Commons Home Affairs Committee (the "HOC Committee") on 20 July 2016. Mr Gardner was questioned about, *inter alia*, the

withdrawal of all of the students on the UKVI list. The thrust of the questioning was whether it had been implied to him that a failure to take this action would result in the loss of the college's sponsorship licence. Mr Gardner replied:

> "*It was never said, but it was implied all the time. After the first visit, we got a list of students who were so-called frauds. In fact, on the train down, I did what we believed they required of us, which is we got in touch with the college and we suspended those students or curtailed their classes with immediate effect. We were commended by the Home Office at that time for making progress in the right sort of direction, but they were at pains to say to us that we needed to understand that they never instructed us to do this. They still commended the fact that we actually did it.*"

The ensuing questioning reveals the statistic that approximately one third of the Blakehall College student population had obtained TOEIC certificates.

(25) The evidence included two witness statements of Mr Gardner. In the first of these, he describes a meeting with UKVI representatives in July 2014 – see [16] above – during which he and his colleague were:

> "*…. repeatedly asked by George Shirley (Director UKVI) 'what we were going to do' about these students ….*
>
> *It was our understanding that if we withdrew sponsorship from these students that would certainly count towards an early reinstatement of our HTS status. We then withdrew sponsorship from this group of students, based on what we were told by the UKVI.*"

("HTS" denotes "Highly Trusted Sponsor".)

In a second witness statement, Mr Gardner avers, with reference to the exchange of communications with UKVI in mid-August 2014:

> "*As can be seen, the Home Office witness statements were appended to the email and we were informed by* [the Home Office correspondent] *that we could 'use them', the intention clearly being that they could be used as justification to withdraw sponsorship from the further 22 students. In other words, when this list was provided, it was clearly understood that the Home Office wanted us to do with those students what we had done with the other students (ie withdraw them). The Applicant's name appears on this list.*"

This evidence may be juxtaposed with what we have digested in [16] –[20] above.

(26) As noted above, Mr Gardner gave evidence to this Tribunal. He was a demonstrably thoughtful, balanced and credible witness. His evidence was understated, containing no hint of invention or exaggeration. It was in all material respects consistent with his written statements. He was entirely unshaken in cross

examination.

(27) The final evidence bearing on this subject was that of Mr Turner, one of the senior Home Office employees directly involved in the UKVI interaction with Blakehall College, beginning with the licence suspension decision and culminating in the decision to revoke the college's licence. As with Mr Gardner, we had the benefit of assessing Mr Turner in the witness box. For the reasons elaborated below, we found him a wholly unimpressive witness.

(28) Mr Turner affirmed that he had no knowledge of the decision of this Tribunal in Gazi. When asked about the decision in SM and Qadir, his response was that he had heard of it but had never read it. These aspects of his evidence were symptomatic of the consistent lack of depth and conviction which characterised his testimony throughout. At the outset of his cross examination, Mr Turner was asked about the identical format and near identical content of his witness statement and that of another Home Office employee, Mr Evans**.** It was quite obvious that Mr Turner's statement was modelled on that of his colleague. However, Mr Turner refused to acknowledge this inescapable reality. His protestation that he had prepared his statement without any reference whatsoever to the other was utterly implausible.

(29) Mr Turner's claims as to how the letters and minutes of meetings examined above should be properly construed and understood were simply unsustainable. Digging an increasingly deep hole for himself, he sought unconvincingly to blame colleagues for their actions in agreeing to meetings (one of which he himself attended) and the contents of letters and minutes of meetings. Finding himself, thus, at a point of virtually no return he sought refuge in the manifestly untenable suggestion that the relevant UKVI guidance erects an absolute prohibition to meetings with representatives of licensed colleges during the twilight period between suspension and revocation. Throughout his evidence Mr Turner failed to engage directly with certain pertinent questions and made a series of sweeping, generalised and unsupported assertions.

(30) We have no hesitation in preferring the evidence of Mr Gardner to that of Mr Turner. Our evaluation of Mr Gardner's testimony is as follows. During the period in question, June to October 2014, Mr Gardner found himself in increasingly desperate straits. The reputations of Mr Gardner, his college and those involved in it were at stake. Their livelihood was under serious threat. Mr Gardner found himself in a progressively weak and desperate position. Having considered all of the evidence in the round we find, without doubt, that Mr Gardner was pressurised by UKVI officials into expelling the 218 students in question. This cohort included the Applicant. We consider that he was given no choice. Based on his evidence, which we accept, the requirement that he expel all of these students from Blakehall College was conveyed to him explicitly by a senior Home Office official. This duress is also readily to be inferred from the contemporaneous letters and records of meetings. The threat is not, of course, documented in any of the latter. However,

we attach no weight to this consideration, given that, having regard to Mr Turner's evidence, UKVI has evinced a clear policy of disassociation and innocence as regards student withdrawals and, therefore, selected its written words with caution.

(31) In summary, the Secretary of State's evidence on the issues relating to Blakehall College shrinks and withers to the extent that, for the reasons given, we reject it in all material respects. We shall now relate this omnibus finding to the Applicant's grounds of challenge.

VI FIRST GROUND OF CHALLENGE

(32) The gist of this ground is that the Secretary of State acted unlawfully in electing to take action against the Applicant under paragraph 323A of the Rules, thereby circumventing the statutory scheme under Section 10 of the 1999 Act and paragraphs 321A and 323 of the Rules. The Applicant's fundamental complaint is that the Secretary of State's choice of decision making route deprived him of a statutory right of appeal. The question for the Tribunal is whether any public law misdemeanour of the various types canvassed is demonstrated. The nexus between this ground of challenge and the issue which we have addressed *in extenso* in [10] – [30] above is formed by the Applicant's omnibus contention that having regard to the events relating to the revocation of the licence of Blakehall College the impugned decision is tainted in several inter-related ways.

Immigration Rules and Statutory Framework

(33) At this juncture, reference to the statutory framework is essential. There are three provisions of the Immigration Rules of significance. Each is contained in Part 9, a discrete regime entitled "General grounds for the refusal of entry clearance, leave to enter or variation of leave to enter or remain in the United Kingdom". From 30 December 2013 (at latest) paragraph 321A of the Rules has provided:

> *"321A. 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 or,*

(3) save in relation to a person settled in the United Kingdom or where the Immigration Officer or the Secretary of State is satisfied that there are strong compassionate reasons justifying admission, where it is apparent that, for medical reasons, it is undesirable to admit that person to the United Kingdom; or (4) where the Secretary of State has personally directed that the exclusion of that person from the United Kingdom is conducive to the public good; or

(4A) Grounds which would have led to a refusal under paragraphs 320(2), 320(6), 320(18A), 320(18B) or 320(19) if the person concerned were making a new application for leave to enter or remain (except where this sub-paragraph applies in respect of leave to enter or remain granted under Appendix Armed Forces it is to be read as if for paragraphs 320(2), 320(6), 320(18A), 320(18B) or 320(19)" it said "paragraph 8(a), (b), (c) or (g) and paragraph 9(d)"); or

(5) The Immigration Officer or the Secretary of State deems the exclusion of the person from the United Kingdom to be conducive to the public good. For example, because the person's conduct (including convictions which do not fall within paragraph 320(2)), character, associations, or other reasons, make it undesirable to grant them leave to enter the United Kingdom; or

(6) where that person is outside the United Kingdom, failure by that person to supply any information, documents, copy documents or medical report requested by an Immigration Officer or the Secretary of State."

The Appellant's case in principle fell within paragraph 321A(2).

