THE TOEIC SCANDAL

an ongoing injustice

NUSUK

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nus national union of students

1. Foreword from Yinbo Yu

The publication of this report is timely given the recent focus on the "Hostile Environment" policy developed by the Home Office. Ministers have been quick to point out that the policy was only ever designed to deter and deal with "illegal" immigration. Whilst that may have been their intention, the consequences were all too different as this report outlines. Thousands of students have had their dreams of international higher education in the UK shattered, many feel their integrity has been called into question, living, as they are, under the cloud of being a "cheat". Students can get caught up with institutions that lose their license, with little or no redress and more often than not they are left out of pocket.

In 2012 the post study work visa was removed from international students, a vital opportunity to gain valuable experience and money, to help offset exorbitant international student study fees. In recent years visa requirements have become more stringent, the ability to work (both for students and their dependents) has become more difficult. Upon arrival students are required to register with the police within seven days, pay a surcharge to the NHS and their landlords have to administer immigration checks. These bureaucratic barriers all add up to a hostile environment for students, one that is actively deterring students from studying in the UK.

It is clear to me that the conflation of general immigration policy in an attempt to play to the "will of the British people", and we should be wary of politicians who claim to be able to interpret a people's will, is damaging the reputation and quality of higher education in the UK. We are still recruiting and students report that they enjoy their experience, but we are not taking advantage of the current growth in international student numbers. We are losing out to competitors who can provide English language teaching. In a post Brexit environment, the UK is going to need as many internationally literate graduates as possible, this is achieve by enhancing not restricting outward mobility and encouraging not deterring inward mobility. The hostile environment policy and the decision to leave the European Union both threaten our continued success in their areas. NUS policy is clear we should remove international students from migration targets, as they have done in Australia, and create an open and welcome student experience that will enrich us all.

I would like to thank or staff team, partners such as Joy Elliott-Bowman for their work on this report. We have also worked closely with our legal partner Bindmans LLP to prepare this report, and throughout our response to the ETS scandal.

Yinbo Yu
International Students Officer 2017 – 2018

2. Introduction

NUS has been monitoring the TOEIC scandal closely since the Home Office action commenced in June 2014. This report follows our February 2015 interim report[1] and provides an update to our 6 June 2016 written submissions[2] to the Home Affairs Select Committee (in conjunction with both of which this report should be read). The landscape is complex for several reasons, including: the sheer numbers involved, the labyrinthine immigration legal framework (which has changed several times in the past four years alone), and the piecemeal evidence coming out of legal cases. We hope that by pulling the information together we can assist proper debate and investigation into this ongoing scandal.

The TOEIC scandal is unprecedented in terms of numbers: in 2014 ETS informed the Home Office that more than 56,000 people had cheated or may have cheated in the TOEIC English language test over the course of more than a three-year period. As at the end of 2016 the Home Office had taken action in a staggering 35,870 cases, and although the Home Office no longer reports on TOEIC cases in its transparency data figures[3] we are aware that further action has been taken by the Home Office since then.

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. As we set out below, the impact on those falsely accused cannot be understated.

It is worth noting that there has been absolutely no willingness by the Home Office to consider representations or evidence put forward by students to explain their innocence. Students who came to the UK already with excellent English – in some cases fluent English – were accused. Students who whose tutors and lecturers gave glowing references attesting to their ability could not shake the Home Office's conclusion that they were guilty. Even those who have obtained Masters level degrees – and higher – taught in English in the UK have been unable to persuade the Home Office that they had no reason to cheat. It seems that there is nothing that students on the 'invalid' list can do to persuade the Home Office that they did not cheat. As a result of this approach, and the absence of a discrete process to deal with the individuals on the TOEIC list, a huge number of cases have been funnelled through the Courts and Tribunals.

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. There remain very many unanswered questions and unpursued lines of inquiry. Until these have been investigated it is impossible for the Home Office to know who did and who did not cheat.

[1] http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/home-affairs-committee/english-language-testing/written/31779.pdf

[2] http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/home-affairs-committee/english-language-testing/written/34158.pdf

[3] https://www.gov.uk/government/publications/temporary-and-permanent-migration-data-february-2017

The TOEIC scandal is embarrassing for ETS and the Home Office. Both will want it to simply fade into the recesses of time. But this must not be allowed to happen. It is imperative that the TOEIC scandal be investigated by an independent and impartial body so steps can be taken to find out what happened and remedy the injustice caused to innocent students. And of course, in order that important lessons can be learned. As will be seen below, the Home Office is not impartial and frankly, it has demonstrated that it is not willing to conduct the necessary enquiries to get to the bottom of what happened.

The scandal should be of general interest from a number of different angles: not only because of the human cost but also due to the enormous amount of public resources that have been expended and continue to be expended, in legal fees paid by the Home Office to its lawyers (which are likely to run into the hundreds of thousands across all of the cases), in Court and Tribunal time and, for the few lucky individuals who qualify, in Legal Aid costs.

With the UK poised to leave the European Union, the Tier 4 visa system for international students will become increasingly important to the functioning of our higher education system. However, it is NUS' view that the Tier 4 system is broken. It is high time that a root and branch review is conducted. Students who come to the UK and find themselves subject to unfair treatment by the Home Office or their educational institution have no effective recourse to an independent body for an impartial adjudication. Rights of appeal to the Immigration Tribunal have been taken away from international students and replaced with an 'administrative review' within the Home Office to correct 'case-working errors'. This is no substitute for an appeal to an immigration judge. The Office of the Independent Adjudicator has no powers to stop immigration action being taken whilst complaints are investigated. The reputation of our higher education system is at stake.

Note on terminology

ETS returned two lists of students to the Home Office: (1) a list of 33,725 names of those whom ETS were confident had not sat the English language test themselves on the basis of the voice recognition tests that they ran (known as the 'invalid' list – because their English language certificates were invalidated as a result); and (2) a list of 22,694 names where ETS had 'limited confidence' in the test results (the validity of their tests was 'questionable').

