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**Preparing and Presenting ETS Applications**

1. In reliance on ETS's investigation and findings with respect to the use of Proxy Testing the Secretary of State in 2014 and 2015 made decisions in over 40,000 cases cancelling or refusing leave to remain for persons who were said to have obtained leave on the basis of cheating in the TOEIC test. Many more thousands of individuals have subsequently had their leave cancelled on account of the accusation that they had used a proxy.

**Every case must be considered on its own individual facts**

2. In *SM\_and Qadir v Secretary of State for the Home Department* [2016] UKUT 229 (IAC) it was emphasised that: (§102)

'We take this opportunity to re-emphasise that every case belonging to the ETS/TOEIC stable will invariably be fact sensitive. To this we add that every appeal will be determined on the basis of the evidence adduced by the parties. 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: see Gazi at [36] - [37].'

3. This was then specifically endorsed by the Court of Appeal by *Beatson LJ in Majumder and Qadir v Secretary of State for the Home Department* [2016] EWCA Civ 1167 (25 October 2016):

‘As to the other cases pending before this court, my starting point is to agree with the UT at [102] to [103] that every ETS/TOEIC case will be fact sensitive, with the outcome determined on the basis of the evidence adduced by the parties.’

4. *In Ahsan v SSHD [2017] EWCA Civ 2009* it was stated: (§2)

‘Although it seems clear that cheating took place on a huge scale, it does not follow that every person who took the TOEIC test in any centre was guilty of it. Large numbers of claims have been brought, either in the First-tier or Upper Tribunals (“FTT” and “UT”) or in the High Court, by individuals who say that the Home Office’s decision in their case was wrong: this has become known as the TOEIC litigation. There have already been many decisions on both procedural and substantive questions. Criticisms have been advanced of the way in which the Home Office approached the task of identifying individuals who had cheated, and some challenges have succeeded. It is the Secretary of State’s case that the proportion of the impugned decisions that was wrong or unfair is very small indeed; but even if that turns out to be the case the individuals affected by those decisions will have suffered a serious injustice.’

5. Indeed in *Ahsan v SSHD [2017]* the Court accepted that even in the most ‘extreme’ cases a fact specific approach would be required: (§33)

‘Ms Giovannetti was concerned to emphasise the extent to which the forensic landscape had changed since the Secretary of State’s initial, and frankly stumbling, steps in this litigation. The observations of the UT in *SM and Qadir* should not be regarded as the last word. Where the impugned test was taken at an established fraud factory such as Elizabeth College, and also where the voice-file does not record the applicant’s voice (or no attempt has been made to obtain it), the case that he or she cheated will be hard to resist. We were not ourselves taken to any of the underlying evidence, but I am willing to accept that that appears to be a reasonable summary of the effect of the recent decisions to which we were referred. However, I am not prepared to accept – and I do not in fact understand Ms Giovannetti to have been contending – that even in such specially strong cases the observations in the earlier case-law to the effect that a decision whether the applicant or appellant has cheated is fact-specific are no longer applicable or that there is no prospect of their oral evidence affecting the outcome.’

6. Almost invariably the Home Office have failed to consider cases on an 'individual' basis with no opportunity having been given to the vast majority of individuals to be interviewed and for those accused of fraud to respond. There does appear to now be the use of a pro forma interview and an example is attached. What is clear is that this is extraordinarily rigid and is most likely to benefit those who did use fraud. The reliance upon such pro forma interviews against Applicant is likely to render those decision open to challenge: *R (on the application of Anjum) v Entry Clearance Officer, Islamabad (entrepreneur - business expansion - fairness generally)* [2017] UKUT 406 (IAC)
- 'An immigration interview may be unfair, thereby rendering the resulting decision unlawful, where inflexible structural adherence to prepared questions excludes the spontaneity necessary to repeat or clarify obscure questions and/or to probe or elucidate answers given'

**Burden of proof:**

7. In *SM\_and Qadir v Secretary of State for the Home Department* [2016] UKUT 229 (IAC) emphasised that the burden of proof lay on the Secretary of State to the balance of probabilities:

'57 In this context, we highlight what was stated at [11] of Shen:

*" At the end of the day the SSHD bears the burden of proof. This is a proposition which is uncontroversial and has been confirmed on many occasions."*

