Neutral Citation Number: [2017] EWCA Civ 2009

Case No: C2/2016/3726
C8/2016/2333
C8/2016/1072
C8/2016/2209

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM the Upper Tribunal (Immigration and Asylum Chamber)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/12/2017

Before:

LORD JUSTICE UNDERHILL
LORD JUSTICE FLOYD
and
LORD JUSTICE IRWIN

- -

Between:

NABEEL AHSAN — **Appellant**

- and -

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT **Respondent**

HARWINDER KAUR **Appellant**
- and -
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT **Respondent**

RAJWANT KAUR **Appellant**
- and -
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT **Respondent**

ATAULLAH FARUK **Appellant**
- and -
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT **Respondent**

- -
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Mr Stephen Knafler QC and **Mr Greg Ó Ceallaigh** (instructed by **M & K Solicitors**) for **Nabeel Ahsan**
Mr Stephen Knafler QC and **Mr Rowan Pennington Benton** (instructed by **Farani Javid Taylor Solicitors**) for **Harwinder Kaur**
Mr Michael Biggs (instructed by **Mayfair Solicitors**) for **Rajwant Kaur**
Mr Zane Malik (instructed by **Universal Solicitors**) for **Ataullah Faruk**
Lisa Giovannetti QC and **Colin Thomann** (instructed by **the Treasury Solicitor**) for the **Respondent**

Hearing dates: 19-21 September 2017

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Approved Judgment

Lord Justice Underhill

INTRODUCTION

1. The background to the four appeals before us can be summarised, in bare outline, as follows. The Immigration Rules require applicants for leave to remain in some circumstances to pass a test of proficiency in written and spoken English. The principal form of approved test is the "Test of English for International Communication" ("TOEIC") provided by a US business called Educational Testing Service ("ETS"). ETS's TOEIC tests have been available at a large number of test centres in Britain. The spoken English part of the test involves the candidate being recorded reading a text, with the recording then being sent to an ETS assessor for marking. In February 2014 the BBC *Panorama* programme revealed that there was widespread cheating at a number of centres, in particular – though not only – by the use of proxies to take the spoken English part of the test. In response to the scandal, ETS at the request of the Home Office employed voice recognition software to go back over the recordings at the centres in question and try to identify cases in which it appeared that the same person had spoken in multiple tests and could thus be assumed to be a professional proxy. In reliance on ETS's findings 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.

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.

3. All four Appellants are the subject of decisions taken by the Secretary of State on the basis (or, in one case, partly on the basis) that they had cheated in TOEIC tests. All of them deny that allegation. The primary question raised by these appeals is whether they can challenge the Secretary of State's decision (whether by judicial review or appeal) from within the UK or whether they can only do so by an appeal brought after they have left the country – a so-called "out-of-country appeal". However the route by which that question arises is not the same in all four cases. They fall into two categories.

(A) *The Section 10 cases*. Harwinder Kaur ("HK"), Rajwant Kaur ("RK"), and Ataullah Faruk ("AF")[1] – who are from India, Pakistan and Bangladesh respectively – all came to this country on student visas and were subsequently granted extensions of their leave to remain. Each has been served with a notice that they are liable to removal under section 10 of the Immigration and Asylum Act 1999 (so-called "administrative removal") on the basis that they used deception in obtaining those extensions by using a proxy for the spoken part of their TOEIC tests. Each denies doing so and has sought permission from the UT to apply for judicial review of the section 10 decision. Permission was in each case refused on the basis that they have an appropriate alternative remedy in the form of an out-of-country appeal; but permission has been given to appeal to this Court against that refusal. The primary issue raised by the appeals is whether an out-of-country appeal is indeed an appropriate remedy in their cases and others like them. They rely in particular on the recent decision of the Supreme Court in *R (Kiarie and Byndloss) v Secretary of State for the Home Department* [2017] UKSC 42, [2017] 1 WLR 2380, in which it was held that an out-of-country appeal was not a fair or effective procedure in the (different) context of challenging a deportation order.

(B) *Mr Ahsan's case.* Nabeel Ahsan ("NA") is a national of Pakistan who made an application for leave to remain on human rights grounds, which was refused by the Secretary of State partly on the basis that he had cheated in a TOEIC test. Other things being equal, he would be entitled to an in-country appeal against that decision; but the Secretary of State has certified that his human rights claim is clearly unfounded, which has the effect that any appeal can only be pursued from outside the UK. Permission to apply for judicial review of the certification has been refused by the UT; but permission has been given to appeal to this Court.

4. HK and NA were represented before us by Mr Stephen Knafler QC, leading Mr Rowan Pennington-Benton in HK's case and Mr Greg Ó Ceallaigh in NA's case. RK was represented by Mr Michael Biggs and AF by Mr Zane Malik. The Secretary of State was represented in all four cases by Ms Lisa Giovannetti QC, leading Mr Colin Thomann. The appeals were expedited because of the number of pending cases potentially affected by them, and that led to some regrettable hiccups in the preparation of the papers; but the quality of the oral submissions from all counsel has been very high. For convenience, and with apologies to their respective juniors, I will sometimes in this judgment refer to Ms Giovannetti's and Mr Knafler's skeleton arguments and written submissions as if they were their sole authors, which I am sure is far from being the case.

5. I will deal separately with the two categories of appeal identified at para. 3 above, but it will be convenient by way of preliminary (1) to set out the relevant statutory provisions, which to some extent overlap between the two, and (2) to give a short overview of the TOEIC litigation to date.

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[1] I refer to the Appellants by their initials without any disrespect and as a matter of convenience only, particularly because two of them are Sikh women and so both have the same surname.

(1) THE STATUTORY PROVISIONS

6. Both section 10 of the 1999 Act and the appeal regime relating to decisions made under it were replaced by changes introduced by the Immigration Act 2014. There are complicated commencement and transitional provisions under which the relevant provisions of the Act came into force at different dates, depending on the circumstances, between 20 October 2014 and 6 April 2015. All three of the section 10 appeals fall to be determined primarily by reference to the old regime; but for reasons which will appear we will have to consider also some aspects of the position under the 2014 Act regime (which remains in force today).

The Pre-2014 Act Regime

Section 10 of the 1999 Act

7. The version of section 10 of the 1999 Act which was in force immediately prior to the 2014 Act read (so far as material) as follows:

> "(1) A person who is not a British citizen may be removed from the United Kingdom, in accordance with directions given by an immigration officer, if—
>
> (a) having only a limited leave to enter or remain, he does not observe a condition attached to the leave or remains beyond the time limited by the leave;
>
> (b) he uses deception in seeking (whether successfully or not) leave to remain;
>
> (ba) his indefinite leave to enter or remain has been revoked under section 76(3) of the Nationality, Immigration and Asylum Act 2002 (person ceasing to be refugee) …; or
>
> (c) directions have been given for the removal, under this section, of a person to whose family he belongs.
>
> (2)-(7) …
>
> (8) When a person is notified that a decision has been made to remove him in accordance with this section, the notification invalidates any leave to enter or remain in the United Kingdom previously given to him."

8. We are in these appeals concerned only with head (b) under section 10 (1) – since submitting a TOEIC test result obtained by cheating plainly constitutes deception – but I have set out the other heads because it should be borne in mind that the issues in these appeals do not affect the entirety of the operation of section 10: head (a) in particular was very commonly employed against overstayers and persons in breach of the conditions of their leave (typically restrictions on the right to work) in circumstances that did not involve any element of deception.

9. The effect of a decision under section 10 was, as appears from sub-section (8), that the subject and any dependants no longer had any leave to remain in the UK. The absence of leave to remain has a number of consequences, most notably that any one remaining without leave

(a) is committing a criminal offence – see section 24 (1) (b) of the Immigration Act 1971;

(b) is not entitled to work;

(c) (with effect from the coming into force of Part 3 of the Immigration Act 2014) is subject to the restrictions imposed by that Part as regards, in particular, the right to occupy premises under a residential tenancy agreement, access to NHS services, the right to open a current account and the right to a driving licence.

Appeal Rights

10. Section 82 (1) of the Nationality, Immigration and Asylum Act 2002 provided that:

> "Where an immigration decision is made in respect of a person he may appeal to the Tribunal [i.e. the First-tier Tribunal]."

"Immigration decision" is defined in sub-section (2). It includes, at (g),

> "a decision that a person is to be removed from the United Kingdom by way of directions under section 10 (1) … (b) … of the Immigration and Asylum Act 1999".

11. Section 92 of the 2002 Act regulated the question whether an appellant was entitled to remain in the UK in order to exercise his or her right of appeal. The basic rule stated in sub-section (1) was that "a person may not appeal under section 82 (1) while he is in the United Kingdom unless his appeal is of a kind to which this section applies". The following sub-sections identified the types of appeal to which section 92 applied. These included some specified categories of immigration decision, which did not include appeals against a decision taken under section 10 (1) of the 1999 Act, and appeals arising in some other circumstances which are immaterial for our purposes. However, sub-section (4) read (so far as material):

> "This section also applies to an appeal against an immigration decision if the appellant—
>
> (a) has made … a human rights claim … while in the United Kingdom, or
>
> (b) ..."

The term "human rights claim" was defined in section 113 (1) of the 2002 Act as

> "a claim made by a person to the Secretary of State at a place designated by the Secretary of State that to remove the person from or

> require him to leave the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 (c. 42) (public authority not to act contrary to Convention) as being incompatible with his Convention rights".

In *R (Nirula) v First-Tier Tribunal* [2012] EWCA Civ 1436, [2013] 1 WLR 1090, Longmore LJ described the purpose of section 92 (4) as being to provide an "orderly process" by which "the Secretary of State … [is given] … the opportunity to give a decision on any human rights claim before the appeal is determined so that her decision on that question can become part of any appeal" – see para. 17 of his judgment (p. 1096 C-D).

12. The effect of section 92 (4) was qualified by section 94 of the Act. Sub-sections (1) and (2) read as follows:

> "(1) This section applies to an appeal under section 82(1) where the appellant has made an asylum claim or a human rights claim (or both).
>
> (1A) …
>
> (2) A person may not bring an appeal to which this section applies in reliance on section 92(4)(a) if the Secretary of State certifies that the claim or claims mentioned in subsection (1) is or are clearly unfounded."

The upshot of sections 92 (4) and 94 (2) taken together was that a person in whose case a removal decision was made under section 10 (1) could only pursue his or her appeal from inside the UK if they had made a human rights claim and that claim had not been certified under section 94 (2) as clearly unfounded.

13. I should make two particular points about the operation of section 92 (4) which are relevant to the issues which I will have to consider later.

14. The first concerns the procedural element of a human rights "claim" for the purpose of section 113 and thus of section 92 (4). Although it appeared from her initial correspondence that the Secretary of State's position might be something different, Ms Giovannetti accepted before us that in order to fall within the terms of section 113 a "claim" does not require to be made in the form of a fee-paid application under the Immigration Rules. She made it clear that it is still the Secretary of State's position that a human rights claim ought to be made by a formal application, in the interests of orderly decision-making, and that priority may be given to claims so made; but she acknowledged that that was not a statutory requirement and she said that even if a claim was made in some other form a claimant would not be removed from the UK until it had been considered.

15. The second concerns the point at which a human rights claim has to have been made in order to attract the operation of section 92 (4). In the first instance decision in *Nirula* [2011] EWHC 3336 (Admin) (I have referred above to the decision in this Court) Mr Mark Ockelton, sitting as a deputy High Court Judge, held that, in order for section 92 (4) to apply, the human rights claim in question had to have been made

before the decision being appealed against was taken: see paras. 32-38 of his judgment. In this Court it was thought unnecessary to go further than holding that the claim had to have been made before the lodging of the appeal to the FTT: see paras. 17-22 of the judgment of Longmore LJ (pp. 1096-7). However in *Munir v Secretary of State for the Home Department* JR/4207/2015 (unreported 25.11.16) the UT followed the decision of Mr Ockelton: see paras. 39-51 of the judgment of Judge Kekic. All parties proceeded before us on the basis that those decisions were correct.

The 2014 Act Regime

16. The new section 10 (1) of the 1999 Act is in wholly different terms from its predecessor. It provides simply that:

> "A person may be removed from the United Kingdom under the authority of the Secretary of State or an immigration officer if the person requires leave to enter or remain in the United Kingdom but does not have it."