(34) Paragraph 323 of the Rules prescribes various circumstances in which leave to remain in the United Kingdom may be curtailed (discretionary curtailment). Throughout the period under scrutiny and until 06 April 2015 it provided:

"323. A person's leave to enter or remain may be curtailed:

(i) on any of the grounds set out in paragraph 322(2)-(5A) above (except where this paragraph applies in respect of a person granted leave under Appendix Armed Forces "paragraph 322(2)-(5A) above" is to read as if it said "paragraph 322(2) and (3) above and paragraph 8(e) and (g) of Appendix Armed Forces"); or

(ia) if he uses deception in seeking (whether successfully or not) leave to remain or a variation of leave to remain; or

(ii) if he ceases to meet the requirements of the Rules under which his leave to enter or remain was granted; or

(iii) if he is the dependant, or is seeking leave to remain as the dependant, of an asylum applicant whose claim has been refused and whose leave has been curtailed under section 7 of the 1993 Act, and he does not qualify for leave to remain in his own right, or

(iv) on any of the grounds set out in paragraph 339A (i)-(vi) and paragraph 339G (i)-(vi), or

(v) where a person has, within the first 6 months of being granted leave to enter, committed an offence for which they are subsequently sentenced to a period of imprisonment, or

(vi) if he was granted his current period of leave as the dependent of a person ("P") and P's leave to enter or remain is being, or has been, curtailed."

The Appellant's case in principle fell within paragraph 323 (ia).

(35) Next, Rule 323A(a), in force from 06 April 2012 to date, introduced certain grounds for mandatory curtailment of leave in respect of Tiers 2, 4 and 5 migrants. It provided:

"In addition to the grounds specified in paragraph 323, the leave to enter or remain of a Tier 2 Migrant, a Tier 4 Migrant or a Tier 5 Migrant:

(a) is to be curtailed if:

(i) in the case of a Tier 2 Migrant or a Tier 5 Migrant:

(1) the migrant fails to commence, or

(2) the migrant ceases, or will cease, before the end date recorded on the Certificate of Sponsorship Checking Service, the employment, volunteering, training or job shadowing (as the case may be) that the migrant has been sponsored to do.

(ii) in the case of a Tier 4 Migrant:

(1) the migrant fails to commence studying with the Sponsor, or

(2) the Sponsor has excluded or withdrawn the migrant, or the migrant has withdrawn, from the course of studies, or

(2A) the migrant's course of study has ceased, or will cease, before the end date recorded on the Certificate of Sponsorship Checking Service, or

(3) the Sponsor withdraws their sponsorship of a migrant on the doctorate extension scheme, or

(4) the Sponsor withdraws their sponsorship of a migrant who, having completed a pre-sessional course as provided in paragraph 120(b) (i) of Appendix A, does not have a knowledge

> *of English equivalent to level B2 of the Council of Europe's Common European Framework for Language Learning in all four components (reading, writing, speaking and listening) or above."*

The impugned decision of the Secretary of State was made under paragraph 323A(a)(ii)(2).

(36) We turn to consider the relevant primary legislation. Prior to 20 October 2014, section 10(1) of the 1999 Act provided:

> "A person who is not a British citizen may be removed from the United Kingdom, in accordance with directions given by an immigration officer, if - (a) having only a limited leave to enter or remain, he does not observe a condition attached to the leave or remains beyond the time limited by the leave; (b) he has obtained leave to remain by deception or (c) directions ("the first directions") have been given for the removal, under this section, of a person ("the other person") to whose family he belongs."

By virtue of Section 82(2)(g) of the Nationality, Immigration and Asylum Act 2002 previously in force, there was a statutory right of appeal against decisions made under Section 10 of the 1999 Act. An appeal of this *genre* had to be pursued out of country, per Section 92(2). This appeal right would have availed the Appellant, per section 10(1)(b), had he been the subject of a decision thereunder at any time from the beginning of the saga in mid – June 2014 until 20 October 2014, when significant changes, including the abolition of this appeal right, were effected by SI 2014/2771, commencing certain provisions of the Immigration Act 2014**.**

Policy Guidance

(37) The provisions of statute and the Rules outlined above do not exist in a vacuum. Rather, they are to be considered in conjunction with one of the Secretary of State's published policies which featured in the evidence, namely the publication "Curtailment of Leave", effective from 31 July 2014. This states, firstly [at page 11]:

> *"This page tells caseworkers about considering curtailing a migrant's leave when they have made false representations or failed to disclose material facts in a previous application for leave.*
>
> *You must consider curtailment under paragraph 323(i) of the Immigration Rules with reference to paragraph 322(2), if you find that in a previous application for leave to enter or remain under the Immigration Rules, a migrant:*
>
> - *has made a false representation, such as providing a false document, or*
> - *did not disclose information that they should have provided.*

In this context a 'previous application' means one that has already been considered and decided, rather than one that is currently being considered and has not yet been decided.

You must consider curtailment under paragraph 323(i) of the Immigration Rules with reference to paragraph 322(2A), if you find that, in a current or previous application for a document that indicates the person has a right to reside in the UK, a migrant:

- *has made a false representation, such as falsely stating on the application form that they have no criminal convictions, or*
- *did not disclose information that was material to the application."*

It continues [at page 12]:

"Check whether the case should be treated as a removal rather than curtailment

You must consider whether to curtail a migrant's leave if they have made false representations or failed to disclose material facts. Before you curtail, you must first consult the local immigration, compliance and engagement (ICE) team to see if the case can be treated as a removal under Section 10 of the Immigration and Asylum Act 1999 (on grounds of deception).

The ICE team will assess most of these cases to see if they can be considered for:

- *administrative removal, or*
- *removal for illegal entry in the case of leave to enter."*

Within the same section the following statement appears [at page 13]:

"False representations or failure to disclose material facts in a current application

You may find that a migrant has made false representations or failed to disclose material facts in the current application that you are considering and the migrant will still have leave remaining after you have refused the application. You cannot curtail the remaining leave in these circumstances. This is because paragraph 322(2) relates to false representations or failure to disclose material facts for the purpose of obtaining leave to enter or a previous application to vary leave, rather than the current application.

Therefore, when refusing a current application on these grounds you must refuse under paragraph 322(1A) of the Rules. If you refuse the application on this basis, you must then refer the case to the appropriate ICE team to consider making a Section 10 removal decision (on the grounds of deception), instead of curtailing any remaining leave. If a removal decision is made, this will invalidate any existing leave."

At page 49 one finds under the rubric "Mandatory Curtailment" the following

passage:

> "***Exclusion or withdrawal from studies***
>
> *If the sponsor has excluded or withdrawn the migrant, or the migrant has withdrawn, from the course of studies, you must curtail their leave under paragraph 323A(a)(ii)(2) of the rules."*

The Secretary of State's policy guidance in vogue at the material time included the "Enforcement Instructions and Guidance" ("EIG"). This, under the rubric "Curtailment of current leave", states, at paragraph 50.8:

> "*Although a person's leave can be curtailed where they have breached their conditions of stay by, for example, working whilst here as a student in excess of the hours permitted under the Rules, it is normally more appropriate to consider Section 10 action in such cases where a person has come to attention during an enforcement visit.*"

The Competing Arguments In Outline

(38) Mr Armstrong submitted that the scheme of the 1999 Act and the Rules is as follows:

(a) In cases where Section 10 of the 1999 Act was available, it should be utilised. The main procedural protection thereby triggered was an out of country appeal.

(b) In cases where Section 10 could not be utilised, the appropriate course was to invoke the curtailment provisions of the Rules, namely Rule 323, rather than Rule 323A, with the consequence of either an in country right of appeal or the ability to make a further immigration application.

(c) The exercise of the mandatory curtailment power enshrined in Rule 323A was designed to be confined to cases where a student had withdrawn from the relevant course for educational reasons.