Recommendations

1. **NUS call for an independent investigation into the scandal including: following up the unpursued lines of inquiry, recommending appropriate outcomes for successful students and making recommendations for redress**
2. **NUS asks that individuals seeking to prove their innocence be granted access to Legal Aid or a special legal assistance scheme for immigration advice and representation in the Immigration Tribunal**
3. **NUS recommends that in-country appeals are reinstated for international students**
4. **NUS recommends a root and branch review of the Tier 4 sponsorship system including an investigation of the effectiveness of complaints procedures and the OIA complaints scheme**
5. **NUS recommends that international students have access to a protection scheme which they may access where their Tier 4 sponsor loses its licence**
6. **NUS calls for international students to be removed from net migration targets**

Our recommendations are explained in detail on page 18 onwards.

3. Impact upon falsely accused individuals

It has now been four years since the TOEIC scandal broke. Yet for many falsely accused individuals there has been no resolution. Needless to say, an accusation of cheating by a foreign government is a very serious matter and the allegations are an ongoing source of extreme distress to a great many individuals. We are aware that depression, anxiety and sleep disturbance is almost universal amongst falsely accused individuals. Self-harming and suicidal thoughts are common. Many are in serious debt. Families have been separated and some have broken down.

The extremely serious impact was recognised by the then President of the Upper Tribunal, Mr Justice McCloskey, in the *Mohibullah* case in December 2016 (*R (Mohibullah) v Secretary of State for the Home Department* [2016] UKUT 00561 (IAC))[4]:

> *"(79) We do not identify in the [Home Office's] submissions […] 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."*

WV, a professional from southern Africa who came to the UK as a student and has since married a British national said:

> *"The effect of these allegations on our lives has been absolutely devastating… The idea of this allegation crushes me – it is deeply shameful. Only my husband and my close friends know about it. I cannot understand why this has happened to us. Our lives have stopped. We are really broken inside. My husband and I live in a constant state of worry and panic that something awful is going to happen. It feels like we have lost all control over our lives.*
>
> *I suffer badly from depression as a result of my situation… I take [anti-depressants] and my GP referred me for counselling. I also have other medical problems: I have unexplained pains in my arm and am awaiting the results of an MRI scan, and I am also suffering with memory problems… [My husband] is also suffering with depression… I blame myself for what he is going through and it feels so awful to see how it affects him."*

[4] *R (on the application of Mohibullah) v Secretary of State for the Home Department* (TOEIC – ETS – judicial review principles) [2016] UKUT 561 https://tribunalsdecisions.service.gov.uk/utiac/2016-ukut-261

KA, a Bangladeshi student said:

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. This experience has destroyed my dreams and has been the biggest curse of my life...

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… It is so full of unfairness and I cannot believe this is happening. 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…

The strain on my relationship with my wife is also huge. 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…"

HM, a Bangladeshi student (extract from GP letter):

"He has a history of anxiety and depression which was triggered by the [false accusation]. He has still not been able to complete his course or to apply to other universities to obtain a degree or complete his degree. He is also not able to travel home to see his family. He tells me his marriage has also dissolved as a result of the above stressors. He has had psychological intervention with our local psychologist.

He remains low in mood. He is not sleeping, has lost his appetite and has become forgetful as a result. He has negative thoughts about the future and has had thoughts that he would be better off if he was dead. He feels his future has been destroyed as he is not able to complete his course.

He remains on [antidepressants] due to persistent symptoms of anxiety and depression and we will continue to monitor him in primary care. He is very keen to complete his degree and we feel this would help his anxiety and depression symptoms as not completing his degree has been the main trigger for his symptoms."

4. Affected individuals

In our June 2016 report, four groups of affected students were outlined. Since then, the number of groups has increased. This is in part due to the complex and frequently changing immigration appeals framework. It is also because the Home Office has begun taking action against individuals who may have been students some years ago but who have since transferred into other immigration categories. In general, the groups can be categorised as follows:

1. **Students who were not directly implicated in any wrong doing but whose educational institution had its licence revoked due to the TOEIC scandal**

    - These students were treated with suspicion merely for having studied at an institution whose licence was revoked. There was no financial assistance whatsoever and only minimal, ineffective practical assistance to find new educational institutions. In any event, these students were effectively blacklisted as they were considered too 'risky' by alternative Tier 4 sponsors, having come from a 'revoked institution'.

    - The majority of these students returned to their countries of origin, having had their studies interrupted and curtailed, and without any financial redress or refund of course fees. These students were effectively collateral damage.

    - Some institutions' licences' were revoked merely for sponsoring a large number of students whose names appeared on the ETS lists.

2. **Students in the 'questionable' group**

    - Individuals were included in the 'questionable' group because ETS had 'limited confidence' in the validity of their TOEIC test because of 'administrative irregularity'. This group included students who sat their TOEIC test at a test centre where there was a high rate of 'invalid' TOEIC tests. This group numbered 22,694 individuals.

    - These students were permitted to sit a new Secure English Language Test (SELT). NUS understands, contrary to some reports, that the majority of these students were required to pay for the new tests. The outcomes for this group are not known.

3. **Students who were withdrawn from study by their institution for reason of their name appearing on the 'invalid' list, including where the Home Office instructed institutions to do so**

    - A number of students were dealt with outside of the usual immigration processes (whereby ordinarily, if a student's name appeared on the ETS list Home Office action would follow as a direct consequence).

    - Instead, in some cases the Home Office instructed the educational institution to withdraw the student from their course of study, and subsequently the student was told by the Home Office to find a new sponsoring institution within 60 days or leave the country. However, since the student was effectively 'blacklisted' from finding a new sponsor because their name is on the ETS list, invariably they would reach their 60 days without finding a new sponsor.