17. So far as concerns rights of appeal, the new section 82 of the 2002 Act no longer specifies categories of appealable "immigration decision". Instead, sub-section (1) provides that:

> "A person ('P') may appeal to the Tribunal where—
>
> (a) the Secretary of State has decided to refuse a protection claim made by P,
>
> (b) the Secretary of State has decided to refuse a human rights claim made by P, or
>
> (c) the Secretary of State has decided to revoke P's protection status."

For present purposes we are concerned with (b): the definition of human rights claim in section 113 (1) is not materially altered. Those are the only appeal rights granted. There is thus no right of appeal against a removal decision as such, but only in so far as that decision involves the refusal of a human rights claim. I will refer to an appeal brought under head (b) of the new section 82 (1) as a human rights appeal.

18. The provisions governing where a human rights appeal can be exercised from are distributed between sections 92 and 94 of the amended 2002 Act. Section 92 (3) provides that an appeal against the refusal of a human rights claim must be brought from within the UK unless (so far as relevant) it has been certified under section 94 (1), in which case it must be brought from outside the UK. Section 94 (1) reads as follows:

> "The Secretary of State may certify a protection claim or human rights claim as clearly unfounded."

19. It is important to appreciate that the role that the human rights claim plays in determining whether an appeal may be brought in-country is quite different under the two regimes. Under the old regime the fact that a human rights claim has been made is the trigger which permits the appeal against the immigration decision to be brought

in-country (unless certified); but that decision remains the subject of the appeal. Under the new regime, by contrast, the *making* of a human rights claim is in itself of no significance; but if the claim is *refused* the refusal generates a right of appeal, which will be in-country (again, unless certified).

The Effect of a Finding of Deception

20. It was common ground before us that a finding of "deception" such as was made by the Secretary of State against the Appellants in these cases would prejudice their chances of obtaining leave to enter in the future, if and when they eventually left the UK, but there was initially some disagreement about the nature and extent of the prejudice. We were taken to paragraph 320 of the Immigration Rules, from which it is clear that the position is somewhat nuanced. I need not set out the full details. It is sufficient to say that where a person has previously used deception in order (broadly) to obtain leave there will be a mandatory ban on the grant of leave to enter or remain for a period of between one and ten years, the length of the period depending on whether they left the UK voluntarily and at their own expense. Even in circumstances which do not attract a mandatory ban, leave to enter or remain will "normally" not be granted where there has been such deception and there are aggravating circumstances. And, quite apart from the particular provisions of paragraph 320, the fact that an applicant has used deception will also be relevant in the assessment of the suitability criteria prescribed in Appendix FM.

21. More generally, it is self-evident that an official finding – albeit not made by a court or tribunal – that a person has cheated in the way alleged in these cases may become known to others, in which case it is likely to be a source of shame and to injure their reputation.

(2) THE TOEIC LITIGATION TO DATE

22. I shall refer at a later stage to decisions in the TOEIC litigation which directly address the issue of the availability of an in-country appeal. But that issue does not arise in every TOEIC case. In some the substantive question whether a person has cheated arises in the context of a challenge to a decision other than under section 10 of the 1999 Act and has to be resolved in-country, whether by appeal or judicial review. Some out-of-country appeals have also been brought. There have now been a number of such cases: we were referred, I think, to the decisions in all those which have been decided in the High Court or in the UT, though there have been others in the FTT. It is unnecessary to give a detailed account of what has happened in all these cases, but some of the arguments raised before us involve reference to some of them, and I should give a brief overview here.

23. The evidence supplied by the Secretary of State in the substantive TOEIC cases has developed over the course of the litigation. In the earlier cases she sought to rely essentially on (a) generic evidence, given by two Home Office officials, Rebecca Collings and Peter Millington, about the reports received from ETS identifying results as "invalid" or "questionable", and the methodology underlying those reports; and (b) the use of an "ETS Look Up Tool" to marry up those reports with the case of the individual appellant. These cases were not always well-prepared, and in some the look-up tool evidence was not provided at all, or was provided so late that it was not

admitted. In more recent cases, however, the Secretary of State has supplemented that evidence by a report from another Home Office official, Adam Sewell, who has analysed the test results from a number of test centres in London. On the basis of his evidence the Home Office case now is that certain centres were "fraud factories" and that all test results from those centres, generally or on certain dates, are bogus. The centres in question include Elizabeth College, which has also been the result of a criminal investigation, under the name Project Façade.

24. The evidence adduced by individual appellants in rebuttal will obviously vary from case to case. At a minimum they can be expected to give evidence that they did indeed attend the centre on the day recorded and took the spoken English test in person. But that may be supplemented by supporting evidence of various kinds: a frequent theme is that it is said to be demonstrable from other evidence that their spoken English was very good and that they thus had no motive to cheat.

25. One other development that I should mention is that it in due course became known that ETS has retained copies of the individual voice recordings which it has identified as showing the use of a proxy, and that a copy can be obtained (without charge) on application. This will allow the person concerned to listen for themselves to check if the recorded voice is their own. If they believe it is, they can seek confirmation from an independent expert: the Secretary of State's practice is to agree in such a case to the instruction of a joint expert. However, even where the voice appears to be someone else's that is not necessarily accepted by applicants/appellants as conclusive. There have been challenges to the accuracy of the system for storing and retrieving the relevant file; and it has been argued that even if a test centre submitted a batch of recordings made by a proxy that was done in its own interests and without the knowledge of the person taking the test.

26. Although there were some earlier decisions of the UT, the first to which I need refer is the decision of McCloskey P and UTJ Saini in *SM*[2] *and Qadir v Secretary of State for the Home Department* [2016] UKUT 229 (IAC), which was promulgated on 31 March 2016. The Secretary of State had cancelled the appellants' leave to remain on the basis that they had cheated in their TOEIC tests by the use of proxy test-takers. Those decisions attracted a right to an appeal in-country. The appellants' appeals failed in the FTT, but in both cases the FTT's decision was set aside and the decision fell to be re-made by the UT. 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

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2 SM's name was de-anonymised on the subsequent appeal to this Court (see below).

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".

27. On 29 June 2016 this Court gave judgment in two cases where the FTT had found in statutory appeals that the Secretary of State had failed to prove that the appellants had cheated and those decisions had been upheld in the UT – *Secretary of State for the Home Department v Shehzad and Chowdhury* [2016] EWCA Civ 615. The appeal in Mr Chowdhury's case (brought from out of country) was allowed because the FTT had wrongly held that the Secretary of State's evidence did not establish a *prima facie* case, and the appeal was remitted for a hearing to consider Mr Chowdhury's evidence in answer. (The question whether that should include oral evidence, and if so how that evidence could be given from abroad, was not raised.) The appeal in Mr Shehzad's case was allowed on jurisdictional grounds, although Beatson LJ, who gave the leading judgment, expressed doubt about whether in his case, unlike Mr Chowdhury's, the Secretary of State's evidence even raised a case to answer.

28. In the meantime the Secretary of State had appealed to this Court against the decision in *SM and Qadir*. On the eve of the hearing she sought to withdraw both appeals. The Court insisted on the hearing proceeding: see *Majumder and Qadir v Secretary of State for the Home Department* [2016] EWCA Civ 1167 (25 October 2016). The judgment of Beatson LJ gives a very helpful account of the state of the litigation at that date but I need not summarise it here. I need note only two points:

    (1) He endorsed the UT's observation that every TOEIC case was fact-sensitive: see para. 27.

    (2) He noted that the Secretary of State was in more recent cases seeking to add to and improve the quality of her generic evidence, and that one such case (*MA* – see below) had already been decided in the UT: see para. 28.

29. On 16 September 2016 the UT (McCloskey P and UTJ Rintoul) promulgated its judgment in *MA v Secretary of State for the Home Department* [2016] UKUT 450 (IAC). This was another statutory appeal where the decision of the FTT was set aside and fell to be re-made by the UT. The available evidence was fuller than in *SM and Qadir*. In particular, what was said by ETS to be the voice-file recording the test as taken by the appellant had been obtained, and it was agreed that the voice on it was not his. However, he challenged whether that file was indeed a recording of the test that he had taken, and there was evidence from no fewer than three experts exploring how the wrong file might have been supplied. The UT acknowledged (para. 47) that there were "enduring unanswered questions and uncertainties relating in particular to systems, processes and procedures concerning the TOEIC testing, the subsequent allocation of scores and the later conduct and activities of ETS". Accordingly, much still turned on the UT's assessment of the appellant's oral evidence. It found that evidence to be a fabrication and dismissed the appeal. It again emphasised, to quote from the judicially-drafted headnote, that "the question of whether a person engaged in fraud in procuring a TOEIC English language proficiency qualification will invariably be intrinsically fact sensitive". (I should also note, because Ms Giovannetti attached particular importance to the point, that in response to MA's argument that his

English was so good that he had no need to use a proxy the Tribunal observed that there were many reasons why persons whose English was good might nevertheless use a proxy: see para. 57 of its judgment.)

30. Two judicial review applications in TOEIC cases were heard by the UT along with *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) – but in both cases judgment was not given till later: in *Mohibullah* on 12 October 2016 and in *Saha* on 26 December 2016. Neither case required a decision on the substantive issue whether the applicant had cheated. However, in *Saha* the Secretary of State applied, after the conclusion of the main hearing, to adduce the evidence of Mr Sewell, and the application was granted on the basis that he attend a further hearing. Unfortunately at that hearing the appellants were unrepresented and Mr Sewell was not cross-examined. The Tribunal said, however, that it accepted his essential conclusion that none of the results from the sessions in which Mr Saha claimed to have taken his test could be considered genuine: see paras. 58-59.

31. We were referred to three first-instance decisions this year in judicial review proceedings, two in the High Court and one in the UT, in which the issue of whether the claimant/applicant had cheated was treated as a matter of precedent fact on which the lawfulness of the decision challenged turned and which accordingly had to be decided[3]. In the first – *Iqbal v Secretary of State for the Home Department* [2017] EWHC 79 (Admin) – the claimant succeeded, on the basis that the Secretary of State had, on the evidence adduced, failed to show even a *prima facie* case. In the second – *R (Abbas) v Secretary of State for the Home Department* [2017] EWHC 78 (Admin), [2017] 4 WLR 34 – William Davis J regarded the Secretary of State's evidence as sufficient to require an answer and found the claimant's oral evidence, on which he had been extensively cross-examined, to be "wholly unconvincing and at some points demonstrably false" – see para. 18. Accordingly he upheld the Secretary of State's case that the claimant had cheated. In the third – *Habib v Secretary of State for the Home Department*, promulgated on 22 March 2017[4] – the impugned test was taken at Elizabeth College, and the Secretary of State relied in particular on the Project Façade report and on Mr Sewell's report. It was common ground that the evidence raised a case to answer and UTJ Gleeson found that the applicant's oral evidence, which was riddled with implausibilities, was insufficient to shift the burden on him.

32. We were also referred to two recent decisions of UTJ Freeman in TOEIC cases – *Kaur v Secretary of State for the Home Department* and *Nawaz v Secretary of State for the Home Department* [2017] UKUT 00288 (IAC)[5] – but these were cases in which the issue was not whether the applicants had in fact cheated but whether the Secretary of State's belief that they had was rational, and I need not prolong this judgment further by summarising the reasoning in them.

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3 In two of the cases – *Abbas* and *Habib* – the decision was to revoke the claimant's/applicant's indefinite leave to remain. In the third, the decision was a refusal of leave to enter. Thus in none of them was the challenge to a decision under section 10.

4 Oddly, the decision in the form produced to us has no neutral citation number.

5 The former is reported as an attachment to the latter.

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.

A. THE SECTION 10 CASES

34. I will begin by setting out the case-law which gives rise to the issues in these three appeals – under head (1) the line of authorities which deals with the availability of judicial review in section 10 cases; and then, under head (2), *Kiarie and Byndloss*. I will then set out the facts and procedural histories of the three cases – head (3) – before proceeding to consider, under heads (4)-(7), the issues themselves.

(1) JUDICIAL REVIEW AND APPEALS: THE PREVIOUS CASE-LAW

35. It is trite law that judicial review is a remedy of last resort and that claimants will not normally be allowed to pursue it where an adequate alternative remedy is available. That principle has been applied in several cases in this Court in the context of attempts to seek judicial review of decisions under section 10 of the 1999 Act by claimants who object to having to leave the country in order to pursue an appeal.