(39) Developing his argument, Mr Armstrong submitted that, from the Secretary of State's perspective this was at all times a case of alleged deception on the part of the Applicant, thereby rendering resort to a decision under Rule 323A unsustainable in law. It was argued that the decision of the Secretary of State frustrated the legislative purpose; alternatively, deprived the Applicant of the procedural protections which both of the alternative decision making mechanisms would have provided; and further, or in the alternative, fails to withstand review by reference to the established public law standard of anxious scrutiny, fairness and discharge of the Tameside duty of enquiry (see Secretary of State for Science and

Education v Tameside Metropolitan Borough Council [1977] AC 1014). Mr Armstrong further submitted that the impugned decision was made in disregard of or, alternatively, in breach of the Secretary of State's policy guidance (*supra*). Finally, Mr Armstrong submitted that having regard to the factor of deception, the appropriate standard of review in a challenge of this kind is that of precedent fact.

(40) We distil the core of the riposte of Mr Kovats QC to be the following. The Applicant's challenge to the impugned decision of the Secretary of State can be advanced only on the ground that it was unfair not to make an appealable immigration decision. Furthermore, properly analysed, this is not a challenge to the Secretary of State's curtailment of leave decision, the real target being the college's withdrawal decision. Nor does any question of precedent fact arise. The Applicant had the opportunity to make representations to the Secretary of State's agents following the termination of his registration at the college on 13 August 2014. While ETS assessed the Applicant's TOEIC test scores to be invalid, this did not form the basis of the decision under challenge. As a result, the evidence of the Applicant, including the expert evidence of Professor Sommer on which he relies, as to the reliability of the test results is irrelevant and, though admitted *de bene esse* by the Tribunal, should, at this stage, strictly be considered inadmissible.

(41) The submissions of Mr Kovats also laid emphasis on the fact that the only decision under challenge is that of the Secretary of State and, further, that it is not the function of this Tribunal to make findings of fact relating to the events surrounding the TOEIC tests which the Applicant claims to have undertaken. It was further submitted that the Secretary of State's decision is vulnerable to challenge only on the basis of Wednesbury principles. Mr Kovats' submissions further highlighted that the revocation of the Blakehall College licence is not under challenge in these proceedings and was, in any event, based on several grounds extending beyond the "ETS/TOEIC" issue. Finally, submitting that the Applicant's challenge is defeated by delay, Mr Kovats highlighted the absence of any challenge to the actions of the Secretary of State's agents relating to the college's decision to withdraw the Applicant from his course, with the result that the present challenge, which attacks the Secretary of State's curtailment of leave decision of 18 December 2014, is "*a device to obscure the fact that* [the Applicant] *has not only fired his shot too late, he has aimed at the wrong target*".

(42) Post-hearing the Tribunal invited further submissions from the parties on the following issues relating to the Secretary of State's policy guidance (*supra*):

(a) The Secretary of State's stance on whether either of the policy guidance instruments invoked by the Applicant was applicable.

(b) The factual question of whether the Secretary of State's decision maker took into account either or both of these instruments.

(c) The factual question of whether the Secretary of State's decision maker took into account the multiplicity of decision making routes available in the Applicant's case.

[See Appendix 3 hereto]

In a further submission, it was accepted on behalf of the Secretary of State that the "Curtailment of Leave" guidance was applicable. The submission did not address the second ("*EIG*") instrument of guidance. Next, the submission acknowledged, in substance, that the Secretary of State could adduce no evidence bearing on either of the factual questions ventilated. The Tribunal's post-hearing Notice to the parties' representatives also invited argument on the legal consequences which would flow from (a) a finding that the Secretary of State had failed to take into account, or give effect to, either or both of the policy guidance instrument and (b) a finding that the Secretary of State had failed to take into account the multiplicity of decision making routes available. The further submission on behalf of the Secretary of State did not address either of these issues.

The Choice of Decision Making Mechanism

(43) In our judgement there are two main competing approaches to this issue. The first involves focussing on what the Secretary of State, formally and expressly, stated in the decision under challenge. It is necessary to identify the following separate stages in the sequence of events:

(i) At the first stage, ETS communicated to the Secretary of State its assessment that the Applicant had procured his English language proficiency certificates by deception, via the use of a proxy test taker.

(ii) At the second stage, the Secretary of State relayed this information to Blakehall College.

(iii) The Secretary of State's agents then pressurised the college's proprietor into withdrawing the Applicant and all other student members of the same cohort from the course of study they were pursuing. This conduct was based exclusively upon their conviction that the Applicant (and others) had committed fraud.

(iv) At the next stage, the college made withdrawal decisions in respect of the Applicant and other students

(v) At the final stage, the Secretary of State decided to curtail the Applicant's leave to remain in the United Kingdom under paragraph 323A(a)(ii)(2) of the Rules.

The Decision in Giri

(44) At this juncture we consider the decision in R (Giri) v Secretary of State for the Home Department [2015] EWCA Civ 784. There, the Secretary of State refused the timeous application of a Tier 4 student migrant for further leave to remain in the United Kingdom under paragraph 322(1A) of the Rules on the ground of false representations or information. As the Applicant's extant leave remained intact, there was no appealable immigration decision, with the result that the ensuing challenge proceeded via judicial review.

(45) The Court of Appeal, having noted that the crucial question for the Secretary of State was whether the student had engaged in deception, categorised this as a question of fact requiring a finding by the decision maker in deciding whether to grant or refuse entry clearance or leave to enter or remain. It was held that the role of the court is to review the ensuing decision on Wednesbury principles. Richards LJ, delivering the unanimous judgment of the Court, stated at [32]:

> "*I accept that a finding that deception has been used should be scrutinised very carefully but I do not accept that the relevant question is anything other than whether it was reasonably open to the decision maker, on the material before him, to find that deception had been used. The finding in question is one of fact.*"

In the remaining passages of its judgment, the Court reiterated the well established principles that the onus of proving deception rests on the Secretary of State and the standard of proof is the balance of probabilities.

General

(46) Our evaluation of the submissions of the parties' respective counsel gives rise to the following analysis and conclusions. We take as our starting point some elementary dogma. This is not a challenge to the merits of the Secretary of State's decision to curtail the Applicant's leave to remain in the United Kingdom. Furthermore, this is not an immigration appeal. Rather, by this challenge, the Applicant invokes the supervisory jurisdiction of this Tribunal

(47) The only prerequisite to a decision under this Rule (in this context) is that the sponsor college has withdrawn the migrant from his course of studies. Analysed in this way, the Secretary of State's decision did not involve a finding that the Applicant had engaged in deception in the manner suggested by ETS. The decision did not involve, and was not dependent upon, a finding of deception. Rather, for the purposes of the Rule invoked, the critical fact involved in the decision was that the Applicant had been withdrawn from his course of study by the sponsor college.

(48) The alternative, competing approach is somewhat wider. It entails focussing on the reality and substance of the impugned decision. This involves scrutinising the

conduct of the Secretary of State's agents throughout the period under scrutiny and sustained underlying motivation. It is clear beyond peradventure that the Secretary of State's agents did not merely suspect, or believe, that the Applicant had engaged in deception in the relevant manner. Rather, they were plainly convinced of this fact. As recorded in the judgment of this Tribunal in Gazi, at [15]:

> "*The Home Office invariably accepts the deception assessment provided by ETS, without more*".

See also SM and Qadir at [20]. The thrust of Mr Turner's evidence to this Tribunal was unambiguously in these terms. Furthermore, from start to finish of the material period the Secretary of State's agents adhered relentlessly to the position that the Applicant had practised deception and had to be penalised accordingly. Notwithstanding, they ultimately had recourse to a decision-making mechanism in which deception does not feature.

(49) What is the effect of this analysis? It is tempting to conclude simply that the Secretary of State had a choice of decision making routes at her disposal. However unsatisfactory this multiplicity of choice might appear in the abstract, this was the legal effect of the co-existence of the several legal mechanisms all duly made and adopted and having the requisite parliamentary scrutiny. So it was simply a matter of picking from the menu. But is this apparently simplistic assessment correct in law?