    - Since this was not Home Office action there was no right of appeal attached to it. Therefore, students in this group had **no right of appeal** whatsoever, in-country or out-of-country, because their cases were dealt with outside of the appropriate immigration processes. The Upper Tribunal found this approach to be unlawful in the *Mohibullah* case. NUS understands that the Home Office has not taken any steps to contact others in this category following the *Mohibullah* judgment to rectify this unlawfulness.

4. **Students on the 'invalid' list who were outside of the UK at the time of the Home Office action and who received the notices informing them of the allegation against them on their return to the UK (before 6 April 2015)**

   - This group mainly comprised students who had visited family in the summer holidays and on their return to the UK they were served with notices (usually at airports). Some were detained and some were interviewed by Immigration Officers.

   - These students had a right of appeal from within the UK but NUS understands that most were not permitted to continue their courses pending the appeal hearings. For many students this meant an end to their studies.

   - The Home Office has not released figures relating to the numbers of successful and unsuccessful appeals. However, NUS understands that in each and every case won by a student the Home Office appealed the outcome (to the Upper Tribunal or onwards to the Court of Appeal).

   - NUS understands also that where the appeals process was exhausted by the Home Office (i.e. where the student had ultimately succeeded on conclusion of the series of appeals) the Home Office has been slow to provide a remedy to the student (for example, reinstating leave to remain or deciding a new application for leave to remain) and in some cases, successful students remain in limbo.

5. **Students on the 'invalid' list who were in the UK at the time of the Home Office action (before 6 April 2015)**

   - Most of these students were served with 'section 10 notices' (under s.10 of the Immigration and Asylum Act 1999) informing them that the Home Office considered them to be cheats, that they should leave the UK immediately and, if they wished to appeal, to do so from their country of origin.

   - Many students in this group sought to appeal from within the UK, rather than returning to their countries of origin to pursue appeals due to concerns about the effectiveness of out-of-country appeals and a December 2017 Court of Appeal judgment (*Ahsan and others*) has vindicated their concerns.

   - Some of these students were not issued with 'section 10 notices' at the time, but have been refused further leave to remain at a later point on the basis of the TOEIC allegations. The experience of these students is the same as Group 7, below.

6. **Students on the 'invalid' list who were in the UK at the time of the Home Office action (from 6 April 2015)**

   - The Immigration Act 2014 removed rights of appeal from students and replaced them with an 'administrative review'. Therefore, students who received decisions after 6 April 2015 have **no right of appeal** (unless there are human rights arguments).[5]

   - Students might have human rights arguments, for example, if they have been in the UK for a number of years, they are part-way through an educational programme or if they family in the UK (e.g. a partner or if their children are at school). However, the Home Office can review the human rights arguments and determine that they are 'clearly unfounded' in which case the student can only appeal from their country of origin.

[5] The position is the same for other individuals in the UK under the Points Based System (Tier 1 entrepreneur, investors, highly skilled and exceptionally talented workers, Tier 2 skilled workers, Tier 5 (temporary skilled workers).

- Administrative Review is a review by a Home Office caseworker to correct 'case-working errors'. Importantly, however, there is no Administrative Review of removal decisions or decisions to cancel leave to remain (as distinct from a decision to refuse an application for leave to remain). Therefore, students receiving section 10 decisions from 6 April 2015 also have **no access to Administrative Review**.

- Where an individual's Administrative Review fails or if they have no entitlement to Administrative Review, presently their only option is to challenge the removal or cancellation decision by a claim for judicial review. However, judicial review is expensive, carries the risk of costs being awarded against the student and the legal hurdle in judicial reviews is high (the individual will succeed only if the decision was so unreasonable that no reasonable person acting reasonably could have made it – which is different to an appeal before an immigration). Further, the student would not ordinarily be permitted to give oral evidence in court.

7. Former students on the 'invalid' list who have made new applications for leave to remain

- Students who had completed their course of study did not generally receive section 10 notices. Instead, if and when they made subsequent applications for leave these were refused on the basis of the allegation of TOEIC fraud. These include people who have married British citizens and people who have had children in the United Kingdom, and who are therefore applying for leave on the basis of those relationships. Often they had no idea about the TOEIC allegations before they made their applications, and have established family lives in the United Kingdom.

- The Home Office has historically certified these applications as 'clearly unfounded', which means that the individual must go back to their country of origin to bring an appeal. As with Group 5 above, the recent judgment in *Ahsan and others* has shown that this approach was unlawful and that these people should generally be given an in-country appeal.

- There will be people in this category who still have no idea about the allegations against them, because they have not needed to make a new application for leave since the Home Office action began.

5. Court of Appeal case: Ahsan and others v Secretary of State for the Home Department [2017] EWCA Civ 2009

NUS has raised concerns from the outset of the TOEIC scandal about the inherent unfairness of a process which allowed the Home Office to remove individuals from the UK, interrupting their studies, without first giving them an opportunity to respond to the extremely serious allegations, and with only a right of appeal from their home country.

On 5 December 2017 the Court of Appeal handed down judgment in the case of *Ahsan and others*[6] which changes the picture significantly. The case concerned a number of students who had received 'section 10' decisions (Group 5 on page 8 above).

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 because the nature of the allegations necessitated oral evidence in response, so an out-of-country appeal would not provide a fair and effective process to challenge the section 10 decisions.

Notably, the judges in the *Ahsan* case lamented the "*very messy and unsatisfactory state of affairs*" caused by the fact that "*the basic route of challenge to a section 10 decision provided for by the legislation is by way of an out-of-country appeal, in circumstances where such an appeal does not, in cases like these, afford access to justice*" in combination with the many changes to the legislative framework over recent years (see paragraph 129).