36. The starting-point is *Secretary of State for the Home Department v Lim* [2007] EWCA Civ 773, which concerned the proposed administrative removal of a claimant who was alleged to have been found working in breach of a condition of his leave. At first instance Lloyd-Jones J granted him permission to challenge that decision by way of judicial review – [2006] EWHC 3004 (Admin). He held that the statutory right of appeal did not constitute an adequate alternative remedy because "an out-of-country appeal in which Mr Lim was unable to participate by giving evidence in person would not provide him with a fair hearing" (para. 47): in that connection he noted (para. 48) that it was "far from clear" whether he would be able to give evidence by video-link. Overall, such an appeal would not provide him with "fair, adequate or proportionate protection against the risk that the immigration officer had acted without jurisdiction" (para. 50).

37. This Court reversed that decision. The claimant submitted that the issue of whether he was in breach constituted a question of precedent fact which could properly be decided in the High Court, notwithstanding the existence of an appeal mechanism, in accordance with the decision of the House of Lords in *Khawaja v Home Secretary* [1984] 1 AC 74. Sedley LJ, who delivered the leading judgment, accepted that a finding of breach was a precedent fact, but he held that it did not follow that

"everything which s. 10 lays down as making removal permissible is justiciable without regard to the s. 84 appeal mechanism". He said, at para. 21 of his judgment, that it was impossible to take that approach "without disregarding the manifest purpose of s. 82 of the 2002 Act, since the effect would be that the right of appeal had effect only where the individual concerned chose not to raise his or her challenge by way of judicial review". He continued:

> "22. The only coherent solution, it seems to me, is to continue to regard every question arising under s.10 as in principle both appealable and reviewable …, but to calibrate the use of judicial review, through the exercise of judicial discretion, to the nature of the issue or issues. In this way – and, so far as I can see, in no other way – the High Court can remain loyal to what was decided in *Khawaja* by consistently retaining jurisdiction to determine the existence of preconditions of liability to removal, as well as other questions of law apt for the High Court's determination, but can also respect the policy of s.82 by declining to entertain challenges on issues more apt for the appeal mechanism, whatever its hardships.
>
> 23. …
>
> 24. This argument depends upon the well-established principle, not confined to the immigration field, to which I referred earlier in this judgment: that where a statutory channel of appeal exists, in the absence of special or exceptional factors the High Court will refuse in the exercise of its discretion to entertain an application for judicial review. …"

The earlier passage referred to at para. 24 is para. 13, where he had said:

> "It is well established, as the judge reminded himself, that judicial review is a remedy of last resort, so that where a suitable statutory appeal is available the court will exercise its discretion in all but exceptional cases by declining to entertain an application for judicial review: see *R v IRC ex parte Preston* [1985] AC 835, *R v Chief Constable of the Merseyside Police, ex parte Calveley* [1986] 1 QB 424, *R v Home Secretary, ex p Swati* [1986] 1 WLR 477, *R (Sivasubramanian) v Wandsworth County Court* [2003] 2 WLR 475."

Applying that approach, Sedley LJ held that nothing in the reasons given by Lloyd-Jones J was sufficient to support his conclusion that the case was exceptional: this was "precisely the kind of issue for which the legislation, for better or for worse, prescribed an out-of-country appeal" (see para. 27).

38. *Lim* was followed in this Court in *R (RK (Nepal)) v Secretary of State for the Home Department* [2009] EWCA Civ 359 and *R (Anwar) v Secretary of State for the Home Department* [2010] EWCA Civ 1279, [2011] 1 WLR 2552. In *RK (Nepal)* Aikens LJ summarised the effect of what was decided in *Lim* as follows (para. 33):

> "The importance of that decision lies in its emphasis on the appeal structure that Parliament has laid down in the 2002 Act with respect to various types of 'immigration decision'. The courts must respect that

> framework, which is not open to challenge in the courts by way of judicial review unless there are 'special or exceptional factors' at play. Therefore, except when such 'special or exceptional factors' can successfully be invoked so as to give rise to a right to judicial review, the court must accept that an out of country right of appeal is regarded by Parliament as an adequate safeguard for those who are removed under section 10 of the 1999 Act."

39. I should also refer to the judgment of Green J in *R (Khan) v Secretary of State for the Home Department* [2014] EWHC 2494 (Admin), [2016] 1 WLR 747, since the Appellants attached some importance to a particular passage in it. This was another case in which judicial review of a section 10 decision (based on alleged breach of a condition of leave to enter) was refused on the basis that the claimant's right of (out-of-country) appeal constituted an adequate alternative remedy. At para. 70 of his judgment (pp. 771-2) Green J summarised the relevant principles in line with the earlier case-law. Under head (x) (p. 772 C-D) he said:

> "The mere fact that Parliament has chosen to introduce an appellate procedure which can operate harshly, for example in relation to out-of-country appeals, is not in itself a special or exceptional reason for the High Court to assume jurisdiction. Were it otherwise the system of out-of-country appeals would be rendered toothless given that in many cases the out-of-country procedure operates to the disadvantage of the appellant. If this were a factor militating in favour of judicial review that would serve to trigger a judicial review in the vast majority (if not all) section 10 cases (*Lim*; *RK (Nepal)*; *Jan* [[2014] UKUT 265 (IAC)]). The same applies where the High Court takes the view that it is more effective and convenient for it to hear the case; this is however not a good reason to assume jurisdiction (*Willford* [[2013] EWCA Civ 674])."

He went on to gloss that summary at para. 77 of his judgment, but it will be more convenient if I set that out later (see para. 81 below).

40. There are two recent decisions in which the *Lim* approach has been applied specifically in the case of persons accused of cheating in their TOEIC tests.

41. The first is *R (Ali) v Secretary of State for the Home Department* [2015] EWCA Civ 744, [2016] 1 WLR 461, which was decided with another case, *R (Mehmood) v Secretary of State for the Home Department*, and is more often referred to under that name. Beatson LJ, who gave the leading judgment, referred to the *Lim* line of cases and extracted three propositions. I need only quote the first two (p. 476 B-E):

> "51. … First, except where there are 'special or exceptional factors', 'the court must accept that an out of country appeal is regarded by Parliament as an adequate safeguard for those who are removed under section 10 of the 1999 Act': *RK (Nepal)* at [33] *per* Aikens LJ.
>
> 52. Secondly, the existence of disputes of fact are rarely likely to constitute 'special or exceptional factors'. This is because, as Sedley LJ stated in *Lim's* case (at [25]), 'were it otherwise, the courts would

> be emptying Parliament's prescribed procedure of content', and also because judicial review proceedings are not best suited to resolve such issues, even if they sometimes have to be used for them, for example in 'jurisdictional fact' cases where the court has to determine the merits and not just exercise a traditional public law reviewing function: see [*Khawaja*] … . Accordingly, the default position for disputes as to whether there has been a breach of the conditions of leave or deception has been used in connection with an application for leave will, absent such special or exceptional factors, be an out-of-country appeal. ...."

It followed that the fact that there was in Mr Ali's case a dispute as to whether he had in fact cheated in his TOEIC test could not by itself constitute a special or exceptional reason why an out-of-country appeal should not be treated as an adequate alternative remedy. Beatson LJ went on to consider certain particular matters relied on by counsel for Mr Ali (in fact, Mr Malik) as constituting special or exceptional reasons in his case, but I need not set them out since none is directly relied on here. At para. 71 (p. 480 B-D) he accepted that having to leave the country halfway through his course would cause Mr Ali inconvenience and expense, but he said that that in itself could not constitute a special or exceptional reason since it was inherent in the statutory scheme.

42. The second such decision is *R (Sood) v Secretary of State for the Home Department* [2015] EWCA Civ 831, which was heard the day after the decision in *Mehmood and Ali* was handed down. That decision was of course treated as authoritative as regards the overall approach. Beatson LJ, who delivered the leading judgment, again held that the particular reasons relied on by the appellant in that case did not constitute special or exceptional factors. However, counsel did make some general submissions by reference to the importance of maintaining the rule of law. In response to those Beatson LJ said, at para. 44:

> "Beyond the cases of jurisdictional fact mentioned in *Mehmood and Ali*'s case at [52] and (something I hope would never occur) the abusive manipulation of the system by the Secretary of State or her officials, I consider that it is undesirable to seek to define a category of 'special' or 'exceptional'. It would, in my judgment, only be where there is compelling evidence that, in the circumstances of a particular case, the issues could not properly or fairly be ventilated in an 'out of country' appeal, that it might be possible to argue that the circumstances are special or exceptional."

43. I should also mention the decision of this Court in *R (Giri) v Secretary of State for the Home Department* [2015] EWCA Civ 784, [2016] 1 WLR 4418, which was also decided very soon after *Mehmood and Ali*, and by a constitution which included Beatson LJ. The appellant had been refused leave to remain on the basis that he had used deception in an earlier application for entry clearance, and the court at first instance made its own finding on that issue. This Court held that it had been wrong to do so. The grant or refusal of leave to remain was a matter for the discretion of the Secretary of State under section 3 of the Immigration Act 1971 and could only be

reviewed on grounds of irrationality. Having reached that conclusion, Richards LJ continued, at para. 20 of his judgment (p. 4426 B-D[6]):

> "The position would be different if we were concerned not with the exercise of the power under section 3 of the 1971 Act to grant leave to remain but with a decision to remove a person under section 10 of the 1999 Act on the ground that he or she had used deception in seeking leave to remain … . In that event, as a matter of statutory construction, the very existence of the power to remove would depend on deception having been used; and in judicial review proceedings challenging the decision to remove, the question whether deception had been used would be a precedent fact for determination by the court in accordance with *Khawaja*. Miss Giovannetti QC, on behalf of the Secretary of State, accepted as much. In practice, however, the issue will rarely arise in that form, because decisions under section 10 are immigration decisions carrying a right of appeal to the tribunal, which can review for itself the facts on which the decision under appeal was based, and the existence of that alternative remedy means that judicial review is not available in the absence of special or exceptional factors: see, most recently, the decision of this court in [*Mehmood and Ali*]."

(2) *KIARIE AND BYNDLOSS*

44. Although *Kiarie and Byndloss* is relied on by the Appellants because it concerns the effectiveness of out-of-country appeals, that issue arose in a different context from that of the *Lim* line of authorities, to which indeed the Supreme Court was not referred. Under the pre-2014 Act regime, which was applicable in both cases, a person who was subject to a deportation order had a right of appeal to the First-tier Tribunal. As with appeals against decisions taken under section 10, such an appeal had to be brought while the appellant was out of the country, unless they had made a human rights claim. However, by section 94B of the 2002 Act, even where a human rights claim had been made the Secretary of State had power to certify that removal pending the outcome of an appeal would not be in breach of the human rights of the person subject to the order; and if she did so the appeal could only be brought from outside the UK. The Secretary of State made certificates under section 94B in the cases of both appellants, who were facing deportation to Kenya and Jamaica respectively. The appellants challenged the certificates by way of judicial review. Permission was refused by the UT in both cases. In this Court permission was granted but the substantive claims were dismissed.

45. The Supreme Court allowed the appeals and quashed both certificates. The *ratio* of the majority appears in the judgment of Lord Wilson. The details of much of the reasoning are not material for our purposes, and it is unnecessary that I quote extensively from his judgment. The essential steps can be summarised as follows:

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[6] This passage is of course obiter, and Mr Biggs in his skeleton argument referred to the later case of *R (Ahmed) v Secretary of State for the Home Department* [2016] EWCA Civ 303, in which this Court went out of its way to emphasise that that was so. But the reason that it did so is not one that impugns its correctness for our purposes.

(1) The appellants' proposed deportation gave rise to a potential breach of their rights under article 8 of the European Convention on Human Rights.

(2) They were entitled, as an aspect of article 8 itself, to an effective procedure for appealing against that threatened breach.

(3) The Secretary of State had failed to show that an out-of-country appeal allowed for an effective challenge to the deportation decision. Various problems about pursuing an appeal against deportation from outside the UK were discussed, but what was decisive in Lord Wilson's view was:

(a) that the nature of the issues was such that the appellants would need to give oral evidence – see para. 61 (p. 2401 C-G); and

(b) that, although in principle it might be acceptable for such evidence to be given remotely by video-link[7], the evidence showed that "the financial and logistical barriers [to the appellants being able to do so] were almost insurmountable" – see para. 76 (p. 2406 F-G).