(50) We take as our point of departure that, in principle, where multiple decision-making mechanisms are available to any public authority the decision to invoke one of these rather than any of the others entails the exercise of discretion and is susceptible to challenge on conventional public law grounds.

(51) Given the crucial importance of context, it is appropriate to highlight certain features of the situation prevailing at the time of the Secretary of State's impugned decision. At this stage, the Applicant had been in limbo during a period of some four months, consequent upon the termination of his registration at Blakehall College: [10] *supra*. During this period his situation remained static, with no amelioration or, indeed, any type of material development. We accept the Applicant's evidence that following receipt of the withdrawal letter, he went to the college seeking further information and clarification and was informed that he could expect a letter from the Home Office. We accept his further evidence that this triggered a period during which his stance was one of awaiting the expected letter prior to taking any kind of action. There was no suggestion from any source that he should proactively contact the Home Office and, of course, he had not experienced previously a comparable plight. He received no warning of what was in the pipeline, he was not informed in any detail of the case being built against him and he was not invited to make representations on any issue.

(52) In the circumstances just noted, the Secretary of State's decision maker had a choice of the three separate decision making mechanisms outlined above. In simple public law terms, there was a discretion to be exercised in the matter of identifying the selected route. Properly analysed, the Applicant is challenging the exercise of this discretion. We consider that that whereas the formal driver propelling the impugned decision was the withdrawal by the sponsor of the Applicant from the college, the real rationale was the ETS assessment that the Applicant had procured his qualification by deception and the Secretary of State's acceptance thereof. Having regard to certain undisputed (or indisputable) facts and our findings (see Chapter V above) this diagnosis is inescapable. We consider that this alleged deception on the part of the Applicant was the omnipresent and dominant force throughout the sequence of events in question. Formally and technically, the withdrawal of the Applicant by the college from the course was the underpinning of the Secretary of State's curtailment of leave decision. However, in substance and reality, the assessment that the Applicant had practiced deception in procuring his TOEIC qualification was the essential underpinning of the conduct of the Secretary of State's officials from the beginning to the end of the period under scrutiny, culminating in the impugned decision in December 2014.

(53) Turning to scrutinise the actions of the Secretary of State's decision maker, we note firstly the absence of any evidence of alertness that a discretion fell to be exercised. The evidence adduced on behalf of the Sectary of State contains no indication, either express or by reasonable implication, that the decision maker was aware of, and duly gave consideration to, the three decision making routes available. The finding that there was no real exercise of discretion, is readily made. Applying orthodox public law doctrine, this invites the analysis that material considerations were disregarded by the decision maker and that the discretion in play was fettered. The other two decision making routes were material factors for the reasons that they provided options lawfully available in the circumstances and they entailed significantly different consequences for the Applicant, namely the triggering of a statutory right of appeal. Had they been considered a quite different species of decision could have materialised. Thus the requirement of materiality is clearly satisfied.

(54) We consider that the duty imposed on the Secretary of State was to identify the multiplicity of decision making routes available and, having done so, to conscientiously consider the alternatives in accordance with normal public law standards. The question of whether this duty was discharged is one of fact. The evidence, in our judgement, points clearly to the finding that it was not. The public law misdemeanour thereby committed was the disregard of material considerations. We conclude that the impugned decision of the Sectary of State is vitiated on this ground alone.

The Policy Guidance Issue

(55) At this juncture we turn to examine the impugned decision from a different

perspective. The two decision making routes contained in the Rules, together with the single statutory decision making alternative did not exist in a vacuum. Rather, they co-existed with the Secretary of State's policy guidance. We have outlined the salient features of this in [35] above. Mr Kovats was correct in his submission regarding the status of this instrument, namely it ranks as mere guidance. However, it is policy guidance bearing directly on the question of selection of the decision making route. Furthermore, we are mindful in the principle enunciated by Lord Dyson JSC in Lumba v Secretary of State for the Home Department [2011] UKSC 12 at [26]:

> "…a decision maker must follow his published policy …… unless there are good reasons for not doing so
> ."

(56) As noted in [42] above, the applicability of the "Curtailment of Leave" guidance is not disputed. Within this publication there are separate sections entitled "Curtailment of Leave – False Representations (etc)" and "Curtailment of Leave – Tier 4 Mandatory Curtailment". Mr Kovats submitted, in effect, that these belong to separate, hermetically sealed compartments. We reject this submission. The guidance is a single, indivisible instrument. It must be considered as a whole. Furthermore, it is not to be construed with the rigours appropriate to an exercise in statutory interpretation or the construction of a deed or contract. Rather, given its nature and status, it is to be approached more broadly and flexibly. We consider all of this to be orthodox dogma. The final ingredient in this analysis is that the Applicant's case belonged to overlapping, or multiple, categories.

(57) We consider that both sections of the guidance fell to be considered by the decision maker. This is unremarkable, given the overlapping nature of certain of the material provisions in Part 9 of the Rules coupled with the multiplicity of decision making routes available in the circumstances. As regards the first of the two sections of the guidance under scrutiny, the simple fact is that the Applicant was, at the material time, a person who was considered to have made false representations and who was liable to have his leave to remain curtailed in consequence. As regards the second section, the Applicant was also a Tier 4 Student who was, on paper, liable to mandatory curtailment action. We add that while the "Tier 4 Mandatory Curtailment" section of the guidance purports by its language to prescribe rigid instructions to case workers, we consider that, as a matter of elementary principle, these are not to be construed as extinguishing the discretion to have resort to other options. Moreover, "rules" of this species must be construed and applied with the flexibility required by the British Oxygen principle (British Oxygen v Board of Trade [1971] AC 610).

(58) The materiality of the guidance was not – and could not have been – contested. Accordingly, there was a duty on the decision maker to take it into account. If the decision maker had done so, this would have entailed, as a matter of obligation (given the terms of the guidance), weighing the options available and, specifically,

considering whether a removal decision under Section 10 of the 1999 Act should be made in preference to a curtailment of leave decision under the Rules. Furthermore, again as a matter of obligation, the decision maker was bound by unambiguous instruction ("*You must ……*") to consult the "*local immigration, compliance and engagement (ICE) team*" in making this choice. The evident purpose of this step is to provide the caseworker concerned with advice, information and guidance.

(59) The first – and elementary - question is whether the Secretary of State's decision maker had regard to the aforementioned guidance. This is a question of fact. Having considered all the evidence, including the response on behalf of the Secretary of State to the Tribunal's post-hearing Notice, we conclude without hesitation that the impugned decision was made without any reference to the guidance. It follows inexorably that there was a failure to have regard to a material consideration.

(60) It further follows that none of the steps specified in the guidance, outlined briefly in [58] above, was taken. Nor were the optional courses of action considered. As a result the impugned decision of the Secretary of State failed to give effect to the policy guidance. No explanation of, or justification for, this failure was proffered in the evidence. The conclusion that there was a breach of the Lumba principle follows inexorably. To summarise, our consideration of the issue relating to the first instrument of guidance in play yields the conclusion that the Secretary of State's decision is vitiated by the aforementioned public law misdemeanours. We are satisfied that neither this conclusion nor that in [55] above is precluded by Daley-Murdock v Secretary of State for the Home Department [2015] EWCA Civ 161, [6] – [9], on which Mr Kovats relied, which concerned a different species of legal challenge.

(61) The second instrument of policy guidance of the Secretary of State upon which the Applicant relies is Chapter 50 of the EIG. We have reproduced in [37] above the provision – paragraph 50.8 – invoked by the Applicant. The gist of this is that in cases where a person is considered to have "*breached their conditions of stay*" action under Section 10 of the 1999 Act is usually the appropriate course. We consider that this does not avail the Applicant for the elementary reason that this is not a case of breach of conditions of stay. Indeed, the conditions upon which the Applicant was permitted to enter and remain in the United Kingdom did not form part of the evidence adduced. We find it unsurprising that neither party addressed this discrete issue in the further submissions invited.