58. It is well established that proof of dishonesty on the part of the immigrant concerned is required in order to establish either "*false representations*" or "*false documents*" under paragraph 321A of the Rules: see AA (Nigeria) v Secretary of State for the Home Department [2010] EWCA Civ 773, at [44] and [51] especially. Following the consumption of large quantities of judicial ink, the legal rule which has emerged with unmistakable clarity is that in civil proceedings there is but one standard of proof, namely proof on the balance of probabilities. One of the clearest expositions of this rule is found in the judgment of Richards LJ in R (N) v Mental Health Review Tribunal (Northern Region)[2006] QB 468, at [62]:

*"Although there is a single civil standard of proof on the balance of probabilities, it is flexible in its application. In particular, the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities."*

In short, as emphasised by Lord Carswell in Re D [2008] UKHL 33, at [28], the fundamental judicial task is to decide whether, having regard to the context, the evidence adduced is of sufficient cogency to warrant the conclusion that the burden of proof has been discharged to the civil standard.'

8. This approach was considered and approved in *Secretary of State for the Home Department v Shehzad and Chowdhury* [2016] EWCA Civ 615 (at §30) Beatson LJ  
'The UT said that the correct approach was (I paraphrase in the interests of brevity) to consider first whether the Secretary of State's evidence – at that stage consisting essentially of the evidence of Ms Collings and Mr Middleton, together with the look-up tool – established a *prima facie* case that the appellant had cheated; and then, if it did, to decide whether that case was sufficiently answered by his or her evidence. The evidence of Ms Collings and Mr Middleton was criticised by the UT as displaying "multiple frailties", which left open the possibility that false positive results might have arisen. Nevertheless it was held to be (just) sufficient to transfer the evidential burden to the appellants to show that they had not cheated. Having heard oral evidence from both appellants, which recounted with some circumstantiality how they took the test and other matters relevant to their credibility, the UT upheld both appeals. It did so partly on the basis of its assessment of the oral evidence – that of SM requiring quite a nuanced assessment, while that of Mr Qadir was described as "impressive in its entirety" – and partly on the frailties of the generic evidence. At para. 102 of its judgment it "re-emphasise[d] that every case belonging to the ETS/TOEIC stable will inevitably be fact sensitive".
9. The reason for such an approach is perhaps most clearly explained by Green J in *Shen (Paper appeals; proving dishonesty)* [2014] UKUT 236 (IAC):

“At the end of the day the SSHD bears the burden of proof. This is proposition which is uncontroversial and has been confirmed on many occasions.....Where the appellant’s evidence is not met, a Tribunal should be slow indeed to find dishonesty, particularly without hearing evidence and submissions on the point from the Appellant and/or the SSHD. It must be recorded that a finding of dishonesty can have catastrophic consequences for the applicant in social and economic terms. It is not to be found lightly.” (para [26] and headnote (4)).

## **Discharging the Burden of Proof upon the Home Office**

### **Look up Tool**

10. To discharge the ‘evidential’ burden of proof the Home Office it is required to provide the ‘Look up Tool’ and will rely upon the generic evidence explaining its methodology in the statements from Home Office officials including, Mr. Sewell.

11. The importance of the Home Office providing this ‘individual’ evidence is demonstrated in Judgment of Beatson LJ Shehzad and Chowdhary [2016] EWCA Civ 615: (§30)

‘But, in circumstances where the generic evidence is not accompanied by evidence showing that the individual under consideration’s test was categorised as “invalid”, I consider that the Secretary of State faces a difficulty in respect of the evidential burden at the initial stage.

12. Obviously the evidence contained in the Look Up tool must be considered carefully. The evidence contained within it is often at odds with the evidence given by the Applicant and there have been frequent instances where, for example, the date on which it is recorded that the test was undertaken is at odds with the Applicant’s evidence.

### **Disclosure of ETS Test Spoken Recordings:**

13. Initially ETS refused to provide the recordings of individual’s spoken tests. It now will provide the recording upon a request being made although the response given to such requests has been inconsistent.