I should say a little more about Lord Wilson's reasoning on the third element.

46. As to (a), at para. 61 Lord Wilson discussed the nature of the issues on which foreign criminals were likely to need to give evidence in a deportation appeal. One was whether they had in truth changed their ways. The other was the quality of their relationships with family members in the UK. It was Lord Wilson's view that on both those issues the appellant's own oral evidence was likely to be essential. In connection with the former he made the point that oral evidence was all the more likely to be necessary in view of the fact that an appellant's claim to have become a reformed character was likely to be met with "a healthy scepticism": see p. 2401 D-E.

47. As to (b), I should note by way of preliminary that at para. 67 Lord Wilson had expressed some doubts as to the satisfactoriness of giving evidence by video-link at all and that in that connection he quoted with approval a passage from the judgment of the UT in *Mohibullah* (see para. 30 above), in which the issue is discussed; that was notwithstanding the Secretary of State's objection that the context in that case was different because it involved "issues relating to deception" (p. 2403F). In the end, however, he was willing to proceed on the basis that, while taking evidence by video-link was sub-optimal,

> "it might well be enough to render the appeal effective for the purposes of article 8, provided only that the appellant's opportunity to give evidence in that way was realistically available to him"

(p. 2403G).

48. As to whether such an opportunity was realistically available in the case of either appellant, Lord Wilson's conclusion that it was not was reached on the basis of materials lodged both by them and by the charity Bail for Immigration Detainees

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7. I will use this term to cover any form of live video evidence, including Skype.

("BID") about the financial and logistical obstacles to making effective arrangements. These obstacles partly consisted in the cost of hiring video-link facilities in Kenya and Jamaica, but the evidence was that arrangements at the UK end were also problematic: the tribunal service itself did not have video-link facilities in a form appropriate to a public hearing[8], and its position was that the full responsibility for making and paying for the necessary arrangements had to be borne by the appellant. Realistically neither of the appellants would be able to overcome those obstacles. For them to be removed in circumstances where they had no effective right of appeal did not strike a fair balance between their interests and those of the community as required by article 8. Lord Wilson observed that, while the appellants had proved that that was the case, the burden of justifying an interference with article 8 rights was on the Secretary of State and accordingly the proper analysis was that she had failed to establish that the balance was fair: see para. 78 (p. 2407 D-E).

49. It is important to note that in *Kiarie and Byndloss* the Secretary of State had not certified the human rights claims themselves under section 94 (2), and the case proceeded on the basis that the substantive appeals were arguable. Lord Wilson emphasised that this fact was an essential basis for his reasoning: see paras. 35 (p. 2393 F-G) and 54 (p. 2399 A-B).

(3) THE INDIVIDUAL CASES: FACTS AND PROCEDURAL HISTORIES

50. I can summarise the facts and procedural histories of the individual cases fairly shortly. It will be necessary to address some particular features of the individual cases in more detail at a later stage.

Harwinder Kaur

51. HK is aged 38. She came to this country in September 2009 on a student visa. Her husband accompanied her as her dependant. They have since had a son and daughter, in 2009 and 2013 respectively.

52. On 9 September 2013 HK applied for further leave to remain in order to continue her studies. She submitted to her sponsoring college a TOEIC certificate purporting to show that she passed the ETS test at Elizabeth College on 18 September 2012. She was granted leave up to 31 July 2015.

53. On 6 August 2014 the Secretary of State wrote to HK notifying her of the decision to remove her under section 10. On 17 September an amended decision was served. The letter began:

> "It has come to the attention of the Home Office, from information provided by Educational Testing Service (ETS) that an anomaly with your speaking test indicated the presence of a proxy test taker.

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8. In this regard Lord Wilson refers at paras. 70-71 (p. 2404 E-H) to the decision of the UT in *Nare v Secretary of State for the Home Department* [2011] UKUT 443 (IAC), which sets out quite rigorous requirements for the arrangements that need to be in place when a video-link is used.

> In light of this information it is the considered opinion of the Home Office that you have utilised deception to gain leave to remain in the United Kingdom. You have therefore been served with the attached Immigration Enforcement Papers; these papers inform you of the reasons as to why you are considered an immigration offender, along with your liability for detention and removal."

The "attached Immigration Enforcement Papers" consist of a "Notice to a Person Liable to Removal" (form IS.151A), stating that the author is satisfied that HK is a person to whom removal directions may be given in accordance with section 10 of the 1999 Act. It incorporates a "Specific Statement of Reasons" as follows:

> "You are specifically considered a person who has sought leave to remain in the United Kingdom by deception. For the purposes of your application dated 9 September 2013, you submitted a certificate from Educational Testing Service ("ETS") to your sponsor in order for them to provide you with a Confirmation of Acceptance for Studies.
>
> ETS has a record of your speaking test. Using voice verification software, ETS is able to detect when a single person is undertaking multiple tests. ETS undertook a check of your test and confirmed to the SSHD that there was significant evidence to conclude that your certificate was fraudulently obtained by the use of a proxy test taker. Your scores from the test taken on 18 September 2012 at Elizabeth College have now been cancelled by ETS.
>
> On the basis of the information provided to her by ETS, the SSHD is satisfied that there is substantial evidence to conclude that your certificate was fraudulently obtained."

54. HK and her husband and children issued proceedings in the UT on 26 September 2014 seeking judicial review of the amended decision. Permission was initially refused on the papers by UTJ Kebede and subsequently by UTJ Kekic at a hearing on 29 April 2016, essentially on the basis that *Mehmood and Ali* established that an out-of-country appeal was an appropriate alternative remedy.

55. On 19 October 2016 HK and her family made a further application for leave to remain, relying among other things on the effect of removal on her and their private and family life. The application was rejected on the basis that no fee had been paid.

56. Permission to appeal to this Court was given by Sir Stephen Silber on 11 July 2017 "in the light of the decision of the Supreme Court in *Kiarie and Byndloss*". Permission to amend the grounds of appeal was given by Hickinbottom LJ on 3 August and by Hamblen LJ on 14 August.

Rajwant Kaur

57. RK is aged 37. She came to this country in August 2007 on a student visa. Her husband joined her in June 2011, and they have since had two children, born in 2012 and 2015 respectively. She applied for further leave to remain on 11 January 2012 in

order to continue her studies. The application was refused. She appealed to the FTT and in February 2013 her appeal was allowed. Although she succeeded on the basis that the refusal was not in accordance with the Immigration Rules, she had also advanced an alternative argument under article 8 of the ECHR, and in that connection the FTT found in terms that both she and her husband had developed "a degree of private life whilst in the UK" and that removing them before RK had completed her studies would interfere with their article 8 rights.

58. On 21 September 2012 RK submitted an application for further leave to remain. In order to obtain the necessary confirmation of acceptance for studies ("CAS") for the purpose of that application she submitted a TOEIC certificate purporting to show that she passed the ETS test at South Quay College in London on 29 August. The application was granted.

59. In June 2013 the licence of the college where RK was then studying was revoked and in August her fresh application based on a CAS from a different college was refused. She again appealed to the FTT, relying *inter alia* on her rights under article 8. By a determination promulgated on 12 August 2014 her appeal was allowed, though on a basis that did not require consideration of the article 8 claim.

60. On 30 September 2014 the Secretary of State wrote to RK notifying her of the decision to remove her. The letter and form IS.151A are in the same terms, *mutatis mutandis*, as in HK's case.

61. RK issued proceedings in the UT on 12 December 2014 seeking judicial review of the decision of 30 September 2014. Permission was refused by UTJ McGeachy on the papers on 15 January 2016. Although one or two other points are mentioned in his reasons, the essential basis of his decision was that in the light of *Mehmood and Ali* permission ought not to be given to apply for judicial review because she had a statutory right of appeal.

62. Permission to appeal to this Court was given by Sir Stephen Silber on 10 July 2017 in the same terms as in HK's case.

Ataullah Faruk

63. AF is aged 34. He came to this country in February 2006 on a student visa. On 31 October 2011 he applied for further leave to remain to complete his studies. He submitted to his sponsoring college a TOEIC certificate purporting to show that he passed the ETS test at Elizabeth College on 16 November 2011. The application was successful. He completed a degree in Business Studies at the University of Greenwich.

64. Following the completion of his studies he was granted further leave to remain as a post-study migrant and took up employment as a producer with a television station catering for the Bangladeshi community in Europe. He subsequently became host of a popular television talk-show broadcast by NTV. He describes himself as a human rights activist and says that he works for Amnesty International "as a press monitor and Administrative Officer" Prior to the expiry of his visa he applied for indefinite leave to remain, but no decision had been reached on that application at the time that the Secretary of State made her decision under section 10.

65. On 21 March 2015 the Secretary of State wrote to AF notifying him of the decision to remove him under section 10. We do not have a copy of the letter but it can be assumed that it was in the same terms as the letter to HK which I have quoted above. We do have the form IS.151A, which is likewise in identical terms, *mutatis mutandis*, to HK's.

66. AF issued proceedings in the UT on 8 May 2015 seeking judicial review of the decision of 21 March 2015. Permission was refused by DUTJ Pitt on the papers on 5 April 2016, both on the basis that the Secretary of State's decision that AF had used deception was *Wednesbury*-reasonable and on the basis that in any event following *Mehmood and Ali* permission ought not to be given to apply for judicial review because he had a statutory right of appeal.

67. Permission to appeal to this Court was given by Sir Stephen Silber on 11 July 2017 on the basis of two particular features of AF's case which he regarded as arguably "special and exceptional": it is more convenient that I explain these later (see paras. 130-2 below).

68. In the meantime, in January 2016 AF made a claim for indefinite leave to remain on the basis that he had been resident in this country for ten years. The claim was made both under the Immigration Rules and on the basis of article 8 of the Convention. It was refused by the Secretary of State on 5 August 2016 on the basis that he had cheated in his TOEIC test. The human rights claim was certified under section 94 (2), with the result that he is entitled only to an out-of-country appeal. He has issued judicial review proceedings challenging the certification, but they have been stayed pending the outcome of these proceedings.

(4) THE SHAPE OF THE ISSUES

69. The Appellants' case before us was, in essence, that their claims should be allowed to proceed by way of judicial review, notwithstanding their entitlement to a statutory (out-of-country) appeal, because they turned on a disputed question of (precedent) fact on which it was necessary in the interests of justice that they be able to give oral evidence, and that they would not be able to do so in an appeal from outside the country. They contended that the denial of an effective hearing in that way was contrary to their rights both at common law and under article 8 of the Convention.

70. The Secretary of State's initial response, as set out in Ms Giovannetti's skeleton argument, was focused on rebutting the various elements in that case. But she subsequently put forward an alternative answer, namely that, even if an out-of-country appeal did not constitute an adequate alternative remedy, it had at all times been, and remained, within the power of the Appellants to make a human rights claim, as a result of which they would become entitled to an *in*-country appeal: an appropriate alternative remedy was accordingly within their grasp and they should not have permission to proceed by way of judicial review. This way of putting the case first emerged in correspondence from the Treasury Solicitor but was then developed in Ms Giovannetti's "Reply and Position Statement", which was submitted shortly before the hearing and subsequent to the lodging of the Appellants' skeleton arguments. The late stage at which it emerged was unfortunate. It means not only

that we do not have the benefit of fully developed skeleton arguments but also that not all aspects of the point were fully explored in oral submissions.

71. I will consider first the Appellants' case based on the ineffectiveness of an out-of-country appeal – "the out-of-country appeal issue" – and then the Secretary of State's case based on their right to make a human rights claim the refusal of which would attract the right to an in-country appeal – "the human rights claim issue".

(5) THE OUT-OF-COUNTRY APPEAL ISSUE

The Appellants' Case

Article 8

72. As noted above, the Appellants advanced their case both at common law and by reference to article 8 of the Convention. Mr Biggs submitted that the former was the right starting-point in principle, since it was unnecessary to resort to the Convention if the rights in question were afforded at common law: he reminded us of the observations of Lord Neuberger in *R (Osborn) v Parole Board* [2013] UKSC 61, [2014] AC 1115, at para. 63 (p. 1148 D-E). I have considerable sympathy with that approach, but the particular way in which the case-law has developed in this area makes it, I think, more convenient to start with article 8, and that was the course taken by Mr Knafler, who took the lead for the Appellants.[9]

73. Mr Knafler's starting-point was that the rights of HK and her husband and children to respect for their private and/or family life would be sufficiently seriously interfered with by their removal to engage the operation of article 8 – i.e. that "*Razgar* questions (1) and (2)" were satisfied (see *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27, [2004] 2 AC 368, per Lord Bingham at para. 17 (p. 389 D-F)).