Wednesbury irrationality or proof of the precedent fact of deception?

(62) Which of these is the appropriate standard of review? This is the stark choice to be confronted, bearing in mind our analysis and conclusion above that in substance and reality the curtailment of leave action taken against the Applicant was underpinned by the Secretary of State's unshakeable and unwavering conviction that he had engaged in deception in procuring his TOEIC English language

qualification. The Applicant argues that his judicial review challenge falls to be determined by reference to the standard of the precedent fact of deception. We consider that he Appellant's argument founders on the rock of the Giri decision, which points firmly to the conclusion that the Wednesbury principle, rather than proof of the precedent fact of deception, provides the appropriate standard of review in this context.

(63) The next question, logically, is whether the impugned decision of the Secretary of State is vitiated by Wednesbury irrationality? As emphasised in recent Supreme Court decisions such as Keyu v Secretary of State for the Home Department [2015] UKSC 69, the Wednesbury principle, in cases not involving the assertion of fundamental rights, continues to entail an acutely elevated threshold. It has a heavy emphasis on (merely) supervisory judicial review. Applying the formula adopted by Richards LJ in Giri, we are satisfied following careful scrutiny that while the information available to the Secretary of State was far from abundant, and bearing in mind when the impugned decision was made viz it preceded the significant developments (evidential and otherwise) in the "ETS saga" heralded by the decisions in Gazi and SM and Qadir, the assessment that the Applicant had engaged in deception based on the notification from ETS lay within the spectrum of rational decisions open to the hypothetical reasonable decision maker.

Conspicuous Unfairness

(64) From Mr Armstrong's quiver next emerged the submission that the Tribunal should apply the prism of conspicuous unfairness to the decision making route selected by the Secretary of State. The factual ingredients in this discrete argument are that this is the only known case to date in which this curtailment of leave provision in Rule 323A has been deployed by the Secretary of State (which is not contested); the conditions under which resort to this decision making power became possible were orchestrated by the dubious conduct of the Secretary of State's agents in exercising improper pressure on the college to withdraw the Applicant from his course; and the Applicant has been treated differently than other suspected TOEIC fraudsters, without adequate explanation or good reason. The other key ingredient in this equation is, of course, that each of the other two possible decision making routes generated a statutory right of appeal.

(65) "Conspicuous unfairness" is a term which has gained currency in a number of reported cases during recent years. It denotes fairness of the substantive, rather than procedural, variety. It focuses on harshness of impact and outcome. The concept features, for example, in Rashid v Secretary of State for the Home Department [2005] EWCA Civ 744 where the issue concerned a failure by the Home Office to apply an internal relocation policy when refusing the asylum application of an Iraqi Kurd. Delivering the main judgment of the Court of Appeal, Pill LJ stated, at [34]:

> *"It is … a claim of unfairness amounting to an abuse of power, of which legitimate*

expectation is only one application. The abuse is based on an expectation that a general policy for dealing with asylum applications will be applied and will be applied uniformly. Serious errors of administration have resulted in ***conspicuous unfairness*** *to the claimant."*

[Emphasis added.]

Other elements in this analysis were the persistence of the offending conduct and the absence of any explanation: [36].

(66) In a concurring judgment, Dyson LJ described the central issue in the case as one of "*justice and fairness*": [44]. He too adopted the "*conspicuous unfairness*" standard, at [52]. Both judgments contain an acknowledgement that the concept of "*conspicuous unfairness*" is traceable to the judgment of Simon Brown LJ in R v Commissioners of Inland Revenue, ex parte Unilever [1996] STC 681, a decision of the Court of Appeal which, by reason of more recent jurisprudential developments, has come to be recognised as a seminal development in modern public law. We are at a loss to understand the insistent argument on behalf of the Secretary of State that the Supreme Court's subsequent disagreement with the substantive outcome of Rashid, in TN (Afghanistan) v SSHD [2015] UKSC 40 somehow reversed also the Court's exposition of the principle which we are here addressing. Our reasoning is entirely independent of the result in Rashid.

(67) While Mr Armstrong's argument also prayed in aid the decision of R v Liverpool County Court, ex parte Baby Products Association [2000] LGR 171, we are inclined to view this as a routine illustration of a first instance decision in which a public authority was held to have acted unlawfully as it had, in effect, acted *ultra vires* and, further, in a manner which improperly circumvented and frustrated the statutory scheme in question.

(68) Our attention was also drawn to R (London Borough of Lewisham) v AQA and Others [2013] EWHC 211 (Admin). This requires some reflection. There Elias LJ, delivering the judgment of the Divisional Court, offered the following thesis, at [111]:

"Logically, if there is a doctrine of conspicuous unfairness as a substantive head of judicial review which is to be treated as a distinct form of abuse of power, it must be for the court to decide whether in any particular case the decision-maker has infringed that principle since the court must decide whether power has been abused. It is no different from a court deciding that a decision has been exercised for an improper purpose or that an irrelevant consideration has been taken into account. But I do not believe that Unilever has formulated a fresh head of review conferring on the court a wide discretion to substitute its view of the substantive merits for the decision-maker. In order to constitute conspicuous unfairness, the decision must be immoral or illogical or attract similar opprobrium, and it necessarily follows that it will be irrational. I would treat this concept of conspicuous unfairness as a particular and

distinct form of irrationality, which in essence is how it was viewed by Sir Thomas Bingham in Unilever. There are no doubt cases, of which Unilever is one, where the concept of fairness, and an allegation of conspicuous unfairness, better captures the particular nuance of the complaint being advanced than the concept of irrationality. Indeed, I think that is typically so in any case where the alleged unreasonable behaviour involves a sudden change of policy or inconsistent treatment. It is more natural and appropriate to describe such conduct as unfair rather than unreasonable. But in my view it is only if a reasonable body could not fairly have acted as the defendants have that their conduct trespasses into the area of conspicuous unfairness amounting to abuse of power. The court's role remains supervisory."

The last sentence in this passage is of self-evident importance, being preceded by an emphatic reiteration of the root principle that even in cases where conspicuous unfairness is canvassed, it is not the function of the reviewing court to substitute its view of the substantive merits. Elias LJ, ultimately, applied the prism of reasonableness which, of course, was, historically, the term habitually used in this field (see Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 at [407] – [413] (per Lord Diplock) until it became more fashionable to speak of rationality and its antithesis, irrationality. Notably, Elias LJ linked this to what is generally recognised as the ultimate touchstone in judicial review, namely abuse of state power.

(69) While recognising that there may not be judicial or academic unanimity on this interesting issue, we consider that, doctrinally, the approach in AQA is the correct one. The emergence of the concept of conspicuous unfairness may be viewed as a natural development, or elaboration, of the Wednesbury principles. The concept was somewhat dormant during a period of approximately two decades. However, its re-emergence is probably attributable to the development of the doctrine of substantive legitimate expectations, duly driven by the organic power of the common law. A decision which results in a conspicuously unfair outcome for, or impact upon, the claimant has the potential to qualify for the condemnation of irrationality. The ultimate question is whether the decision under scrutiny is so unfair and/or unreasonable as to amount to an abuse of power. Stated succinctly, the exercise of governmental power with conspicuously unfair or unreasonable results violates the Wednesbury principle.