Effect of the Ahsan judgment

NUS understands that Home Office lawyers (from the Government Legal Department) are presently working their way through the list of several hundred cases which have been placed on hold in the Court of Appeal, with a view to making proposals to the individuals as to how their cases should be dealt with (these proposals will need to be consistent with the reasoning in the *Ahsan* case).

NUS understands that the proposals will likely lead to a Court or Tribunal hearing (so a judge can decide whether - on the balance of probabilities - the individual cheated) for those individuals who have a pending Court of Appeal case and who were previously granted only an out-of-country appeal.

This approach could have been taken from the outset. It would have avoided significant expense (for the individuals and taxpayers alike) and of course the grave consequences for the falsely accused. The students who remain here to clear their names are generally now in financial difficulties and suffering from ill health as a direct result of the Home Office's unfair processes.

These individuals will require support from lawyers to prepare their cases, whether they are granted appeals or judicial reviews. NUS calls for a legal assistance scheme to be set up for affected students. NUS also calls for compensation for these students. The processes to determine these cases are likely to continue for several months if not years and they continue to suffer in the meantime.

What will be the practical outcome for students with Court of Appeal cases?

Whilst the *Ahsan* judgment is welcomed NUS is concerned that students who subsequently vindicate themselves by winning an appeal or judicial review (thereby demonstrating their innocence) will not necessarily be guaranteed a fair outcome leading to permission to continue studying.

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[6] *Ahsan and others v The Secretary of State for the Home Department* (Rev 1) [2017] EWCA Civ 2009 http://www.bailii.org/ew/cases/EWCA/Civ/2017/2009.html

This is essentially because the Immigration Rules are hugely complex and very strictly applied. Where an international student succeeds in an appeal they will usually be given a standard letter by the Home Office, notifying them that they have 60 days to find another Tier 4 sponsor or leave the UK. This approach is riddled with unfairness, as NUS has pointed out since the scandal erupted.

For example, the Immigration Rules require an international student applying to the Home Office for permission to study at a new educational institution to have valid leave to remain at the date of their application *and* to make their application within 28 days of the course start date. It will be all but impossible, therefore, for student receiving a '60 day letter' in any month other than August to meet the necessary requirements, given the fact that most courses start in around the middle or end of September.

Further, it is unlikely that a student simply wishing to complete the final year or semester of the course that they were prevented from completing (and are likely already to have paid for) will succeed in this aim. Tier 4 institutions have a limited number 'Confirmation of Acceptance for Studies' to offer to international students each year and fees paid by international students are vital income. It is unrealistic to expect institutions to offer valuable Confirmation of Acceptance for Studies to students who may just need to complete a single semester.

In addition, any students needing to start their courses from scratch will also often encounter problems arising from the '5 year cap' which is the maximum period of time international students are allowed to study in the UK at degree level, also specified in the Immigration Rules. The rule operates to include all leave to remain granted to study, whether or not the student was studying for that period.

What about those who do not have cases pending in the Court of Appeal?

The "*difficulty and complexity of the law in this area*" - as it was put in the *Ahsan* judgment (paragraph 129) - is illustrated by the fact that the Home Office has still not adopted a consistent approach in these cases.

NUS has serious concerns about the fate of those who do not have cases on hold in the Court of Appeal (this is generally because their cases were dismissed at an earlier stage). The Home Office appears to be treating these cases differently and it is not applying the spirit of the *Ahsan* judgment. NUS is aware, for example, of some students who unsuccessfully attempted to obtain an in-country appeal in 2015 and 2016 who have approached the Home Office again following *Ahsan* only to be told that their cases will not be looked at again.

NUS is also extremely concerned about those who do not have legal representation and who are attempting to navigate the labyrinthine legal system themselves. For example, NUS is aware of a case where a student challenged a Home Office refusal by bringing a claim for judicial review, with the Home Office subsequently agreeing that it would reconsider its decision. In normal circumstances in judicial review claims, the loser (the Home Office) should pay the legal costs of the winner (the student). Although the student was not represented by solicitors, he had paid court fees and for legal submissions from a barrister. However, he was not informed that his legal fees ought to be paid and the order did not include provision for any payment to him, thereby unfairly depriving him of several hundreds of pounds.

6. What happened? Evidence in the public domain and findings of the Courts and the Immigration Tribunal

Since the scandal broke in 2014 there have been many legal cases where evidence has been produced and findings have been made by judges. Evidence has also been produced in connection with the Home Affairs Select Committee Inquiry. As a result, the factual picture has moved on significantly since our last report.

Voice clips

ETS has begun providing voice clips to individuals. NUS understands that in most instances the voice on the clips does not belong to the individual. This has led to the investigation of other avenues which might have resulted in a mismatch.

Voice recognition expert evidence

As indicated in our 2016 written submissions, NUS obtained a report from a forensic speech and acoustics consultant, Dr Philip Harrison of JP French Associates to examine what was known of the biometric voice analysis conducted by ETS. Dr Harrison considered the Home Office's explanation of ETS' processes and determined that the 'false positive' rate could be as high as 20% (false positives being those who were incorrectly implicated as cheats by the ETS voice testing process).

In response, the Home Office obtained a report, from Professor French, also of JP French Associates. Professor French was provided with additional information that was not available to Dr Harrison and he concluded, with the benefit of that additional information, that the rate of false positives would be relatively modest at around 1%.

However, since then important questions have been raised regarding the 'chain of custody' of the test data. Several of these questions remain unanswered. The TOEIC testing processes comprise a number of different events (over the course of two separate test dates), including: registration, sitting the test (in the speaking element, this involved speaking into a microphone at a computer terminal), uploading of the responses by the test centre employees in the UK to ETS in the US, downloading of the responses by ETS in the US onto its server for scoring and production of certificates.