74. Mr Knafler's primary submission in support of that contention was that article 8 was likely to be engaged in pretty well any case of a student who, as in HK's case, has resided and studied lawfully in the UK for a substantial period at his or her own expense. In his skeleton argument he referred to a large number of decisions of the AIT and UT about the article 8 rights of students, but in his oral submissions he relied in particular on two. The first was the decision of the Asylum and Immigration Tribunal (SIJ Grubb and IJ Hall) in *MM v Secretary of State for the Home Department* [2009] UKUT 305 (IAC). The Tribunal in that case carried out a thorough review of the then case-law and concluded, to quote from the (judicially-drafted) headnote:

> "Whilst respect for 'private life' in Art 8 does not include a right to work or study *per se*, social ties and relationships (depending upon their duration and richness) formed during periods of study or

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[9] To avoid a possible confusion, I should say that the Appellants' reliance on article 8 for this aspect of the case does not mean that they are relying on section 92 (4), as set out at para. 11 above, in order to assert a statutory right to an in-country appeal of the 2002 Act. They cannot do so because they had not made such a claim at the time that the section 10 decision was taken: see para. 15. They thus have to rely on article 8 apart from the statute in the way developed below.

> work are capable of constituting 'private life' for the purposes of Art 8."

The second was the decision of the Upper Tribunal (Blake J, Ockelton V-P and SIJ Allen) in *CDS* (*Brazil*) *v Secretary of State for the Home Department* [2010] UKUT 305 (IAC). At para. 19 of its judgment the Tribunal said:

> "… people who have been admitted on a course of study at a recognised UK institution for higher education are likely to build up a relevant connection with the course, the institution, an educational sequence for the ultimate professional qualification sought, as well as social ties during the period of study. Cumulatively this may amount to private life that deserves respect because the person has been admitted for this purpose, the purpose remains unfilled, and discretionary factors such as misrepresentation or criminal conduct have not provided grounds for refusal of extension or curtailment of stay."

75. Mr Knafler made it clear, however, that he did not need to rely on any general proposition about the position of students, on which he acknowledged that the authorities showed "some hesitation". He said that he could in any event rely on a number of particular features of HK's case. She and her husband had been in the country for five years at the date of the Secretary of State's decision. They have relatives settled in the UK, who live near to them and with whom they have a close relationship. Their two children, who were born here and have never been to India, are now attending school and have their own relationships with friends and cousins. These factors were developed to some extent in HK's witness statement and in a report from a child psychologist, but I need not give further details.

76. If, therefore, article 8 would indeed be engaged by HK's removal, it was necessary to consider the remaining *Razgar* questions – whether her removal would be in accordance with the law (question (3)) and, if so, whether it was (for short) justified (questions (4)-(5)). In practice the answer to those questions depended straightforwardly on whether she had cheated in her TOEIC test. If she had not, it was not suggested that there was any legitimate basis for removing her. Mr Knafler emphasised that we were not in this kind of case concerned with the familiar balancing exercise of weighing the state's interest in maintaining an orderly system of immigration control against the interests of the individuals in question: HK was entitled by the Rules to be here unless she had cheated.

77. The only question being whether HK had cheated, it was confirmed by *Kiarie and Byndloss* that article 8 in its procedural aspect required that a fair procedure for the determination of that question be available to the Appellants. As to whether such a procedure was available, Mr Knafler's case can be summarised as follows:

(1) The nature of the issues in a typical TOEIC appeal, and certainly in these cases, was such that it was as essential that the tribunal hear the oral evidence of the appellant as it was in the case of the deportation appeals which were the subject of *Kiarie and Byndloss*, albeit for different reasons. Mr Knafler referred to the TOEIC cases which have already been decided, as summarised above, and

pointed out how central the oral evidence of the person accused of cheating had been in all of them.

(2) That being so, there could only be a fair hearing of HK's appeal from India if she and her husband would have access there to reliable and affordable arrangements for giving evidence by video-link.[10] The Appellants relied on the evidence from BID which had been before the Supreme Court in *Kiarie and Byndloss*, supplemented by some rather miscellaneous further evidence prepared for the purpose of these appeals. There was a witness statement from Sairah Javed, now of the Joint Council for the Welfare of Immigrants but who was formerly in practice as a solicitor: this dealt principally with the difficulties which she had encountered in one particular case in trying to arrange for a client to give evidence by video-link from Pakistan, but she also gave some general evidence, not specific to any particular country, to a similar effect to the conclusions of the Supreme Court in *Kiarie and Byndloss*. AF's solicitor, Ms Urvi Shah, gave similarly general evidence. There were also witness statements from lawyers in Pakistan and India confirming that video-link facilities would not be available through the court systems of either country.

78. It followed, Mr Knafler submitted, that the supposed alternative remedy which had led the UT to refuse permission in HK's case was inadequate and that accordingly her application for judicial review should have been allowed to proceed. It was well established that where necessary questions of primary fact could be determined, and oral evidence heard, in judicial review proceedings: Lord Wilson made that very point at para. 42 of his judgment in *Kiarie and Byndloss* (p. 2395 D-E). The question whether an applicant had cheated in their TOEIC test had indeed already been decided in judicial review claims where the issue had fallen to be decided as a question of precedent fact and where the statute provided for no right of appeal – see para. 31 above.

79. As regards RK and AF, Mr Biggs and Mr Malik submitted that article 8 was engaged equally in their cases as in HK's, and that the fair determination of the question whether they had cheated would likewise require them to give oral evidence, which they would be unable realistically to do so by video-link from, respectively, Pakistan or Bangladesh. I summarise their submissions in turn.

(1) As to RK, Mr Biggs pointed out that she already had the benefit of a finding from the FTT in early 2013 that the removal of her and her husband before she had completed her studies would interfere with their article 8 rights. Her case in that regard could only be stronger by the time of the Secretary of State's decision a year and a half later, not least because she had by then had a child. In her case she was able to rely on the specific evidence adduced about the difficulties of pursuing an appeal by video-link from Pakistan.

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[10] I did not understand Mr Knafler to accept that even the availability of the opportunity to give evidence by video-link would necessarily make the process fair: he drew our attention to the reservations expressed by the UT in *Mohibullah* to which Lord Wilson had referred in *Kiarie and Byndloss* (see para. 47 above). But, as in that case, this was not a battle which he needed to fight.

(2) As to AF, he had been in the UK for over nine years at the date of the Secretary of State's decision. Unlike the other two section 10 Appellants he has completed his studies and embarked on a successful career in this country. It was plain beyond argument that his article 8 rights were engaged. Mr Malik did not rely on any specific evidence about the difficulties that might face AF in pursuing an appeal from Bangladesh but he relied on the general evidence from Ms Javid.

Common Law

80. Although it was, again, Mr Knafler who led on the common law challenge, Mr Biggs also addressed us on it fully. There were some differences of emphasis in their submissions, but I can deal with them as a composite. They essentially depended on the same proposition as the article 8 case, namely that in circumstances such as those of the Appellants the requirement that the right of appeal conferred by section 82 of the 2002 Act be exercised from abroad meant that a fair and effective appeal was simply not available: that was what the Supreme Court had found in *Kiarie and Byndloss*, and the evidence in the present case was to the same effect. They submitted that such a state of affairs was in plain conflict with the fundamental constitutional right of access to the courts most recently re-affirmed by the Supreme Court in *R (Unison) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409: we were referred in particular to paras. 66-75 of the judgment of Lord Reed (pp. 431-4).

81. The question then was how that right of access to the courts could be vindicated in cases like the present. Mr Knafler and Mr Biggs acknowledged that it could not be by permitting an appeal to be pursued from within the UK, since (in a case of the kind with which we are concerned) section 92 (1) explicitly provided to the contrary. But their submission was that the ineffectiveness of an out-of-country appeal constituted, in the language of *Lim*, a "special and exceptional reason" for allowing the decision to be challenged by way of judicial review. In support of that submission Mr Knafler referred to para. 77 of the judgment of Green J in *Khan*, in which, as I have said, he glossed the general statement of principle at para. 70 (x). The passage in question (p. 776 E-G) reads:

> "In my view the High Court should in this context treat a decision according only an out-of-country appeal as special or exceptional only if facts emerged which showed, whether systemically or in relation to an individual case, that an out-of-country appeal implied a materially inferior right of access to the Tribunal than an in-country right of appeal. If that were the case then the High Court might well conclude that there was a violation of the fundamental right of access to a court that needed to be protected by the exercise of its own jurisdiction. If such a situation did arise it could readily be categorised as 'special' or 'exceptional'. But as matters stand there is no evidence to this effect in this case …".

Mr Knafler submitted that since *Kiarie and Byndloss* it was now established that, in a case where oral evidence was central and the opportunity to give such evidence by video-link facilities was not realistically available, an out-of-country appeal did indeed afford "a materially inferior right of access".

82. That left the question of how that submission could be reconciled with the decisions in *Lim* and in *Mehmood and Ali* and *Sood*. In *Lim* this Court had allowed the Secretary of State's appeal notwithstanding Lloyd-Jones J's view that an out-of-country appeal would not provide the claimant with a fair hearing. In *Mehmood and Ali* Beatson LJ had said in terms that even in a deception case – indeed specifically a TOEIC case – the default position was that an out-of-country appeal was an adequate alternative remedy. Mr Biggs, who developed this point more fully than Mr Knafler, submitted that we were not bound by either decision because in neither was the Court squarely confronted with a submission that an out-of-country appeal would be positively unfair or ineffective, whether because the claimant would not be in a position to give evidence by video-link or otherwise. Although in *Lim* the possibility that there might be difficulties about giving evidence by video-link was evidently raised at first instance, there appears – unlike in these cases – to have been no evidence about it, and the question was not addressed in the judgment of Sedley LJ. As for Mr Ali, the particular factors relied on in his case were limited and specific. Mr Biggs reminded us that in *Sood*, which post-dated *Mehmood and Ali*, Beatson LJ had expressly contemplated that a claimant could proceed by way of judicial review where "the issues could not properly or fairly be ventilated in an out-of-country appeal" – see para. 42 above.

The Secretary of State's Response

83. In this section I have found it easiest not only to set out the Secretary of State's response to the Appellants' case but also to give my conclusions on it as I go. I again deal separately with the article 8 and common law aspects.

Article 8

84. While she made no formal concessions Ms Giovannetti did not attempt to rebut the case that article 8 was engaged in the case of these three Appellants. Given their particular histories as summarised above, this was realistic. She was, however, concerned to rebut Mr Knafler's primary case that article 8 would be engaged in the great majority of cases where a student was faced with premature removal. She referred to the judgment of Lord Carnwath in *Patel v Secretary of State for the Home Department* [2013] UKSC 72, [2014] AC 651, which was concerned (*inter alia*) with the refusal of leave to remain to two Pakistani students who had applied for further leave to remain to continue their studies. They had failed to supply the correct documentation but sought to rely on article 8. At para. 57 of his judgment (pp. 674-5) Lord Carnwath commented:

> "It is important to remember that article 8 is not a general dispensing power. It is to be distinguished from the Secretary of State's discretion to allow leave to remain outside the rules, which may be unrelated to any protected human right. … One may sympathise with Sedley LJ's call in *Pankina's* case [2011] QB 376 for 'common sense' in the application of the rules to graduates who have been studying in the UK for some years … . However, such considerations do not by themselves provide grounds of appeal under article 8, which is concerned with private or family life, not education as such. The opportunity for a promising student to complete his course in this country, however

> desirable in general terms, is not in itself a right protected under article 8."

In *Nasim v Secretary of State for the Home Department* [2014] UKUT 25 (IAC) the UT (UTJJ Allen and Peter Lane) referred at para. 20 of its judgment to that passage as "a significant exhortation from the Supreme Court to re-focus attention on the nature and purpose of Article 8".

