

NUS Briefing: TOEIC Scandal Debate 4th September 2018

About NUS

The National Union of Students (NUS) is a confederation of over 600 students' unions, representing more than 95 per cent of all higher education and further education unions in the UK. Through our member students' unions, NUS represents the interests of more than seven million students. NUS represents students and students' unions to ensure that education is transformative, skills and learning are accessible and every student in the UK is empowered to achieve their potential.

About The TOEIC Scandal

- In 2014, a Panorama investigation exposed widespread cheating in "TOEIC" exams via the use of "fake sitters" (or "proxies"). The TOEIC exam was a Secure English Language Test provided by ETS (a Home Office contractor). It was frequently used by students and others to satisfy Home Office visa requirements [3].¹
- Subsequently, ETS informed the Home Office that approximately **56,000 people** cheated or may have cheated over the course of more than a three-year period. The Home Office took action against **35,870** students. In some instances, students' leave was curtailed part-way through their courses, in other cases, applications for further leave were refused. Most of those accused had no right to appeal against the allegations from within the UK.
- It has since come to light that a significant number of innocent people may have been unjustly caught up in this scandal. Some students caught up in the scandal had obtained Masters level degrees and were clearly proficient in English. However, the Home Office refused to accept evidence put forward by students to explain their innocence. Expert IT evidence has since considered alternative methods of cheating which may have been employed by test centres and which could explain why innocent test takers were unknowingly caught up in this scandal [12-13].
- On 5 December 2017 the Court of Appeal handed down judgment in the case of *Ahsan and others* [10-11].² The judges decided unanimously that students who had lived and studied in the UK for a number of years should not be summarily removed from the UK with only an out-of-country appeal. To date, a significant amount of public resources have been expended in respect of legal fees and court resources, with the Home Office finally conceding that it cannot deprive students of a right of appeal from within the UK. Importantly the Home Office had argued in cases where those accused were attempting to obtain an in-country right of appeal that an out of country appeal, which could only be exercised once the person had been removed from the UK, provided an adequate remedy. In 2018, nearly 4 years after students were being removed with no right to challenge the removal, it has now been accepted that the facilities for such out of country right of appeals were either inadequate or did not exist. Accordingly, thousands of students who may have been wrongly accused were summarily removed with no due process. It cannot be right that persons accused without proper evidence, could be removed in such circumstances, with no guarantee of being able to resume their courses if they are successful.

¹ In line references are to our report, "The TOEIC Scandal: an ongoing injustice" NUS, May 2018

² *Ahsan and others v Secretary of State for the Home Department* [2017] EWCA Civ 2009

- Clearly there were cheats, initially exposed in the 2014 Panorama footage, and NUS does not condone any form of fraudulent activity, by international students or anyone else. However, it is also now clear beyond any doubt that a significant number of innocent people have been caught up in the scandal and an extremely serious injustice has been done to them. In very many cases, the injustice has still not been recognised or rectified.
- It is astounding that the scandal has been brushed under the carpet by the Home Office, and further still, that this has been allowed to happen. ETS was a Home Office contractor, licensed to provide so called Secure English Language Tests on behalf of the Home Office. It is not in dispute that in each and every case where fraud occurred that fraud was orchestrated by the test centres that were sub-contracted by ETS to run the testing sessions.

The Impact Upon Falsely Accused Individuals

We are now four years on from the scandal and many students still have no resolution. The impact on those falsely accused cannot be understated [5]. The students almost universally say they are too ashamed to return home with the serious allegation hanging over them, so many have stayed in order to prove their innocence. But this has effectively meant living in limbo for several years whilst the legal cases were fought as immigration restrictions have usually meant they are unable to study, so most have been unable to complete their education which they had worked towards and paid for. They are also not permitted to work and many accrued substantial debt. Personal relationships have broken down. Their mental health and wellbeing has deteriorated; some students have selfharmed, been diagnosed with anxiety and depression, and have experienced suicidal thoughts and some have made suicide attempts. Here is an example of one student's experience:

"Because of what happened, my family are out of contact with me. They had a dream for their son, but now they will not talk to me or support me. They gave me money to study, but now that I am facing this cheating allegation they have lost all respect for me... I became very depressed as a result of what has happened. I did not know how we would survive. I thought the Home Office would come and get me. I was being treated like a criminal even though I did not do anything wrong... I contracted viral hepatitis in July 2017. I was very ill with a really high temperature for months. I spent 2 days in hospital, and then had to attend hospital or my GP every day until September 2017. I think this was due to the stress and anxiety, it caused my body to get sick. My wife is now sick with stress and anxiety... I have been unable to support her and I feel so awful seeing her suffering because of me. I have lost all self-respect, and I am afraid that she will leave me. I often wish that my life would end, because I cannot bear this pain any more. I did not do anything wrong and my life has been ruined..."