14. What clearly is important is to request the recording and that now entails approaching:

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15. Indeed the failure to request a copy of the recording was specifically relied upon by William Davis J in *(Abbas) v Secretary of State for the Home Department* [2017] EWHC 78 (Admin), [2017] 4 WLR 34 as a significant reason to find that the Applicant had not discharged the evidential burden upon him

16. Whilst it may have been assumed that the disclosure of such a recording would be sufficient to rebut any denial made by Applicant that they had not used a proxy the Courts and Tribunal have continued to accept that Applicants have discharged the evidential burden even when recordings have been made available and it has not been that of the Applicant.

17. This has been largely on the basis that there are ongoing concerns with respect to the methodology used and that actual recordings were incorrectly married up in the ETS records. Thus, in *MA – Mohibullah v Secretary of State for the Home Department* [2016] UKUT 561 (IAC) and *Saha v Secretary of State for the Home Department* [2017] UKUT 17 (IAC) the evidence from three expert witnesses who produced a 'joint memorandum' was considered by the Panel and in addition, two of them, Mr Stanbury and Professor Sommer, gave evidence to the Tribunal.

18. Their expertise was in the 'fields of computing, database programming, computer forensics and computer security, in general terms'. This memorandum was then reproduced in full in *MA – Mohibullah v SSHD*:

'In their joint memorandum the experts helpfully outline the task to which their endeavours were addressed:

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

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

- i. As regards every decision such as those under challenge in the present cases, *"... everything depends on the policy of the information provided by ETS to the Home Office and the ability of the Home Office to match this with the data from other sources which they hold"*.
- ii. According to the witness statement of the Home Office employee Mr Greene, the "Lookup tool" is an Excel spreadsheet. This mechanism was:
- iii. *" .. wholly developed within the Home Office to enable the information provided by ETS of invalid and questionable test results to be checked and cross referenced against the details of those who have made applications for leave to enter and remain .....*
- iv. *A search can be made on the Lookup Tool using the ETS Certificate number, the person's passport reference number or the unique number allocated to their record on the Home Office case work information and management system."*
- v. With the exception of the ETS "audit" of Synergy College, which is dated 16 January 2013, none of the ETS documents bears a date and *" ... it is*

*not entirely clear whether they accurately refer to circumstances as they existed in April 2012 and March 2013 when the tests were taken".*

- vi. There is conflicting evidence about whether the spoken and written responses of candidates to individual questions are stored on individual electronic files or otherwise.
- vii. One of the ETS test centre administration manuals disclosed post dates the periods when the TOEIC Certificates of the Applicants were generated.
- viii. There is clear evidence that the speaking and writing test methodology was converted in late 2011/early 2012 from a web based system to a mobile delivery system. (In passing, the Tribunal records its surprise that there is no evidence of the month, much less the specific date or dates, when this rather important change was implemented.)
- ix. The manuals contemplate that each candidate will be photographed by an iPhone and/or that there will be photo registration by the Centre Administrator's personal computer. The information provided by ETS' solicitors is that ETS has been unable to locate any photographic records, cannot confirm whether the aforementioned procedure was in operation in April 2012 and simply does not know the provenance of the photograph of the Appellant MA (the only member of this group of three litigants in respect of whom a photograph has been produced).
- x. According to ETS, the system was that each candidate was required to register on a computer relevant personal details, including a passport number, which automatically generated a computerised unique Registration Number.
- xi. The "CBT Manager application" was the computer software used to record each candidate's spoken and written responses. The computerised files thereby created were then transmitted to the "Online Scoring Network" at ETS' US Headquarters.
- xii. There is a distinct lack of clarity relating to the process as described by ETS in (ix) above. The description of uploading of the data following completion of the test is not consistent: in particular, the description provided in respect of the Applicant Mr Mohibullah has not been put forward in either of the other two cases.
- xiii. The integrity of the test taking procedures and systems established by ETS in its manuals depends heavily on the reliability and probity of test