85. We were also referred – though in fact by Mr Knafler rather than Ms Giovannetti – to the decision of the UT in *Munir*, to which I have already referred in another context (see para. 15 above). Judge Kekic in her judgment referred to both *CDS (Brazil)* and *Patel* and said, at para. 62:

> "What these decisions show is that an applicant will not have an article 8 right to remain in the UK to complete a course of study simply because he has invested time and money in those studies. The opportunity for a student to complete his studies is not a protected right under article 8. Whilst that does not mean such a person would never succeed in an article 8 claim, it is implicit in the language of these judgements that successful claims in such circumstances would be rare and that compelling considerations would be required to distinguish the case from the generality of other such cases. No such considerations were identified in the present case."

Mr Knafler submitted that that passage – or at least the second half of it – was not a true reflection of the case-law and that it conflated the distinct questions of whether article 8 was engaged and of whether, if so, the interference was justified.

86. Although the question of the correct approach to the article 8 rights of students is not decisive in the particular cases before us, it appears that there is some uncertainty about the effect of the authorities. It may accordingly be helpful if I say that I can see no real tension between the decisions in *MM* and *CDS (Brazil)* on the one hand and Lord Carnwath's observations in *Patel* on the other. What those observations authoritatively confirm is that the right to complete a course of education is not *as such* a right protected by article 8. However, neither the AIT in *MM* nor the UT in *CDS (Brazil)* said that it was, and Lord Carnwath was not addressing either decision (to which indeed the Supreme Court had not been referred, since they were not material to the issues before it). Rather, what those decisions say is that persons admitted to this country to pursue a course of study are likely, over time, to develop a private life of sufficient depth to engage article 8. So far as that relates to ordinary social relationships, that is obviously correct. It is true that the UT in *CDS (Brazil)* goes rather further, in that it enumerates as possible components in a student's private life not only ordinary social relationships but also a "connection with the course, the institution, an educational sequence for the ultimate professional qualification sought". That is perhaps a little ambiguous, but I do not think it should be read as meaning that the mere fact that the student is part-way through a course leading to a professional qualification by itself engages article 8. In my view it means only that a student's involvement with their course and their college can itself be an important aspect of their private life; and, so read, I regard it as unexceptionable. Whether those and other factors are sufficient to engage article 8 in any particular case will depend

on the particular facts, and I would not venture on any generalisations beyond making the trite point that the longer a student has been here the more likely he or she is to have generated relationships of the necessary quality and depth.

87. At the risk of stating the obvious, it is worth pointing out that the question whether a person's article 8 rights are engaged is quite distinct from the question whether the interference of which he or she complains constitutes a breach of those rights. Specifically in the case of a student, even if his or her article 8 rights are engaged, it does not follow that those rights are breached by their removal before they have completed their course. On the contrary, if they cannot comply with the applicable Immigration Rules, their removal is very likely to be justified. I think that that is all that Judge Kekic meant in *Munir*; but if she meant that it will be rare for the article 8 rights of students to be engaged at all I do not agree.

88. In the particular circumstances of the present cases, it is also worth emphasising that, as Mr Knafler correctly submitted (see para. 76 above), whether the Appellants' removal would be a breach of their article 8 rights depends not on any multi-factorial assessment of proportionality but on the single factual question of whether they cheated in their TOEIC tests – and on whether a fair procedure has been made available for deciding that question.

89. I turn therefore to Ms Giovannetti's case on whether an out-of-country appeal constitutes a fair procedure in these cases. She was at pains to emphasise that the legal context is very different from that in *Kiarie and Byndloss*. The Supreme Court was there concerned with the effect of certification under section 94B, and not with decisions taken under section 10 or, therefore, with the line of authorities deriving from *Lim*. That is obviously correct as far as it goes, but I do not see that the distinction is material for the purpose of the particular way in which the Appellants rely on *Kiarie and Byndloss*. They do so only, but crucially, as (a) establishing that, in a case where the oral evidence of the appellant is important to the determination of an appeal, an out-of-country appeal will not satisfy the procedural aspect of article 8 unless facilities for giving evidence by video-link are realistically available; and (b) as finding, on the evidence before it, which the Appellants say is substantially identical in their cases, that such facilities were not so available.

90. Taking those points in reverse order, Ms Giovannetti did not attempt to challenge the Appellants' contention that there was on the evidence in these cases no realistic possibility of their being able to give evidence by video-link. She simply made the point that in other cases, where appellants were being returned to countries with a higher level of development and/or were better funded, a different conclusion might be reached. I would accept that, in principle, whether it is realistically possible for evidence to be given by video-link needs to be assessed on a case-by-case basis; but I would encourage the Secretary of State and the UT to take a pragmatic view of what is likely to be the position in typical cases and to use these appeals and *Kiarie and Byndloss* as a useful benchmark. Ms Giovannetti also informed us that the Home Office was actively engaged in developing arrangements for making video-link available, in an effective and accessible way, to appellants in the principal countries to which removals or deportations take place; and that accordingly in due course this form of objection to the fairness of an out-of-country appeal would hopefully be met.

91. That leaves the prior question of whether the appeals in these cases, and appeals in TOEIC cases more generally, can only be fairly determined if the appellant gives oral evidence. Ms Giovannetti did not quite confront that question head-on; and certainly she did not explicitly submit that the appeals of any of these three Appellants could be fairly determined without them giving oral evidence. She did emphasise how the forensic scene had changed since the first cases; and she also pointed out that HK and AF took their tests at Elizabeth College, which was one of the "fraud factories" identified by Mr Sewell. But she did not go so far as to submit that we were in a position to decide, in the cases of these Appellants or more generally, that their cases were so open-and-shut, or so exclusively depedent on technical evidence, that the evidence of the individual Appellant could be of no avail. I should however make it clear that I would not have accepted any such submission. We could not have reached a firm conclusion on the strength of the case against any of these Appellants without being taken in detail through the materials deployed in the more recent TOEIC cases and being addressed on the answer which each of the Appellants might give, which we were not. Further, even if the Secretary of State's evidence is as strong as she says, I would be reluctant to accept that it was possible fairly to determine an allegation of this character – that is, an allegation of deliberate dishonesty, with serious implications for the Appellants' rights and reputation – without them being given the opportunity to give oral evidence in rebuttal. In that connection I note Lord Wilson's observation in *Kiarie and Byndloss* that oral evidence may be particularly important precisely because of the scepticism with which an appellant's case was likely to be met: see para. 46 above. I do not rule out the possibility that a sufficiently strong case may be shown, but the test would have to be no lower than that required for certification in the context of a human rights appeal: cf. para. 156 below.

92. For those reasons I am not persuaded that Ms Giovannetti has any answer to the Appellants' case that an out-of-country appeal would not satisfy the procedural requirements of article 8. Such a breach of the Appellants' rights can be avoided by allowing them to challenge the removal decisions in their cases by way of judicial review. That route is not precluded by the decisions in *Mehmood and Ali* and *Sood*, since in neither of those cases – or indeed in the *Lim* line of cases more generally – was any reliance placed on article 8.

Common law

93. That conclusion means that it is strictly unnecessary in these appeals to consider the Appellants' common law case. I should nevertheless do so because the common law position will be important in any TOEIC case where the article 8 rights of the applicant are not engaged.

94. Ms Giovannetti submitted that it was not axiomatic that the procedural requirements imposed by the common law should always be as demanding as in cases where article 8 rights were engaged. On the contrary, the nature of the rights affected by a given decision was always an important determinant of the nature of the procedural protection required: see, for example, *Wiseman v Borneman* [1971] AC 297. That is right in principle. But in the case of a migrant whose leave to remain is invalidated on the grounds of deception, with the consequences identified at paras. 20-21 above, I believe that common law principles of fairness, just as much as article 8, require that

they should have the opportunity to give evidence orally (except in a case where it is established that oral evidence could truly make no difference).

95. The question then is whether that conclusion is open to us on the authorities. I do not believe that the general principle asserted in the *Lim* line of cases is a real obstacle. Those cases recognise that the existence of a statutory right of appeal does not constitute an absolute bar to a challenge being pursued by way of judicial review. In my view Parliament cannot be taken to have intended that access to judicial review should be unavailable in a case where it is established that the statutory appeal procedure would not afford effective access to justice. That is, in essence, recognised both by Green J at para. 70 (x) of his judgment in *Khan* (see para. 39 above) and by Beatson LJ in *Sood* (see para. 42 above). It is true that their formulations are not quite the same. Beatson LJ referred to an exception arising in "the circumstances of a particular case", whereas Green J contemplated that it might arise "systemically". I am not sure there is any real difference, but I can myself see no reason why there may not be a class of cases with common features such that the issues, in Beatson LJ's phrase, "[can] not properly or fairly be ventilated in an out of country appeal".

96. However, it is not as easy as that. As Ms Giovannetti pointed out, *Mehmood and Ali* and *Sood* go further than simply re-stating the principles established by *Lim*: they apply those principles to precisely the kind of case with which we are concerned, namely decisions based on an allegation of cheating in a TOEIC test, and hold that an out-of-country appeal is an adequate alternative remedy. However, I would accept the answer given by Mr Knafler and Mr Biggs, as summarised at para. 82 above. Despite the breadth of some of the statements in them, *Mehmood and Ali* and *Sood* cannot in my view be treated as having decided as a matter of law that an out-of-country appeal was an adequate alternative remedy in a TOEIC case. Formally, they were decisions only that the appellants in those cases had not shown that it was not. That cannot preclude this Court from coming to a different conclusion, on different arguments and different evidence – specifically about the practical unavailability of video-link facilities – even though the same arguments could perhaps have been advanced in those cases. The same goes for *Lim*. Although in that case a doubt about the availability of video-link facilities was aired at first instance, this Court did not address that question at all, and it cannot be treated as part of its *ratio* that, even if it had been shown that it would be impossible for the appellant to give evidence by video-link, the appeal would nevertheless be effective.

Conclusion

97. For the reasons given above I would hold that an out-of-country appeal would not satisfy the Appellants' rights, either at common law or under article 8 of the Convention, to a fair and effective procedure to challenge the decisions to remove them; and that in those circumstances, subject to the human rights claim issue considered below, they were entitled to proceed with such a challenge by way of judicial review.

98. I emphasise that that conclusion depends on the particular features of the Appellants' cases, namely that the nature of the issues raised by their appeals was such that they could not be fairly decided without hearing their oral evidence, and also that facilities for giving such evidence by video-link were not realistically available. Even if those

features are shared by the great majority of TOEIC cheating cases, it does not follow that they will be present in all cases where the legislation provides for an out-of-country appeal: in particular, whether it is necessary for the appellant to give oral evidence will depend on the nature of the issues.

(6) THE HUMAN RIGHTS CLAIM ISSUE

The Secretary of State's Case

99. It is, as I have said, the Secretary of State's case that it was and is open to the Appellants at any time to make a human rights claim, within the meaning of section 113 of the 2002 Act (that is, to claim that the requirement that they should leave the UK was incompatible with their rights under article 8), and that to do so would open the door to an in-country right of appeal. The exact way in which this would occur would depend on when the claim was made. The position is rather complicated and requires to be taken in stages.

100. If the human rights claim was made *before* the section 10 decision was taken the position is straightforward. All the decisions with which we are concerned are subject to the pre-2014 Act regime. Under that regime the mere fact of having made a human rights claim would mean that the appeal against the section 10 decision itself could be brought in-country. However, this will rarely be so in TOEIC cases. It will only be by chance that a person given notice of liability to removal under section 10 would already have a prior human rights claim extant and unresolved.

101. If the human rights claim was made *after* the section 10 decision, section 92 (4) would not operate, for the reason explained at para. 15 above. But Ms Giovannetti pointed out that in *Nirula* at first instance evidence was given, and accepted by Mr Ockelton, that it was the Secretary of State's policy in such a case to withdraw the original decision and (unless she changed her mind) to re-make it in same terms, thus producing a "post-human rights claim" decision which could be appealed in-country. The relevant extract from chapter 51 of the Secretary of State's Enforcement Instructions and Guidance was quoted at para. 64 of the judgment and read:

> "If asylum or HR is claimed after serving the IS151A part 2, and removal directions are in place then refer to OSCU for advice before suspending the removal directions. Otherwise withdraw the IS151A part 2 and where the applicant will get an in country appeal right serve an IS151B with any refusal of the claim."

As Mr Ockelton observed, that is decidedly cryptic, but he held at, para. 65, that the effect was:

> "that a [human rights] claim made to the Secretary of State after the service of an immigration decision … will result in the withdrawal of the decision that carries no right of appeal, and, if necessary, the making of another decision … [which] ... will carry an in-country right of appeal unless certified."