In addition, there is the matter of storage of the test data by ETS in the US and then the production of the 6 short clips that were analysed by ETS in the US at the request of the Home Office in 2014. Subsequently, ETS provided results to the Home Office in the form of several spreadsheets, and finally the Home Office collated the ETS spreadsheets and added further biographical information from their own records to produce the searchable 'lookup tool' that is referred to in many cases.

Consequently, the voice recognition evidence is now of limited importance and the issues relating to IT have become more prominent. Importantly, this has been recognised by the Home Office whose leading counsel said in the Court of Appeal (in the *Majumder and Qadir* appeal) on 25 October 2016 that the voice recognition issues had 'fallen away' and that the IT issues were key.

IT expert evidence

Reports were prepared by IT experts in three cases heard together over several days in the first week of August 2016, by Mr Justice McCloskey, the President of the Upper Tribunal.

In each of the three cases, the voice clips had been obtained from ETS and in each case the voice did not belong to the individual. On receipt of the voice clips further investigations were conducted by the lawyers acting for the individuals. At the request of the lawyers, the Tribunal ordered ETS and the Home Office to produce materials such as ETS' testing processes manuals, test questions,

answer sheets, attendance sheets, audit reports relating to the test centres and details of the Home Office's investigations into the test centres in question.

The Home Office instructed Richard Heighway of Kroll Ontrack and the individuals instructed Professor Peter Sommer and Christopher Stanbury, all experts in IT. The reports were prepared in June and July 2016.

In a joint report[7] the experts agreed that in addition to the 'impersonation' (or proxy) explanation, there were several possible means by which an individual may have been wrongly implicated, including: the use of remote control software in test centres; replacement of files by test centre employees before uploading to ETS; and the use of hidden rooms where proxies sat the tests and unbeknownst to some students their computer was not in fact recording their responses.

The experts highlighted the fact that in each and every instance of fraud, the test centre staff were involved, yet materials relied upon by ETS and the Home Office in implicating students was provided by those criminal test centre employees. Serious questions arise as to the extent to which that material can be relied upon.

After judgment had been given in the case of *Mohibullah* Professor Sommer prepared a submission[8] to the Home Affairs Select Committee of Inquiry (dated 30 December 2016), which summarised the findings of the joint report as follows:

> *"We concluded that the controls around the processes of registering applicants on to the computer system used for testing and the ways in which records of results were combined were unsatisfactory and inadequate. We had particular concerns for circumstances in which local testing centres might decide to falsify results for the benefit of applicants who had paid additional fees for them to do so. We identified a number of routes by which this could happen. We agreed that in any one testing session there could be a mix of genuine applicants and those who were paying for fraudulent results.*
>
> *Looking at the records supplied by ETS to the Home Office in relation to the cases we concluded that there was an absence of cross-checking facilities to identify circumstances in which voice tests were mis-ascribed to individuals.*
>
> ***It seems reasonable to conclude that the 'ETS lists' are not a reliable indicator of whether or not a student in fact cheated."***

[7] See https://www.nus.org.uk/en/who-we-are/how-we-work/international-students/

[8] http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/home-affairs-committee/english-language-testing/written/44911.pdf

7. Observations on the present position

The Home Office's approach to the evidence: a lack of inquiry

The allegations against individuals are based upon the *absence* of their voice on the clips that were analysed by ETS (and in its place, the presence of a voice which appeared more than once across ETS' database of voice clips – and so assumed by ETS to belong to a proxy).

To the knowledge of NUS there is no *positive* evidence against the vast majority of the students accused of using proxies. Yet the Home Office has proceeded upon the assumption that the absence of a person's voice on the clips is conclusive evidence that they cheated (for example, in his 6 May 2016 letter[9] to the Home Affairs Select Committee, James Brokenshire, the then Immigration Minister equated 'invalid' with "*clear evidence of cheating*", Q.58).

The Home Office has had the IT evidence in its possession for almost two years. Yet instead of reviewing its position the Home Office has expressed its apparent frustration that accused students are investigating other lines of inquiry. For example, in his 17 August 2016 letter[10] to the Home Affairs Select Committee from Mike Wells (COO UKVI) said:

> *"… it is also worth noting that when voice recordings have been provided and … it is not that of the alleged test taker this has not settled matters but led to other claims about the evidence".* (Q.106).

Unlike the implicated students, it seems that the Home Office is not concerned to find out what actually happened.

Students' access to evidence

It has been extremely difficult for individuals to obtain information and evidence from ETS and the Home Office. To the knowledge of NUS the first voice clips (i.e. the short audio files that were subject to testing by ETS in 2014) were released by ETS to solicitors acting on behalf of students in 2015 and 2016 (in the three linked cases referred to above). Prior to this ETS resisted providing voice clips. The President of the Upper Tribunal commented in *Majumder and Qadir* (paragraph 63(vii)):[11]

> *"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".*

Subsequently, it appears that ETS have begun to provide voice clips more readily, but we understand that they only provide the clips to students via their solicitors (and not to unrepresented students). NUS is also aware that ETS' lawyers have referred to an agreement with the Home Office's lawyers (Government Legal Department) that it will provide copies of the voice clips only where the Home Office consents. There is no legal basis for requiring such and the official Home Office's position is that individuals should approach ETS for the voice clips (e.g. 17 August 2016 letter, Q. 106).

NUS understands also that ETS has not released the full-length speaking test recordings to any individual, and that ETS generally refuses requests for additional materials (for example, attendance lists, score sheets and audit reports). In *Mohibullah* (paragraph 19) the President of the Upper Tribunal explained ETS' reticence on "*self-incrimination grounds*". NUS is aware that

[9] http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/home-affairs-committee/english-language-testing/written/33662.pdf

[10] http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/home-affairs-committee/english-language-testing/written/36543.pdf

[11] *SM and Qadir v Secretary of State for the Home Department* (ETS – Evidence – Burden of Proof) [2016] UKUT 00229 (IAC) https://tribunalsdecisions.service.gov.uk/utiac/2016-ukut-229 (see paragraphs 63-65)

ETS has relied upon this ongoing criminal investigation as being a reason not to provide materials on request by solicitors representing students.