(70) Reverting to the present case, the most important effect of the Secretary of State's selection of decision making route was to leave the Applicant bereft of an appeal to a tribunal. As our analysis above makes clear, the only form of legal redress available to him, namely an application for judicial review, is quite different from a statutory appeal. This was recognised, with some emphasis, in the decision of this Tribunal in R (Gazi) v Secretary of State for the Home Department [2015] UKUT 327 (IAC), duly endorsed by the Court of Appeal in R (Mehmood and Ali) v Secretary of State for the Home Department [2015] EWCA Civ 744. In Gazi, this Tribunal emphasised, at [40], that judicial review is an unsuitable litigation

mechanism in cases of this kind, continuing:

> *"…Secondly, the present case illustrates that every case belonging to this field will be unavoidably fact sensitive. Each litigant will put forward his or her individual disputed assertions, agreed facts, considerations and circumstances. These will be evaluated by a fact finding tribunal, to be contrasted with a court or tribunal of supervisory jurisdiction. This analysis is, in my view, amply confirmed by the growing number of FtT decisions in this sphere. Within these one finds emphasis on self-evidently important issues such as the appellant's evident English language ability, demeanour and previous life events. Furthermore, it is trite that the assessment of each appellant's demeanour and credibility will be carried out on a case by case basis."*

In SM and Qadir, this Tribunal observed at [102]:

> *"The hearing of these appeals has demonstrated beyond peradventure that judicial review is an entirely unsatisfactory litigation vehicle for the determination of disputes of this kind".*

(71) It is, of course, correct, that, exceptionally, features of the hearing in the present case included oral evidence and cross examination. However, these were confined to specific issues and these mechanisms did not, and were not designed to, convert these proceedings into an appeal on the merits. Rather, what emerged, under strict judicial supervision, was a hybrid of sorts. To this must be added the conclusion which we have reached above that this is not a judicial review challenge in which deception on the part of the Applicant has to be established as a precedent fact.

(72) To summarise, the Secretary of State's selection of decision making mechanism had the effect of depriving the Applicant of a judicial forum in which all of the evidence bearing upon the question of whether he had procured his English language proficiency certificates by deception could be fully ventilated and explored, resulting in a judicial finding on the issue. As we have already observed, the question of whether the Applicant practised deception is the key, dominant one in the overall matrix. By confining the Applicant to pursuing the inferior and limited remedy of judicial review against the background and findings detailed above, the Secretary of State, in our judgment, acted with singular and manifest unfairness. The evidence contains no explanation of why one of the other two available decision making routes was not adopted. Nor is there any explanation of why the decision making routes adopted in all of the other cases known to, and brought to the attention of, this Tribunal in this case and earlier ones were not invoked in this case. As decisions such as AQA make clear, these are relevant considerations. The factors of both an unexpected and unexplained change of policy and unreasoned inconsistent treatment are discernible.

(73) What is the effect of this analysis? In our judgment, it adds a further, discrete

dimension to the Applicant's challenge. It invites the conclusion (to borrow the language of Elias LJ) that a reasonable public authority could not fairly have deprived the Applicant of a statutory right of appeal in the context and circumstances in question. Drawing the various strands together, the conduct of the Secretary of State's agents in their interaction with the proprietor and representatives of Blakehall College attracts the opprobrium of our analysis and findings in [25] – [29] above; the Secretary of State's ability to invoke the mandatory and unappealable curtailment of leave decision making route was a direct result of the improper conduct, consisting in essence of duress and manipulation, which we have found; the Applicant was left in the dark as to the Secretary of State's intentions at all material times; the college was the only source and conduit of information to him; no invitation to make representations about decision making routes was afforded to him; there was no communication with him during a critical period; and, ultimately, the Applicant was driven to pursuing a legal remedy which is markedly less suitable than an appeal on the merits . We conclude that these various factors combine to yield the conclusion that the Secretary of State's decision was so unfair and unreasonable as to amount to an abuse of power.

(74) The Secretary of State had ample opportunity to address evidentially the issue of the decision making route selected in this particular student's case. No evidence bearing on this issue was presented. It is trite to add that all cases are decided on the basis of agreed facts and/or the judicial resolution of contested factual issues. Notably, the Secretary's hopelessly belated and truly forlorn attempt to introduce still further evidence many weeks following the completion of the hearing and remote from the questions raised in the Tribunal's post – hearing Notice (see Appendix 3] did not extend to this discrete issue.

(75) On the assorted grounds and reasons elaborated above we conclude that the Applicant's first ground of challenge, with its multi-facetted ingredients, succeeds.

VII SECOND GROUND OF CHALLENGE: PROCEDURAL UNFAIRNESS

(76) This operates as a free standing ground of challenge. Its factual matrix is uncomplicated and uncontentious. In summary, the Secretary of State's officials played a leading and influential role in the decision of Blakehall College to withdraw the Applicant from his studies there; a hiatus of some four months duration followed; the Applicant interacted with the college, but not UKVI, during this period; UKVI engaged in no form of communication with the Applicant; in particular, he was not informed of the detailed case against him; and he was not invited to make representations on the central issue of alleged TOEIC fraud. We have considered the other procedural features of the impugned decision making process under the rubric of conspicuous unfairness above.

(77) In evaluating this ground of challenge, we are not concerned with unfairness of the conspicuous, or substantive, variety explored above. Rather, the focus here is on

the hallowed principles of natural justice, specifically the *audi alteram partem rule* in its modern incarnation as expounded by Lord Mustill in his seminal speech in R v Secretary of State for the Home Department, ex parte Doody and Others [1994] 1AC 531, at 560 especially. While it is correct that the six precepts of procedural fairness formulated by Lord Mustill began with the question of what fairness required in that case, which concerned decisions by the Secretary of State on the minimum terms of imprisonment to be served by mandatory life prisoners, what follows was clearly of general application. Furthermore, Lord Mustill formulated the principle that there is a presumption that a statutory power will be exercised fairly (in the procedural sense). We can conceive of no reason why a similar approach should not be applied to powers enshrined in the Immigration Rules: and none was advanced on behalf of the Secretary of State. Indeed, the submissions on behalf of the Secretary of State were based on the premise that the Doody principles applied to the decision making process under scrutiny.

(78) For completeness, we add the following. It is trite that the decision making context is all important: see, for example, R (L) v West London Trust [2014] EWCA Civ 47 at [67], [76], [78] and [96] especially, per Beatson LJ. In the fields of immigration and asylum, it has been held that the basic principles of procedural fairness apply to certain decision making contexts: see Miah [2014] UKUT 00515 (IAC) and R (Mushtaq) v Entry Clearance Officer of Islamabad, Pakistan [2015] UKUT 00224 (IAC). If necessary for our decision, we would hold that these principles apply presumptively to all decision making contexts in the field of immigration and asylum law. In R (Mehmood and Ali) v Secretary of State for the Home Department [2015] EWCA Civ 744 at [72], Beatson LJ, while noting that a person in the position of the Applicant is at liberty to make representations or provide evidence to the Secretary of State, acknowledged (in the context of a Section 10 decision) the duty to provide the migrant concerned with "*at least the gist of the evidence*" upon which the removal decision is made.

(79) We do not identify in the submissions of Mr Kovats any suggestion that the repercussions of the Secretary of State's decision were, for the Applicant, anything other than grave. In brief compass, this decision effectively branded the Applicant a fraudster, a person who had abused immigration laws and control; required him to leave the United Kingdom, where he had been established for several years; blighted his academic and career prospects; rendered null the substantial financial investment which he had made in his studies in the United Kingdom; and blacklisted him with regard to future immigration decisions.

(80) We recognise that in theory the Applicant could have made representations to the Secretary of State after communication of the impugned decision. However, it is far from clear that the Secretary of State would have been either willing or, more fundamentally, legally empowered to revoke the decision. Furthermore, there is the inescapable and prosaic reality highlighted by Simon Brown LJ in R v Secretary of State for the Home Department, ex parte Hickey (No 2) [1995] 1 WLR 734, at 744, echoed by Hooper LJ in SP v Secretary of State for the Home Department [2004]

EWCA Civ 1750, at [58], that the exercise of post-decision representations, in the real world, may well be an arid one. This had already been expressly recognised by Lord Mustill (*supra*). This has a clear resonance in the present case, given that the Secretary of State's agents were implacably and, in our view, irrevocably committed to the view that the Applicant had practised deception.