The manoeuvre so described was referred to in the argument before us as "the *Nirula* work-around". The effect is – or was – that even if a human rights claim was made only after the section 10 decision (or indeed after the appeal to the FTT was lodged) an in-country appeal would under the pre-2014 Act regime be made available.

102. Ms Giovannetti said that the policy described in *Nirula* remained in place at all material times, and I think also (though I am not entirely clear about this) that it remains in place today. However, that needs some unpacking. Although no doubt it is correct in respect of the period prior to the 2014 Act regime taking effect, I cannot see the relevance of the policy as regards the period thereafter. Although under the old regime the withdrawal of the old section 10 decision and its replacement by a new post-claim decision was necessary in order to afford the person affected an in-country appeal, that is no longer the case. The right to an in-country appeal is generated by the refusal of the human rights claim and it is against that refusal that the appeal lies (see para. 19 above). That is the case irrespective of what happens to the original section 10 decision, and there is accordingly no need for that decision to be withdrawn. On analysis, therefore, Ms Giovannetti's contention that the Appellants still have access to an in-country right of appeal does not, under the new regime, depend on the *Nirula* work-around but on the fact that they can make a human rights claim and appeal against its refusal when and if that occurs.

103. Thus, to summarise, Ms Giovannetti's case should be analysed as being that:

(a) as long as the old regime remained in effect, the Appellants could have triggered a right to an in-country appeal against the section 10 decision simply by making a human rights claim – relying on the *Nirula* work-around if the claim post-dated the notice; and

(b) once the new regime came into effect, they could and can acquire a right to an in-country appeal by making a human rights claim challenging the decision to remove them and, if and when it is refused, appealing against that refusal.

Although the position under the new regime is for that reason relevant to the issues before us, despite the initial decisions in the Appellants' case being made under the old regime, Ms Giovannetti discouraged us from considering the position as regards a case where the initial decision was made after the coming into effect of the 2014 Act, since no such case is before us. I accept that we should not do so (save to the extent necessary in Mr Ahsan's case).

104. Ms Giovannetti emphasised that the availability of that route was subject to the right of the Secretary of State to certify any human rights claim made, under section 94 (2) of the 2002 Act in its pre-2014 Act form and section 94 (1) of the Act in its current form. But she said that that was unobjectionable. If the claim was indeed clearly unfounded, there could be no objection to it having to be pursued from abroad, even if

such an appeal was not properly effective. She referred to the decision of the ECHR in *De Souza Ribeiro v France* (2014) 59 EHRR 10, at para. 83. She also emphasised that Lord Wilson had made it clear in *Kiarie and Byndloss* that it was fundamental to his analysis that the claims in those cases had not been certified under section 94 (2) (see para. 49 above). If in a particular case the claim had been wrongly certified, the claimant's rights were protected by the availability of judicial review. This was not in fact controversial. Mr Knafler accepted that if a human rights claim was properly certified as wholly unfounded an appellant could not object to having to pursue it from out of country.

105. It is not on the face of it relevant to Ms Giovannetti's argument whether any of the Appellants had in fact made a human rights claim at the time that they brought their judicial review proceedings, or at the time that permission was refused, or whether they have done so subsequently: what matters is that they were, and remain, entitled to do so. However she set out in some detail what she said the position was about human rights claims in each of the three cases, and it is convenient to deal with that at this stage.

106. *Harwinder Kaur*. It is not suggested that HK had made a human rights claim prior to the issue of the present proceedings. In section 4 of the claim form, however, which asks whether the claim includes any issues arising from the Human Rights Act 1998, and if so which article of the Convention is said to have been breached, the "Yes" box is ticked and article 8 is identified as the relevant article – although the Grounds, which are elaborately pleaded, make no reference to HK's Convention rights in any way. Mr Knafler submitted that the mention in section 4 of the claim form constituted the making of a human rights claim within the meaning of section 113. I cannot accept that a merely formulaic reference to article 8 of that kind is sufficient. Although the statute does not prescribe the degree of detail in which a human rights claim must be advanced, it is in my view necessarily implicit in the concept of making such a claim that at least the nature of the breach alleged should be identified. However, as noted above, on 19 October 2016 HK's solicitors submitted to the Secretary of State what was described as the submission of a fresh claim applying for leave to remain. This explicitly relied on the private and family lives of HK and her husband and children, and Ms Giovannetti accepted that it constitutes a human rights claim. No decision has been made on that application.

107. *Rajwant Kaur*. Ms Giovannetti submitted that RK did not make a relevant human rights claim at any time prior to the issue of her judicial review claim or at any stage in the proceedings before the UT. Mr Biggs argued that the reliance on article 8 in the second of her two earlier tribunal cases (see para. 59 above) constituted a human rights claim for these purposes. That cannot be right: the claim was made for the purpose of proceedings in which she had succeeded and was not at the date of the section 10 decision an extant claim requiring determination. However, in a witness statement dated 4 September 2017 lodged for the purpose of her appeal to this Court RK does give evidence, albeit very briefly, of some "personal and family circumstances". There is no express invocation of article 8, but Ms Giovannetti was content to treat this as raising a human rights claim, while pointing out that there was no explanation for why it had not been made earlier.

108. *Ataullah Faruk*. It is not suggested that AF had made a human rights claim prior to the issue of his judicial review proceedings. There is, as in HK's case, a bare indication in section 4 of his claim form that an issue under article 8 of the Convention arises, but no such case is made in the Grounds, which are, again, very fully pleaded. Mr Malik did not advance any submissions about whether that was sufficient to amount to the making of a human rights claim; but in my view it was not, for the reasons I have given in HK's case. However, it is accepted that such a claim was made in January 2016: see para. 68 above.

The Appellants' Response

109. The Appellants' response to Ms Giovannetti's case on the human rights claim issue differed as between Mr Knafler on the one hand and Mr Malik and Mr Biggs on the other. I take them in turn.

110. Mr Knafler acknowledged that in an appropriate case the route proposed by Ms Giovannetti might indeed constitute an appropriate alternative remedy. Specifically, if at the time that the Upper Tribunal was deciding whether to grant permission to apply for judicial review of a section 10 decision the applicant had made a human rights claim (for example, in his or her grounds) and the Secretary of State had in her turn made a new decision which attracted an in-country appeal, then it might indeed be legitimate to refuse permission. But he said that that had not happened in HK's case. He did in fact contend, as noted at para. 106 above, that HK had made a human rights claim in her claim form, which had not led the Secretary of State to make a new decision. But even if he were wrong about that – as I have held he is – the fact remained that at the time that permission was considered there had been no refusal of a human rights claim such as to generate a right to an in-country appeal.

111. Mr Knafler submitted that even where a human rights claim had been made, but not yet refused, it would be wrong in principle to refuse permission to apply for judicial review on the basis that it could be assumed that a decision would be made eventually. There was no guarantee that the Secretary of State would act with reasonable promptitude. She acknowledged no obligation to do so, and it was notorious that decision-taking in the Home Office could be very slow: it was to be noted that no decision had yet been made on HK's claim made in October 2016. The matter was wholly out of an applicant's hands. Mr Knafler reminded us of the grave consequences of the service of a section 10 notice as summarised at para. 9 above. There was a serious risk of persons with a viable challenge to their removal being forced in practice to abandon it and leave the country because they could not get on with their lives; and indeed the Secretary of State would have an incentive to delay a decision in the hope that that would occur.

112. Mr Malik and Mr Biggs took a more radical position. They focused on the fact that any in-country appeal under the post-October 2014 regime afforded by following Ms Giovannetti's route would, necessarily, not be an appeal against the section 10 decision itself but only against the refusal of the human rights claim, which is a different decision. Such an appeal could not be an adequate alternative remedy to the quashing of the section 10 notice by way of judicial review. There were two strands to their submissions in this regard.

113. First, Mr Biggs in particular submitted that persons against whom a finding of deception was made by the Secretary of State were entitled as a matter of justice to a judicial decision about whether that finding was justified, both because of its effect on their reputations and because of its specific consequences for future applications for leave to enter: see paras. 20-21 above. A human rights appeal would not necessarily achieve that outcome. It is true that if (a) the tribunal accepted that the appellant's human rights were engaged by their proposed removal and (b) the only justification advanced for the removal were that they had used deception, then that issue would have to be determined. But one or other of those conditions might be absent. As to (a), not every person against whom a decision based on deception is made may have established a significant private or family life in this country. As to (b), the proposed removal might be justified on other grounds (as in fact the Secretary of State was arguing in Mr Ahsan's case – see para. 150 below).

114. Second, the section 10 notice had the specific consequences in law identified at para. 9 above – including that if the person served with it did not leave the country they would be committing a criminal offence. If it was wrongly made, that very decision needed to be quashed so that those consequences were, as a matter of law, undone. A decision by the tribunal simply that removal would be contrary to their human rights would not have that effect. Mr Biggs illustrated the general point by reference to the circumstances of RK's case. Her outstanding application for leave to remain depended on her having had unbroken leave to remain at the point that she made her further application. If the section 10 decision stood, that would not be the case since the effect of section 10 (8) was that her leave was invalidated. But if that decision were quashed she would be able to rely on section 3C of the 1971 Act in the usual way.

Discussion and Conclusion

115. I start from the position that, other things being equal (though that is an important qualification in this case), it is better for the issue whether a person has cheated in their TOEIC test to be determined in an appeal to the FTT rather than by way of judicial review proceedings in the UT. The FTT is, generally, the more appropriate forum for the determination of disputed issues of primary fact, and as a matter of the best use of judicial resources the UT ought not to be burdened with cases that could properly be determined in the FTT. That approach is reinforced by the consideration that Parliament specifically provided for appeals against section 10 decisions to be heard in the FTT, albeit out-of-country. (The FTT is also, though this is perhaps a neutral point, a jurisdiction where costs are not normally awarded.)

116. Of course, as already established, the direct route to the FTT by way of an old-style appeal against the section 10 decision itself would not provide an effective remedy in these cases, because it is out-of-country. The question before us is whether a different route to the FTT (in-country), via a human rights appeal, constitutes an appropriate available remedy. In my judgment, it may do, if but only if all of the following conditions are satisfied:

(A) It must be clear that on such an appeal the FTT will determine whether the appellant used deception as alleged in the section 10 notice.

(B) It must be clear that if the finding of deception is overturned the appellant will, as a matter of substance, be in no worse position than if the section 10 decision had been quashed in judicial review proceedings.

(C) The position at the date of the permission decision must be *either* that a human rights claim has been refused (but not certified), so that the applicant is in a position to mount an immediate human rights appeal, *or* that the applicant has failed to accept an offer from the Secretary of State to decide a human rights claim promptly so that a human rights appeal would become available.

If those conditions are satisfied, the UT would in my view normally be entitled to refuse permission to apply for judicial review – though it is impossible to predict the idiosyncrasies of particular cases, and I should not be regarded as laying down a hard-and-fast rule. I should say something more about each of the conditions.

117. As for (A), if in a case of this kind permission were given to apply for judicial review of the section 10 decision, the applicant would obtain a judicial determination of whether he or she did or did not cheat in their TOEIC test, since that is a matter of precedent fact on which the lawfulness of the decision depends. I regard the right to such a determination as a matter of real value because of the potentially grave other consequences of an official finding of that character, as identified at paras. 20-21 above, even where (untypically) it is not, or no longer, central to any removal decision. However an appellant would *prima facie* also obtain such a determination in a human rights appeal. The tribunal would of course have to decide the deception issue for itself rather than simply review the Secretary of State's finding on rationality grounds, and the appeal would to that extent be an appropriate alternative. But if there is any risk that the appeal will be determined on a basis which does not require such a determination, e.g. for the reasons suggested by Mr Biggs at para. 113 above, that will not be the case.