It is not clear whether ETS in fact remains under criminal investigation or indeed whether that is good reason to withhold the materials sought by students. Mr Brokenshire's 21 June 2016 letter[12] refers to an investigation against ETS having commenced on 7 May 2014 that being ongoing (Qs. 80 and C1). There is also reference in the 17 August 2016 letter (Q. 100) to the Home Office having conducted "*extensive criminal investigations*" resulting in "*115 organisers (college directors, test centre administrators, agents and proxy test takers) having been arrested and or interviewed*". However, the falsely accused students continue to scrabble around for potentially vindicatory evidence. This is not a fair process.

In *Mohibullah* ETS and the Home Office were ordered to provide additional materials by the President of the Upper Tribunal as a result of persistent and detailed applications made for the evidence by Mr Mohibullah's legal team. The evidence provided was helpful to Mr Mohibullah's case. Mr Mohibullah was lucky to have the benefit of Legal Aid to bring his application for judicial review as the costs of making requests for disclosure and applications against the Home Office and ETS' lawyers, and then arguing them before the Tribunal, was significant. It is simply not feasible for most individuals to do so.

Cherry picking evidence

The Home Office submitted written evidence to the Home Affairs Select Committee on 17 August 2016 and 15 December 2016[13] (Mike Wells and Robert Goodwill MP respectively). Importantly, the written evidence post-dated the IT expert reports referred to above, and the joint expert report of 26 July 2016. It is of serious concern to NUS that the Home Office has ignored the expert reports of Professor Sommer and Christopher Stanbury, and the joint report of all three experts (including Mr Heighway of Kroll Ontrack) in its evidence to the Home Affairs Select Committee.

It is also of concern that the IT expert evidence has not been referred to in legal cases where students and others are challenging allegations of fraud, including in judicial review cases where both sides have a 'duty of candour' to disclose relevant material, whether helpful or unhelpful to their own case. This duty would extend to materials relating to investigations of test centres where the student claimant sat their tests.

Holes in the evidence

There appears to be an unwillingness on the part of the Home Office to investigate all available lines of inquiry: the Home Office seemingly considers it 'job done', having taken immigration action against 'the cheats'.

However, there is a great deal of missing information which is extremely important to those who have been wrongly accused and which could assist them to demonstrate their innocence. The vast majority of the missing information is in the control of either the Home Office or ETS. Our lawyers have sought to obtain answers to some of these questions. For example, requests were submitted to the Home Office last summer under the Freedom of Information Act 2000 but they were all rejected.[14] Further, ETS' solicitors have rejected requests for materials other than the voice clips.[15]

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[12] http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/home-affairs-committee/english-language-testing/written/36541.pdf

[13] http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/home-affairs-committee/english-language-testing/written/44492.pdf

[14] FOIA correspondence See https://www.nus.org.uk/en/who-we-are/how-we-work/international-students/

[15] Jones Day correspondence See https://www.nus.org.uk/en/who-we-are/how-we-work/international-students/

The missing evidence and unpursued lines of inquiry include the following:

1. As referred to above on page 14, NUS understands that ETS has not released the full-length speaking test recordings to any individual, and that ETS refuses requests for additional materials (for example, attendance lists, score sheets and audit reports). It has only provided this evidence when required to by a Court Order.

2. NUS understands that due to delay and inaction on the part of the Home Office an extremely limited number of computers were seized from a small number of test centres, and no CCTV footage was recovered at all. This is a serious impediment to wrongly accused individuals as the computers are likely to have contained information that would assist them to demonstrate their innocence. In his 17 August 2016 letter Mr Wells said (Q.82, and see Q.84) *"whilst there have been suggestions of other methods of fraud [other than impersonation], no evidence has been uncovered during the course of the criminal investigation".* This is hardly surprising as the key evidence which would have uncovered other methods of fraud was not gathered.

3. It is not accurate to say, as Mr Wells did in his 17 August 2016 submission (Q.83), that the metadata attached to the voice clips does not contain any information regarding when the clips were recorded. To the knowledge of NUS ETS has provided *no* files containing metadata. Where voice clips have been provided they are not in the original format and no metadata is associated with those files. This is not to say that the metadata does not exist in respect of the original files in their original format; it is almost certain that there is metadata associated with the recordings that are stored by ETS in the US.

4. It is not accurate to say, as Mr Wells did in his 17 August 2016 submission (Q.84), that the recordings "*were submitted back to ETS at the end of the speaking tests*". It is correct that ETS procedures required the recordings to be submitted to ETS at the end of the test, but this is one of the matters of concern raised by the IT experts: there is some evidence that delays were created which could have been used by test centre staff to tamper with or replace data which was then uploaded (see joint expert report, page 208).

5. Disclosure ordered by the Upper Tribunal in *Mohibullah* revealed that the computer room at the test centre (Synergy College) could not have physically accommodated the number of tests that were said to be sat that day (the room capacity was around a maximum of 38 but the Home Office's 'lookup tool' showed more than 71 results in the testing session that Mr Mohibullah attended). This strongly indicates a method of fraud other than impersonation by a proxy. Mr Mohibullah's legal team raised this anomaly at the hearing in August 2016 but NUS understands that there has been no follow-up by the Home Office.

6. In *Mohibullah* two audit reports were provided documenting audits carried out by ETS of Synergy College on 15 May 2012 and 16 January 2013. The earlier audit report recorded that *"[no test takers] had their ID except some people who came to see me at the end of the test. I couldn't check the other people's ID because they left without notice"* and that the test takers were "*too close they could see each other's screens"*. It concluded that he had *"doubt about this centre because they let the people leave without telling me"*. The January 2013 audit recorded *"all test takers in the room were proxy test takers with the passports of real the test takers with them"*. ETS terminated the agreement with Synergy following the January 2013 audit. It is not clear what, if any, action was taken following the May 2012 audit. It is also not clear whether ETS informed the Home Office of the January 2013 audit findings. It is possible that other audit reports contain information that might assist students to demonstrate their innocence.