(81) The riposte of Mr Kovats to this ground highlighted the large numbers of students perceived to have engaged in deception and the UKVI's interaction with persons and agencies other than the Applicant – in particular ETS and Blakehall College. Mr Kovats' written submission contains the following passage:

> "*To have approached all students individually to seek their comments and representations before approaching the colleges would have caused inordinate delay and inordinate administrative burden, further prejudicing effective immigration control.*"

This submission addresses the wrong target. The Applicant's case is not that he should have been given the opportunity to make informed and considered representations in advance of the August 2014 decision of the college to withdraw him from his course. Rather, the sole focus of the Applicant's challenge is the decision impugned in these proceedings, which was made on behalf of the Secretary of State some four months later. Furthermore, we consider that procedural fairness cannot be sacrificed on the altar of Government volume. The main focus of Mr Kovats' closing submission was the Blakehall College decision. His only submission relating to the Secretary of State's decision is that the Applicant could have made representations on that front between August and December 2014.

(82) It is common case that during a period of some four months preceding the impugned decision of the Secretary of State, the Applicant was aware of the allegation that he had procured his English Language qualification by deception. Second, he was aware that the Secretary of State was the source of this allegation. Third, he knew that this allegation was the reason for the withdrawal action taken against him by the college where he was studying. Fourth, he knew that further action on behalf of the Secretary of State could follow. True it is that he was not aware of the details of the case against him. However, the contours and substance of the case which he had to answer were known to him. The gist was apparent. He was, therefore, equipped to make representations in his defence. He was in no way disabled from making his case. However, his position throughout the period under scrutiny was one of inertia.

(83) As Lord Mustill stated, memorably, what fairness demands in any given case is dependent upon the particular context. Based on the analysis in [79] above, we conclude that the impugned decision was procedurally fair. The Applicant had a very clear target at which he could aim, mustering all his ammunition and resources, during a reasonable period of time. He did not do so. He cannot

complain of procedural unfairness in consequence.

(84) We have emphasised in (65) above the fundamental distinction between substantive unfairness and procedural unfairness. We consider that our conclusion that the impugned decision was procedurally fair does not undermine our anterior conclusion that there was a breach of the Wednesbury principle.

VIII DELAY

(85) Rule 28(2) of the Tribunal Procedure (Upper Tribunal) Rules 2008, as amended, provides:

> *"Subject to paragraph (3), an application under paragraph (1) must be made promptly and, unless any other enactment specifies a shorter time limit, must be sent or delivered to the Upper Tribunal so that it is received no later than 3 months after the date of the decision [, action or omission] [1] to which the application relates."*

As noted in the submissions of Mr Kovats, this Rule differs slightly from its equivalent in the High Court regime, CPR 52.5. Neither party submitted, correctly in our estimation, that anything of substance turns on this difference. Common to both regimes is the power to extend this time limit: as regards the Upper Tribunal, see Rule 5(3)(a). This power must be exercised in accordance with the overriding objective enshrined in Rule 2, by virtue of Rule 2 (3). We understand this analysis to be uncontroversial.

(86) The two key dates are 18 December 2014, when the impugned decision of the Secretary of State was made and 20 February 2015, when these proceedings were initiated (followed by an amended claim form dated 16 March 2015). In the order granting permission to apply for judicial review, the issue of delay was not addressed, notwithstanding that it had been raised in the Secretary of State's pleading. Substantial quantities of water have flowed under the notional bridge since these early litigation events.

(87) We reject unreservedly Mr Kovats' central submission on the delay issue, namely that the real target of the Applicant's challenge is the Blakehall College withdrawal decision of August 2014. This submission effectively airbrushes the factual and juridical reality of the Secretary of State's decision some four months later and the legal effects and consequences thereof. Secondly, the Secretary of State's submissions do not engage with the evidence bearing on and surrounding the impugned decision and the timing of the registration of the challenge thereto. Thirdly, Mr Kovats' submission ignores the reality that the detailed involvement of the Secretary of State's officials in the college's withdrawal decision of August 2014 did not emerge until an advanced stage of these proceedings, following the industrious and diligent endeavours of the Applicant's solicitors.

(88) Given our rejection of the centrepiece of Mr Kovats' argument, the issue of delay

falls away. There was no alternative submission that by reason of the elapse of some two months between the Secretary of State's decision and the lodgement of the Applicant's challenge these proceedings were not initiated "promptly". We make clear that we would have rejected such argument in any event. There are no indications of indolent inactivity during this period. Nor is there any suggestion of a misuse of this Tribunal's process. Had it been necessary to do so we would also have taken into account the (apparently) unprecedented nature of the Secretary of State's recourse to the decision making route of paragraph 323A(a)(ii)(2) of the Rules; the resulting features of this challenge which distinguish it from all others in this Tribunal to date; the educative function and value of judicial review; the legal merits of the Applicant's challenge; the gravity of the stigma of cheating, which the Applicant cannot legally challenge by any mechanism other than these proceedings; and, finally, the illumination which this decision may provide in some of the large numbers of other cases pending in the two tiers of this Chamber, the Administrative Court and the Court of Appeal.

IX OMNIBUS CONCLUSION AND RELIEF

(89) On the grounds and for the reasons elaborated above, the Applicant's challenge succeeds in the following terms:

(a) The Secretary of State's decision maker failed to appreciate the multiplicity of decision making routes available and, in consequence, failed to lawfully exercise the discretion thereby engaged by disregarding material considerations.

(b) The Secretary of State's decision maker failed to take into account the relevant policy guidance.

(c) The Secretary of State's decision-maker failed unjustifiably to give effect to the relevant policy guidance.

(d) The Secretary of State's decision infringes the Wednesbury principle on account of conspicuous unfairness.

(90) We hereby quash the Secretary of State's decision dated 18 December 2014.

(91) **[PERMISSION TO APPEAL]**

(92) The Respondent will pay the Applicant's costs, to be the subject of detailed assessment in default of agreement.

A Footnote

(93) We would observe that the forum of an in–country statutory appeal would be

clearly superior to the hybrid model adopted in these proceedings for the full exploration and consideration of all the evidence and, in particular, the finding of whether the Applicant engaged in deception as alleged. This sounds on our conclusion concerning conspicuous substantive unfairness. The suitability of an out-of-country appeal in this sphere of litigation – and, indeed, in others - has not yet (to our knowledge) been fully tested at either tier and, thus, remains a moot question. In this context, we draw attention to what this Tribunal stated in SM and Qadir, at [104]:

> *"We are conscious that some future appeals may be of the 'out of country' species. It is our understanding that neither the FtT nor this Tribunal has experience of an out of country appeal of this kind, whether through the medium of video link or Skype or otherwise. The question of whether mechanisms of this kind are satisfactory and, in particular, the legal question of whether they provide an appellant with a fair hearing will depend upon the particular context and circumstances of the individual case. This, predictably, is an issue which may require future judicial determination".*

The Upper Tribunal now has experience of a broad range of "ETS/TOEIC" hearings: error of law hearings, remaking hearings, conventional judicial review hearings and the hybrid judicial review model adopted in this case. In SM and Qadir this Tribunal observed, at [102]:

> *"Furthermore, the hearing of these appeals has demonstrated beyond peradventure that judicial review is an entirely unsatisfactory litigation vehicle for the determination of disputes of this kind …".*

The words "of this kind" refer to cases such as SM and Qadir and MA in which the facts relating to the relevant events are of critical importance and, in consequence, the evidence requires penetrating examination.