- centre staff. Further, the ETS security precautions concentration on the elicit conduct of candidates and not test centre employees.
- xiv. With the sole exception of audio files, all of the computer files produced have been in the form of "*print-out to PDF*": the effect of this "*... has been not to preserve any original date - and - time stamps or internal metadata either or both of which would have assisted analysis using digital forensic analysis and helped produce a chronology of events*".
  - xv. The test centre seating plans which have been produced are incomplete.
  - xvi. A study of the spreadsheets attached to the witness statements of the Home Office employee, Mr Sewell reveals a lack of any nexus between the data supplied to him by ETS and the unique ID of individual candidates. As a result, the experts say "*We do not know the processes by which the candidate's name is linked to each test*".
  - xvii. The experts acknowledge the documentary evidence of "simple impersonation", with particular reference to the unannounced ETS audit at Synergy College on 16 January 2013. They express the opinion that the simple impersonation mechanism would be "vulnerable" in any speaking tests.
  - xviii. While there is also some evidence of "dictated answers", "viz" answers to test questions being called out by a person in the examination room, this method would not be viable for the spoken English test.
  - xix. The investigation of a particular test centre in Birmingham established the use of the "remote control software" mechanism by the use of "Team Viewer" software whereby a person using another computer could secure access to the computer being used by the candidate. The possibility of other, covert, remote control mechanisms is acknowledged. There is no evidence of the use of any of these mechanisms in the test centres which relate to these Applicants or the Appellant MA.
  - xx. The experts also advert to the possibility of manipulation of file responses held on the local server, the CBT Manager, at the testing centre. If file responses were stored on this server, this would create an opportunity for alteration by test centre staff. Two of the experts opined that this was unlikely.
  - xxi. Yet another mechanism, entailing a simultaneous testing session using proxies in a "hidden room" at the test centre or elsewhere is acknowledged.

- xxii. According to the experts, "*particular opportunities for mistakes appear to arise if the actual registration on the ETS system is sometimes carried out by test centre staff and not by the candidates themselves*", creating the risk of the data provided by the test centre to ETS mis-matching the candidates and their tests. There was no security precaution available to counter this risk, with the exception of an unannounced ETS audit. As none of the computers or data media associated with the test centres involved in these cases is available, there is no information relating to the important issues of audit, log and configuration files and related time and date stamps. This is one aspect giving rise to the recurring lament of the experts:

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

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

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

- xxiv. Next, it is observed "*The experts have examined the supplied audio files and find that there is no embedded metadata which might assist their enquiries. Time and date stamps appear to be of the most recent copying of the file and not of the point of origination*".
- xxv. The experts' consideration of the report generated by an unannounced audit of Synergy College on 15 May 2012 highlights that while the auditor

expressed "*mild concern*", no specific remedies or sanctions vis-à-vis the college were proposed.

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

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

- (a) The absence of any evidence that the security mechanism of password protection vis-à-vis candidate's test computers was in operation.
- (b) The "hidden room" theory could involve the falsification of the completed tests of both genuine and fraudulent candidates.
- (c) Whereas the speaking and writing TOEIC tests, which were undertaken at a single session, were fully computerised, the listening and reading tests, also undertaken at a single session, were manual.
- (d) There is no evidence of any audit logs. An "audit log" is a computerised record which would demonstrate the chain of storage, handling, processing and transmission of the data generated by the speaking and writing tests (our formulation).
- (e) Metadata, if they existed, would be located inside the voice recording files: there are none. As a result, these files do not contain particulars of the time, date and location of the recordings therein stored.
- (f) Finally, Mr Stanbury's expectation was that there would be in existence certain contemporaneous manual records, relating particularly to the names of candidates and the desk number allocated to each: there are no such records.

(18) Professor Sommer further testified that the evidence fails to disclose whether the important act of uploading the files generated by the speaking and writing tests occurred automatically or involved some human intervention. He agreed that if human intervention was part of this process, this would have created an opportunity for manipulation of the

files, particularly if there was a time lag. The latter could occur through, for example, a loss of internet connectivity, whether false or genuine. Finally, Professor Sommer focused on the issue of photographing TOEIC test candidates. His evidence was that he " *never got to the bottom*" of this. While this issue receives some consideration in the ETS test centre manuals and the witness statements of ETS employees, these sources are incomplete. In response to a question from the panel, Professor Sommar stated that the description of the Appellant MA in evidence of group photographs following completion of the test exercises bore no resemblance to what is specified in the manuals.