Inequality of arms

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. They have not been provided with potentially relevant information which might assist their case and in most cases they are not entitled to free legal assistance (there is Legal Aid for judicial review subject to the student having very low means, but no Legal Aid for immigration appeals).

The inequality of arms is compounded by the fact that the Home Office is effectively investigating itself and seemingly accepts whatever ETS says without question. Yet the Home Office is not impartial: it has an interest to cover its back (and not open itself up to complaints about its earlier actions in this scandal) and also to be seen to be taking a hard line on 'the cheats', in particular given the rhetoric following the scandal in 2014.

Judicial criticism of the Home Office

It is not just NUS that has raised concerns about the approach of the Home Office in these cases. There have been many legal challenges and some serious criticisms of the Home Office's response to the TOEIC scandal, including for example:

- Criticism of a senior civil servant who gave evidence in the Upper Tribunal about the evidence against students;[16]
- Criticism of the evidence of a senior civil servant who was questioned about whether a student's educational establishment had been coerced into withdrawing the student from his course;[17]
- Criticism of the deprivation from a student of his right of appeal "*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*";[18]
- Criticism of the failure to comply with the duty of candour in judicial review.[19]

In NUS' view this all underscores the urgent need for an independent investigation.

[16] *SM and Qadir v Secretary of State for the Home Department* (see paragraphs 63-65)

[17] *Mohibullah* (fn. iv) (paragraphs 27-31)

[18] Ibid (paragraph 73)

[19] *R (on the application of Saha and Another) v Secretary of State for the Home Department* (Secretary of State's duty of candour) [2017] UKUT 17 https://tribunalsdecisions.service.gov.uk/utiac/2017-ukut-17 (paragraphs 45-51)

8. What next? NUS' Recommendations

1. **NUS calls for an independent investigation into the scandal including: following up the unpursued lines of inquiry, recommending appropriate outcomes for successful students and making recommendations for redress**

Lives have been ruined and there are very many unanswered questions before there can be any certainty about what actually happened. On page 16 above we have listed some of the missing evidence that is impeding the efforts of wrongly accused students to prove their innocence. There is very likely more.

Some affected students are still without their voice clips and no students have received the full recordings of their speaking tests. Most students are unable to access potentially valuable materials obtained by or on behalf of the Home Office. Further, ETS has valuable information which it refuses to provide, unless forced to do so by a judge.

There are affected individuals at all levels of the Court and Tribunal processes, some with representation and some without. NUS is concerned that a fair process should be adopted for successful students. We have explained on page 11 above why the standard outcome (the '60 day letter') will not provide a fair resolution. It is our view that successful students should be given a period of leave to remain, outside of the restraints of the usual Tier 4 system, to enable them to complete their studies, as well as access to a scheme for financial redress.

It is vitally important that the work begun by the Home Affairs Select Committee is followed through to its conclusion, whether by the Committee itself, the Parliamentary Commissioner for Standards or an Independent Inquiry.

2. **NUS asks that individuals seeking to prove their innocence be granted access to Legal Aid or a special legal assistance scheme for immigration advice and representation in the Immigration Tribunal**

Affected individuals will require support from lawyers to prepare their cases, whether appeals or judicial reviews. Whilst there is Legal Aid for judicial review there is no Legal Aid for immigration appeals and urgent steps must be taken to provide the necessary access to appropriate professional advice and representation.

3. **NUS recommends that in-country appeals are reinstated for international students**

In 2015 the Home Office has removed rights of appeal altogether from international students. This is in the context of an overall 50% success rate in appeals in the Immigration Tribunal, which demonstrates the extremely poor quality of many Home Office decisions. A 50:50 chance of a lawful decision and no access to a judicial determination is pitiful and an embarrassment to our reputation around the world. It is absolutely clear that immigration appeals are a vital safeguard and they must be reinstated for Tier 4 students.

4. **NUS recommends a root and branch review of the Tier 4 sponsorship system including an investigation of the effectiveness of complaints procedures and the OIA complaints scheme**

International students spend thousands of pounds in the UK and greatly enhance our education system. However, they are viewed with suspicion from the moment they arrive here and they have very little protection when things go wrong, whether that is a dispute with their Tier 4 sponsor or with the Home office. It is extremely rare for the Home Office to allow any flexibility in relation to the labyrinthine Tier 4 rules (the guidance alone is 98 pages), even where the rules produce obviously unfair results.

There is an enormous imbalance of power between students and the Home Office/Tier 4 sponsors. Add into the mix the fact that colleges and universities are now pseudo border guards, and are themselves at the whim of the Home Office who have control of their sponsorship licences, and the balance is yet further skewed against students.

In many (if not all) cases involving international students, the Office of the Independent Adjudicator (OIA) does not provide an effective remedy in disputes with universities because the OIA has no powers in relation to immigration laws (and it cannot look at disputes with private colleges). Where international students are involved in a dispute with their Tier 4 sponsor, the Tier 4 sponsor can circumvent the complaints process by withdrawing sponsorship and notifying the Home Office. This sets in train an immigration process, which usually leads to the student being required to leave the UK. By the time the OIA comes to make a decision the student will usually have left the UK and will be in no position to be reinstated onto his or her course, even if their complaint is subsequently upheld.

The present system puts international students at a very serious disadvantage as compared with their Tier 4 sponsor and the Home Office. NUS calls for a system whereby the immigration process can be put on hold to enable the usual complaints procedures to be followed.