(94) Experience has demonstrated that in such cases detailed scrutiny of the demeanour and general presentation of parties and witnesses is a highly important factor. So too is close quarters assessment of how the proceedings are being conducted – for example, unscheduled requests for the production of further documents, the response thereto, the conduct of all present in the courtroom, the taking of further instructions in the heat of battle and related matters. These examples could be multiplied. I have found the mechanism of evidence by video link to be quite unsatisfactory in other contexts, both civil and criminal. It is not clear whether the aforementioned essential judicial exercises could be conducted satisfactorily in an out of country appeal. Furthermore, there would be a loss of judicial control and supervision of events in the distant, remote location, with associated potential for misuse of the judicial process. The conventional video link bail hearing, at which the subject is virtually present but making little or no active contribution, is to be contrasted.

(95) For the avoidance of any doubt, we add that with the exception of the reception of limited oral evidence, the present challenge was of the classic judicial review

variety and proved to be ideally suited to this species of legal challenge – without prejudice to (a) our comments in Gazi concerning the overall adequacy of this remedy in cases of this *genre* and (b) the further observation that the crucial issue of whether the Applicant engaged in deception in procuring his TOEIC certificates remains unresolved judicially.

(96) The promulgation of this judgment was initially scheduled to coincide with those in the related cases of MA and Saha. However, this was frustrated by certain wholly unsatisfactory post-hearing developments, attributable to the Secretary of State's conduct of the proceedings in Saha. Some further delay was caused by the Tribunal's decision to seek further written submissions from the parties on discrete issues. The Applicant's representatives duly responded, having sought, and having been granted, a brief extension of time. On behalf of the Secretary of State, what emerged was a delayed response to the Tribunal's formal Notice which was neither preceded nor accompanied by a request to extend time. By this response the Secretary of State also sought to adduce new evidence, both within and outwith the submission, without having applied for this facility: see Appendix 3. We regret to observe that these developments were symptomatic of the conduct of these conjoined cases on behalf of the Secretary of State.

Edward McCloskey.

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

Date: 29 November 2016

APPENDICES

APPENDIX 1: Ruling 04/08/16

(1) We shall deal with 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, 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 previously attended a number of educational establishments 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 but at the latest during the several subsequent phases of these heavily case managed proceedings in the discharge of the Secretary of State's duty of candour. Why it did not do so is not explained, adequately or at all. Second there is absolutely no evidence before us that this new evidence was taken into account by the decision maker. Third this new evidence has not been put to the Applicant Mr Mohibullah. We could, of course, devise a mechanism for dealing with this problem. The difficulty with that is that the disruption and delay which would inevitably result in these exhaustively orchestrated and now somewhat elderly proceedings, involving three conjoined cases, would be disproportionate and inimical to the overriding objective. For this combination of reasons we refuse the application.

(3) Second, we rule on the Respondent's objection to the witness statement of Ms Patel. This witness statement is dated 26 July 2016 and was served in advance of the hearing. 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 has been taken on the ground that this purports to be expert evidence and, secondly, has not been adduced in accordance with the requirements of evidence of that category.

(4) We acknowledge firstly that the issue to which the witness statement is addressed is a relevant issue in the proceedings. Furthermore, the author of the witness statement does not have the expertise of an architect or engineer. However, evidence of this species, in our judgment, does not necessarily require expertise of this kind and the main question from our perspective will be the weight to be attached to it. We take into account further that these are public law proceedings, there is no prejudice to the Respondent and no suggestion of inappropriate timing, ambush or being taken by surprise.

(5) We shall admit this evidence and, in due course, shall form a view on the weight, if any, which it merits.

APPENDIX 2: Ruling 05/08/16

(1) There has been much pre-trial activity in these combined proceedings. Today's application 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 factual framework. 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.

(2) 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, Mr Gardner, Roxanna Cram and Bernard Evans, while it should be a matter for the trial Judge whether such oral evidence is required.

(3) This 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.

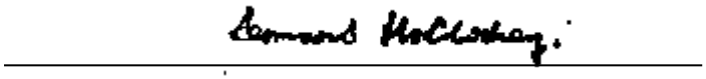
(4) The reception of oral evidence in judicial review is undoubtedly a comparatively unusual occurrence, just as an application for permission to cross-examine any party or witness. These are, however, unusual proceedings. Furthermore, as a matter of general principle it may be said that in the contemporary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

(5) Hence when it is stated by the Divisional Court in the case of Harris (at pages 596 to 597) that the principles for the reception of oral evidence in judicial review are "the following" (and the relevant passage then ensues) we incline to construe this passage as rehearsing applicable principles which were not necessarily intended to be exhaustive and indeed do not have that effect.

(6) We have considered the written submission of Mr Armstrong on behalf of the applicant Mohammad Mohibullah and the helpful response of Mr Kovats on behalf of the Respondent. These challenges have been organic. The organic dimension of these proceedings may not yet be exhausted and we are particularly conscious that this is the second set of combined hearings in this jurisdiction which are likely to have an impact on a substantial quantity of other cases.

(7) Adopting this 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. Any oral evidence adduced will be received *de bene esse*. We shall receive the evidence and in the usual way shall then decide, following such argument as may be advanced, what weight should properly and rationally be attached to it.

(8) 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 in advance of each witness testifying the proposed scope of any examination-in-chief.



APPENDIX 3

Notice to the Parties

(1) In apparent and purported response to the Tribunal's Directions dated 12/10/16 [below], the Secretary of State's representative has filed a written submission signed by counsel.

(2) The further submission has been served out of time. It is neither preceded by the Tribunal's permission to extend time nor accompanied by an application to extend time.

(3) At [5] – [9] and [11] – [12] (second sentence) counsel purport to give evidence about certain matters.

(4) In addition to [3], the further submission is accompanied by new documentary evidence which was not invited or directed by the Tribunal, is not the subject of an application for permission to adduce fresh evidence** and has not been addressed in *inter – partes* adversarial argument.

(5) The further submission does not address issues 1(b), 3 5 or 6 in the Tribunal's Directions.

(6) The Tribunal's embargoed judgment will be transmitted to the parties' representatives on 24/11/16, on the usual strict terms.

(7) The parties' representatives will communicate any spelling errors, misquotes (etc) to the Tribunal by 16.00 on 28/11/16 at latest.

(8) The case will be listed for handing down of judgment and determination of costs, permission to appeal and any other ancillary issue at 09.45 on 01/12/16.

** This was re-emphasised by the Tribunal during the embargoed judgment phase of communications.

DIRECTIONS 12/10/16

The parties are invited to provide further submissions, in writing and by 28 October 2016, addressing the following issues:

(1) The applicability of:

(a) the Home Office guidance "Curtailment of Leave" (valid from 31 July 2014); and

(b) Chapter 50 of the Home Office Enforcement Instructions and Guidance (Section 10 – "Non EEA" especially) to the impugned decision of the Secretary of State dated 18 December 2014.

(2) The factual question of whether the Secretary of State's decision maker took into account either (or both) of the above instruments, including the evidence bearing on this discrete issue.

(3) The legal consequences which would flow from a finding by the Tribunal that the Secretary of State's decision maker failed to take into account either (or both) of the above instruments.

(4) The factual question of whether the Secretary of State's decision maker was aware of, and took into account, the multiplicity of decision-making routes available in the case of the Applicant.

(5) The legal consequences which would flow from a finding by the Tribunal that the Secretary of State's decision maker failed to take into account the multiplicity of decision-making routes available.

(6) Whether it is contended on behalf of the Secretary of State that the basic principles of procedural fairness did not apply to the impugned decision and the preceding decision-making process of the Secretary of State, together with any other issue, factual or legal, said to be directly related thereto.

Signed: _____

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

Dated: 21 November 2016