## **Preparation**

19. On the Home Office providing the 'look up tool' and relevant statements from the Home Office officials then the evidential burden shifts (controversially) to the Appellant. It is then for the Appellant to provide an 'innocent explanation'. The fact that an Applicant can speak English to a high standard is not in itself sufficient. In *MA – Mohibullah v Secretary of State for the Home Department* [2016] UKUT 561 (IAC) the Tribunal observed: (§57) '.....we acknowledge the suggestion that the Appellant had no reason to engage in the deception which we have found proven. However, this has not deflected us in any way from reaching our main findings and conclusions. In the abstract, of course, there is a range of reasons why persons proficient in English may engage in TOEIC fraud. These include, inexhaustively, lack of confidence, fear of failure, lack of time and commitment and contempt for the immigration system. These reasons could conceivably overlap in individual cases and there is scope for other explanations for deceitful conduct in this sphere. We are not required to make the further finding of why the Appellant engaged in deception and to this we add that this issue was not explored during the hearing. We resist any temptation to speculate about this discrete matter.
20. Nevertheless evidence of competence in English will obviously be highly relevant. This can be demonstrated by the oral evidence given by the Applicant and the various qualifications obtained where English has been the language in which the subject was taught.
21. Papers and dissertations that have been written by the Applicant and submitted as part of their course should be considered.

22. Evidence of similarity in results in previous English Language tests, showing consistency or an expected progression where there is no evidence of having used fraud previously. Very high marks will obviously have to be addressed.
23. In SM and Qadir v Secretary of State for the Home Department (ETS – Evidence – Burden of Proof) [2016] UKUT 00229 (IAC) the Tribunal heard the evidence of SM and Qadir who both denied having used a proxy to take the speaking test. The Tribunal found “*viewing all the evidence in the round and having subjected the Appellants’ testimony to the Tribunal to critical scrutiny, the core of their respective cases is truthful and plausible*”.
24. This was following very lengthy and detailed cross examination and analysis of the evidence on which they relied. In doing so the Panel had regard to, inter alia:
- a. They were able to describe accurately the procedure for undertaking the test and what the test involved
  - b. The Appellants did not have reason to cheat
  - c. The fact that they were of good character
  - d. The lapse of time and the difficulties that would result in recalling events
  - e. The fact that the interview by the Home Office had been based on a “*prepared, pro-forma text, with the result that there was no spontaneity in reacting to any of the Appellant’s responses.*”
  - f. The acknowledgement that to “*have cheated would have entailed engaging in a game of risk with very high stakes indeed. Furthermore, having considered all the evidence, we have no reason to question the Appellant’s good character generally.*”
25. Evidence of good character including testimonials and confirmation of no previous evidence of dishonestly should be sought. Would there be any incentive to cheat?

26. Fundamental is also an ability to demonstrate a knowledge of the practicalities of taking the Test:

How did the Applicant arrange the test and how much did it cost.

What preparation did the Applicant do for the test?

27. It will also be relevant to establish why the Applicant chose the college at which the test was taken? This is particularly important as the Home Office have stated they are now concentrating on certain colleges which it alleges were 'Fraud Factories:

- (i) Synergy Business College.
- (ii) Elizabeth College.
- (iii) Cauldon College.
- (iv) Eden College

28. The fact that someone did not take a test in a Centre that was close or convenient to them will need to be addressed as will when did they take the test as the evidence of the use of proxies can also be time specific with respect to certain colleges.

- (i) How did they get there?
- (ii) What was the procedure on arrival
- (iii) Describe the college and the room in which the test was taken – size, layout, What did the test involve?
- (iv) Was it clear that 'cheating' was occurring given the numbers involved
- (v) How were the tests conducted?
- (vi) How long did they last?
- (vii) Were they taken on one day and if not what was the time lapse between the two tests?
- (viii) What tests were taken first:

29. With respect to (vi and vii), in *SM and Qadir v Secretary of State for the Home Department (ETS – Evidence – Burden of Proof)* [2016] UKUT 00229 (IAC) the President of the Tribunal confirmed that the tests were held over two days irrespective of whether fraud was used:

'It is common case that all TOEIC testing exercises have four components, namely listening and reading (examined on the first test date) and speaking and writing (examined on the second test date). This division is accurately reflected in the Appellant's witness statement.'

30. It may also be relevant to take instructions on a situation where a certificate has not been relied upon and if not why not?

31. This is not intended to be exhaustive and obviously regard must be had to the lapse of time and the relative unimportance of such a test for many of those taking the test. This perhaps gives rise to another important consideration. If the Applicant can remember all of the above in great detail, how is this possible?

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