5. NUS recommends that international students have access to a protection scheme where their Tier 4 sponsor loses its licence

NUS has heard regularly of extreme hardship caused to students whose Tier 4 sponsor has ceased operating. NUS is aware of students who have had the misfortune of studying at more than one institution whose licence has been revoked by the Home Office, in each case losing significant sums of money and wasting valuable time which all counts towards the period they are permitted to study in the UK (such as the '5 year cap' on studying at degree level).

This is extremely unfair: not all international students who come to the UK are wealthy; often their parents will spend life savings to send them here to obtain a degree and often the lower fees offered by private institutions make them an attractive option. However, unbeknownst to the students and their parents private institutions have proven to be a risky option as they are far more likely to have their licences revoked than universities.

NUS recommends the creation of a protection scheme that includes:

- A hardship fund to support students in transferring to a new institution;
- Independent advice and guidance for students wishing to change institution;
- A guarantee that students already studying can continue their course until the end of their academic year or that they will be assisted to transfer mid-year to another similar course;
- A guarantee that any deposit or fee paid by the student for the coming academic year will be returned in full if the student decides not to continue at that institution or if the institution loses its sponsorship licence or otherwise closes.

6. NUS calls for international students to be removed from net migration targets

For the first time in 30 years the numbers of international student coming to the UK is in decline, at a time when the international education market is experiencing growth of around 8% per annum.[20] A report from Exporting Education UK and Parthenon – EY *"Supporting international education in the UK"* published in 2016, estimated that the UK was losing as much as £9m because of declining numbers of international students, with approaches to the UK student visa system

[20] http://www.exeduk.com/resources/publications/supporting-international-education-in-the-uk (Accessed 25 January 2018)

being a key barrier. One of the key growth areas in international recruitment are below-degree pathways and vocational training and it is precisely these programmes that have been hardest hit. The EdExUK report calls for a strong, consistent and clear offer for international students if government ambitions to increase education exports to £30Bn by 2020 are to be realised.

Whilst declining numbers is due to a complex set of factors, there is no doubt to us that there is an impact from the current UK immigration policy. Student recruitment has formed part of the drive to reduce immigration to the "tens of thousands" and has therefore formed part of the "hostile environment" policy pursued by the current Government. For EU students there is uncertainty as to their rights to study and work in a post Brexit UK. For non- EEA students these changes have made it harder for genuine students to come to study in the UK and when here to have an equal student experience to that of home students**.** An NUSUK survey in 2014 found that:

51% of respondents said that they did not feel the UK government was welcoming to international students. A further 38% would not recommend studying in the UK to a friend or family member. Many of the responses to the survey referred to the perceived instability in the UK education system, with regular changes to the Immigration Rules and the sponsorship system being identified as sources of concern.

In 2012-13, there was a 25% reduction in the number of Indian students recruited to the UK compared with 2011-12, with many choosing Canada and Australia instead. NUS believes that keeping our universities competitive is intrinsically linked to keeping the UK competitive. Highly effective graduates who have experience of living and working abroad are much prized by employers. Making it easier for students to do this can only benefit the UK in the future as our country forges a new set of global relationships and partnerships. By the same token encouraging and not deterring international students from studying within the UK would seem to be a better strategy to develop strong international partnerships for the future. The Higher Education Policy Institute (HEPI) report on "*The costs and benefits of international students by parliamentary constituency"* demonstrates that the total net impact of international students on the UK economy was estimated to be £20.3bn, with £4.06bn of this net impact generated by EU-domiciled students, and £16.3bn of net impact generated by non-EU domiciled students.[21]

It is clear that the way in which the UK welcomes and monitors international students from arrival to departure will have a profound effect on future international research projects, educational and trade relationships. To enhance recruitment NUS believes it is critical that International students should not form part of the calculation for **net migration targets.** We take the view that there should be no overall target to reduce immigration based on net migration targets and that it would be a more helpful policy to calculate the net migration of international students separately as the tertiary education sector relies on growth in these areas and it makes sense to track it separately. Outside of universities, the arrival and departure of international students is very difficult to monitor as the International Passenger Survey is not aimed at their arrival and departure periods and no one, other than HESA, collects a central database of enrolments and graduations.

Removing students from net migration targets, as they have done in Australia, will help to restore the UK as a leading destination for international study, as would re-instating the post study work visa, a streamlined easy to understand immigration regime with rules that don't reduce the overall experience of UKHE and the country itself, reducing costs and making re-payment easier.

In particular programmes for international students to study English should be adequately supported to ensure that international students can fully engage in UK study programmes and can

[21] http://www.hepi.ac.uk/2018/01/11/new-figures-show-international-students-worth-22-7-billion-uk-cost-2-3-billion-net-gain-31-million-per-constituency-310-per-uk-resident/ (Accessed 2 February 2018)

be empowered to integrate within local communities. Allowing students to study academic subjects alongside ESOL will broaden their learning and application of language.

The situation that has arisen with the TOEIC scandal, and the evidence presented in this report is, we believe, part of an overall tone of some government announcements concerning migration and linking it to international study, which have the impact of making the UK appear to not be a welcoming and supportive environment in which to study. We would suggest that the atmosphere in the post referendum environment has exacerbated such feelings. NUSUK suggests that there should be a clear government international education strategy that prevents a conflation between government approaches to abuse of the migration system, and international students who come to the UK through the Tier 4 or short-term study system. Currently there is a poor balance in the government's approach. Without a clear strategy to support international education, messages will continue to be negative.

We all benefit from the contribution made by international student to academic life in the UK; we also, of course, benefit from the large fees that universities can charge, but ultimately, we benefit in terms of our international reputation and the potential this carries for future partnerships. Following the Windrush revelations, it is hoped that the Home Office and other government departments will reflect on how its messages are received and will bear in mind the potentially negative impact on our future economy and society. Our campuses, our courses, our communal life is made considerably more relevant and positive through the experience of sharing it with people from all over the world.