The Present Legal Position

Following recent helpful Court of Appeal decisions (*Ahsan and others* and more recently, in June 2018. *Khan and others*),³ most students should finally be given a right of appeal within the UK.

Unfortunately, the Home Office continues to deny this right to some students and NUS is aware of at least 8 cases currently before the Court of Appeal which are due to be heard in November.

³ *R (Khan and others) v Secretary of State for the Home Department* [2018] EWCA Civ 1684

The Home Office's Approach

There remain some serious barriers to students' ability to effectively seek justice:

Lack of inquiry and evidence [14]: To the knowledge of NUS there is no *positive* evidence against the vast majority of the students accused of using proxies. In most cases, the basis of the allegation is that the voice clips attributed to the student's test contain a voice which appeared more than once across ETS' database of voice clips and so is assumed by ETS to belong to a proxy. The Home Office accepted ETS findings without question. However, the credibility of ETS evidence has since been brought into question. For example, ETS records for certain students are linked to the wrong test centre or the wrong date. In addition, there are strong indications of more sophisticated schemes in operation by test centres. For example, there have been reports of police investigations into the use of Team Viewer software - at one test centre in Birmingham police seized computers where the test centre used this software to substitute tests *en masse* [13]. This would result in those who had legitimately taken their test in those centres having their recording deleted and to be wrongly accused of cheating. In another case, the number of test certificates issued by ETS on a particular day significantly exceed the number of computer terminals in that test centre, suggesting a technologically sophisticated method rather than the "fake sitter" hypothesis. The Home Office has failed to follow up these and other lines of investigation which could exonerate students [16].

Students' access to evidence [14-15]: It has been extremely difficult for individuals to obtain information and evidence from ETS and the Home Office. In the only case to NUS' knowledge where the student obtained some of the detailed documentary evidence asked for (which was subsequently considered by the IT experts), it was only possible because a judge ordered the disclosure.⁴ ETS cite ongoing criminal investigations as the reason for not agreeing to requests for information but it is unclear whether ETS is still under criminal investigation. In the 2016 case of *SM and Qadir* the President of the Upper Tribunal commented: "*Almost remarkably, ETS provided no evidence, directly or indirectly, to this Tribunal. Its refusal to provide the voice recordings of these two Appellants in particular is mildly astonishing.*" Whilst ETS has since begun providing the voice recordings they continue to refuse all other requests made by students.

Cherry picking evidence [15]: It is of serious concern to NUS that the Home Office continues to ignore IT expert evidence mentioned above. NUS understands that the Home Office is not referring to this evidence in cases where students are unrepresented in appeals and who understandably may not know that this evidence exists.

Inequality of arms [17]: There is a very significant inequality of arms in TOEIC cases. These students have been accused by a foreign government of what amounts to a criminal offence. The effect has usually been the immediate termination of their studies and cancellation of their leave to remain. In most cases they are not entitled to free legal assistance, and the Home Office and ETS have withheld relevant information which might assist their case.

Judicial criticism of the Home Office [17]: The courts have repeatedly criticised the manner in which the Home Office has dealt with TOEIC cases including criticism of evidence given by senior civil servants to the Upper Tribunal, for example in the *Mohibullah* case: "*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.*"

⁴ *R (Mohibullah) v Secretary of State for the Home Department* [2016] UKUT 561

Questions for the debate

1. Given the lives that have been ruined by the TOEIC scandal, and the lack of evidence, is it not time for an independent inquiry or ombudsman investigation into the scandal?
2. What is being done to ensure that those who were removed can have their cases properly reviewed?
3. What proposals has the government considered, or is it going to consider, for compensating those who have been unfairly caught up in this scandal?
4. What additional evidence is held by the Home Office in relation to test centres and ETS, and when will this be made available to the public?
5. How many live TOEIC/ETS related criminal investigations are there and what is each investigation concerning?
6. Is ETS currently under criminal investigation?
7. Why is the Home Office fighting the November cases? These relate to students whose circumstances are materially identical to those under consideration by the Court of Appeal in *Ahsan* but due to bad luck their cases were refused before the Court made its helpful decision in *Ahsan* (see [11] 'what about those who do not have cases pending in the Court of Appeal?').
8. Will the Home Office agree that these cases are not suitable for out of country appeals because of the deeply flawed nature of the evidence relied on to bring allegations, and the very significant obstacles to individual students being able to properly appeal from abroad?

For more information, please see our most recent report, "TOEIC scandal: an ongoing injustice": [link], in particular see our more general recommendations on page [4] and [18-21].

Comment [SB1]: Cat: this link is broken. I think Mike Day was looking at sorting it out a while ago:
<https://www.nus.org.uk/Documents/The%20TOEIC%20Scandal%20an%20ongoing%20injustice.pdf>