118. I should say, for the avoidance of doubt, that the reasoning in the previous paragraph does not mean that in every case where a finding of deception is made the subject of that finding is entitled to a judicial determination of the truth of the allegation. Whether it does so will depend on the legal context in which the question arises, including whether it is material to a human rights claim. That there are cases where only a rationality review is available is illustrated by *Giri* (see para. 43 above)[11]. Ms Giovannetti was asked by the Court whether an appellant was entitled to pursue a challenge to a deception finding in its own right, irrespective of its impact on the question of leave to remain or potential removal. She said that in principle they

[11] NB, however, that in *Kiarie and Byndloss* Lord Wilson specifically distinguished *Giri* on the basis that it "did not engage the court's duty under section 6 of the 1998 Act": see paras. 45-46 (p. 2396 B-C).

would be, but she submitted, relying on *Giri*, that such a challenge could only be on *Wednesbury* grounds.[12]

119. I turn to condition (B). Mr Biggs must be right that where the FTT on a human rights appeal finds that the appellant did not cheat, that will not formally lead to the reversal of the section 10 decision: that is a different and prior decision which will not as such be the subject of the appeal. In contrast, a successful judicial review challenge would lead to the section 10 decision being quashed. But I would not regard that difference as necessarily conclusive. This is an area where we should be concerned with substance rather than form. I would regard the crucial question as being whether the fact that the section 10 decision remained formally in place – so that leave to remain was still formally "invalidated" (see section 10 (8)) – would leave an appellant worse off as a matter of substance than if the decision had been quashed. Unfortunately this aspect was not explored in the oral submissions as fully as it might have been, no doubt as a result of the late emergence of the human rights claim issue; and the guidance I can give must be rather tentative.

120. The starting-point is that it seems to me clear that if on a human rights appeal an appellant were found not to have cheated, which inevitably means that the section 10 decision had been wrong, the Secretary of State would be obliged to deal with him or her thereafter so far as possible as if that error had not been made, i.e. as if their leave to remain had not been invalidated.[13] In a straightforward case, for example, she could and should make a fresh grant of leave to remain equivalent to that which had been invalidated. She could also, and other things being equal should, exercise any relevant future discretion, if necessary "outside the Rules", on the basis that the appellant had in fact had leave to remain in the relevant period notwithstanding that formally that leave remained invalidated. (I accept that how to exercise such a discretion would not always be easy, since it is not always possible to reconstruct the world as it would have been; but that problem would arise even if the decision were quashed on judicial review[14].) If it were clear that in those ways the successful appellant could be put in substantially the same position as if the section 10 decision had been quashed, I can see no reason in principle why that should not be taken into account in deciding whether a human rights appeal would constitute an appropriate alternative remedy. To pick up a particular point relied on by Mr Biggs, I do not regard the fact that a person commits a criminal offence by remaining in the UK from

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12 I record in this connection that in NA's judicial review grounds Mr Ó Ceallaigh argued that the effect on his reputation of the deception finding was sufficient in itself to engage his article 8 rights: he referred to the decisions of the European Court of Human Rights in *Pfeifer v Austria* (2009) 48 EHRR 8 and *Axel Springer SA v Germany* [2012] ECHR 227; and if that were correct a question might arise as to what form of review should be available where that right was claimed to have been breached. In her skeleton argument for the appeal Ms Giovannetti submitted that those decisions had no application in NA's case, and she would no doubt make the same submission in the cases of the section 10 Appellants. But no attempt was made to rely on this aspect of article 8 in their skeleton arguments or in the oral submissions, and I express no view about it.

13 Examples of Ms Giovannetti and the Treasury Solicitor acknowledging this principle appear at para. 133 below.

14 Or indeed reversed on an old-style appeal against the section 10 decision itself.

(apparently) the moment of service of a section 10 notice as constituting a substantial detriment such that he is absolutely entitled to seek to have the notice quashed, at least in circumstances where there has been no prosecution. (It is also irrelevant that the appellant may have suffered collateral consequences from the section 10 decision on the basis that his or her leave has been invalidated, such as losing their job; past damage of that kind cannot alas cannot be remedied by either kind of proceeding.)

121. So far so good, but the law in this area is very complicated and I am not confident that all its ramifications were fully explored before us. I do not feel in a position to say definitively that the Secretary of State will always be able to exercise her discretion, in the aftermath of a successful human rights appeal, so as to achieve the same substantive result as the formal quashing of the section 10 decision. There may, for example, be legislation (i.e. primary or secondary legislation rather than simply the Rules) which would result in the appellant having to be differently treated depending on whether he or she had leave to remain during a particular period. If there were any real doubt about whether in a given case a successful human rights appeal would be as effective as the formal quashing of the section 10 decision the applicant should have the benefit of that doubt and be permitted to pursue judicial review proceedings.

122. As for condition (C), I believe Mr Knafler was right to concede that if at the permission stage a human rights claim has already been made and refused, so that the claimant could appeal forthwith, then the UT would be entitled to refuse permission on the basis that an appropriate alternative remedy was available (assuming that the other two conditions are satisfied). That would lead to the crucial question being determined in what I believe to be the most appropriate forum.

123. However I also agree with Mr Knafler (subject to the point next considered) that it would be wrong to refuse permission where a human rights claim had been made but not yet refused. That would mean refusing permission on the basis, not that an alternative remedy was in fact available, but that it would become available at some uncertain date in the future. I regard that as wrong in principle, since the applicant is left entirely in the hands of the Secretary of State and may have to pass many weeks or months in limbo.

124. The remaining question is what the position is if no human rights claim has been made at all: the Secretary of State cannot decide a claim which has not been made. Given the complexity of the law in this area, I am not prepared to be critical of an applicant who has brought judicial review proceedings challenging a section 10 decision under the pre-2014 Act regime but who has not appreciated the possible procedural value of also making a human rights claim. Under that regime the making of such a claim would not, so far as the statute was concerned, have entitled him or her to an in-country appeal, because the claim would necessarily have post-dated the decision; only the most sophisticated might have been aware of the *Nirula* work-around. Nor do I think it is reasonable to expect them to have re-assessed the position following the coming into force of the new regime. However, the position would in my view be different if this route to an in-country appeal – in what I believe to be inherently the more appropriate forum – had been expressly offered to them by the Secretary of State and unreasonably refused. If the Home Office were to invite a judicial review applicant to make a human rights claim and undertake to consider such a claim and reach a decision within a reasonably short period (say 28 days), and

that offer were not accepted, I would regard it as legitimate for the UT to refuse permission – assuming that the other conditions were satisfied – on the basis that an in-country appeal was potentially available and that the only reason why it was not yet actually available was the applicant's own inaction.

125. The position is of course different if a human rights claim has already been made and certified. In such a case the claimant's right to an in-country appeal must depend on a challenge to the certification decision: see para. 104 above.

126. I turn to consider whether those conditions are satisfied in these three cases. Condition (C) is plainly not. HK made a human rights claim over a year ago but no decision has been made.[15] RK has now, albeit very belatedly, made such a claim, but there has been no offer by the Secretary of State to deal with it within a short timescale. AF has also made such a claim, but it has been certified. The question whether conditions (A) and (B) are met does not therefore arise. However, on the face of it condition (A) would appear to be met in all three cases, since we were not made aware of any other issue in any of them that might make it unnecessary to decide if the Appellant had cheated. As regards (B), my provisional view is that the particular problem in RK's case raised by Mr Biggs (see para. 114 above) could have been satisfactorily met by the Secretary of State treating her outstanding application as if she had had section 3C leave at the time it was made; but I need not express a concluded view.)

127. It follows that I do not believe that permission to apply for judicial review should be refused on the basis that the Appellants have an alternative remedy in the shape of a human rights appeal.

Concluding Observations

128. We have been told that a large number of applications to the UT for permission to apply for judicial review have been stayed pending the outcome in these appeals. It follows from the foregoing discussion that decisions may still have to be taken on a case-by-case basis about whether a human rights appeal does in the circumstances of the particular case afford an appropriate alternative to proceeding by way of judicial review. That produces a less clear-cut outcome than a blanket decision that a human rights appeal either is always or is never an appropriate alternative remedy; but I am afraid that cannot be helped. The Secretary of State may in the end, after consideration of this judgment, prefer not to take the point; but that must be for her assessment. If she does take it in all or some cases, she will no doubt wish to consider how best to ensure that applicants are made aware of the availability, or potential availability, of a human rights appeal in their particular cases. And it may be that some applicants, once they are made aware of that option, may positively prefer to pursue it. But none of these are matters that we can dictate.

129. It is worth reflecting briefly on how this very messy and unsatisfactory state of affairs has arisen. It seems to be the product of three factors operating together:

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15 I appreciate that the delay may not be culpable: perhaps the Secretary of State wanted to await the outcome of these proceedings. But the end result is what it is.

(1) First, 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.

(2) Second, although the legislation as it stood before the 2014 Act allowed for an in-country appeal where a human rights claim had been made, that route was not available in these cases because the claim had to have been made before the decision was taken, and the Secretary of State served the section 10 notices without any prior warning, giving no opportunity to make a human rights claim first. There may have been good reasons for her taking that course, though when we put the point to Ms Giovannetti her instructions did not enable her to say more than that there had been careful consideration by the Home Office of what was the best way of proceeding.[16]

(3) Third, although under the old legislation that problem could have been resolved by use of the *Nirula* work-around, the structural changes effected by the 2014 Act closed off that route. An in-country appeal is now only (arguably) available by appealing against a different decision, which inevitably leads to the complications discussed above.

It would be useless, even if we were in a position fairly to do so, to attribute blame for all this. I would only observe that it is a yet further illustration of the difficulty and complexity of the law in this area.

(7) THE ADDITIONAL POINTS IN MR FARUK'S CASE

130. As noted above, Sir Stephen Silber gave AF permission to appeal not on the basis of the more general grounds in HK's and RK's cases, although he has since adopted those grounds, but on the basis of two reasons peculiar to his case which were said to constitute "special and exceptional factors" of the kind recognised in the *Lim* line of cases. These continued to be relied on by Mr Malik by way of fallback. I take them in turn.

131. The first depended on an e-mail exchange between the Home Office and ETS in 2012, when AF's application to extend his leave to remain was being considered: copies were eventually disclosed as a result of a subject access request. In the exchange ETS was asked by the Home Office to "verify" the information contained in the TOEIC test certificate which AF had submitted in support of that application. It replied saying that the details in question "have been verified and are correct". It is AF's case that that exchange constituted evidence that he had in fact taken the test in person and that it was a breach of the Secretary of State's duty of candour that it had not been disclosed in the present proceedings prior to the refusal of permission by the Upper Tribunal. This contention seems to me obviously ill-founded. The only reasonable reading of the exchange, which pre-dates the *Panorama* revelations by over a year, is that it was not directed to establishing that AF had taken the test personally but was

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16 She also reminded us that this Court had held in *Mehmood and Ali* that it was not unlawful for the Secretary of State not to have given the appellants the opportunity to respond to the allegations of cheating before she made the section 10 decisions (see para. 72 (p. 480 D-F)). That is true as far as it goes, but the point in issue was different.

simply a routine enquiry to establish that the test certificate was a genuine record of his scores.

132. The second stemmed from the fact that AF had a pending application for an extension of his leave to remain at the time that the section 10 notice was served. It was said that but for the allegation of cheating that application would have been granted, and that it would have led to his accruing ten years lawful residence in 2016 and qualifying for indefinite leave to remain. Mr Malik's point was not that the invalidation of AF's existing leave to remain by the service of the notice would deprive him of that opportunity: as I understand it, he acknowledged that if the appeal succeeded the *status quo ante* would be restored. Rather, it was that if he had to leave the country in order to pursue his appeal he would cease to be able to show ten years' continuous residence. Ms Giovannetti's response was that the Secretary of State acknowledged that, if on an out-of-country appeal the FTT found that AF had not cheated, she would be obliged to proceed in any application under the Rules on the basis that the section 10 notice was wrongly given and that AF would have accrued the necessary ten years. I see no reason to go behind that assurance, and if this had been the only basis of AF's appeal I would have dismissed it.

133. I should add for completeness that in her witness statement lodged for the purpose of his appeal AF's solicitor, Ms Shah, recounted in some detail the experience of a different client, a Mrs Shah, who had brought an out-of-country appeal in a TOEIC case and had succeeded[17]. Ms Shah says that when she asked the Home Office "to reinstate Mrs Shah's previous visa status" – the "invalidated" leave not having expired – she was told that she would have to apply for entry clearance in the usual way and show that she qualified under an appropriate category. That decision is now itself being challenged by way of judicial review. Ms Shah's point was that if AF returned to Bangladesh in order to pursue his appeal he would presumably be treated in the same way and be deprived of – or at least unjustifiably hampered in achieving – the fruits of his victory. A similar point, based on the case of a Mr Patel, was made in evidence from Mr Khan of HK's solicitors. There was some discussion of this point in oral submissions. Ms Giovannetti said that she was unable to comment on the particular cases referred to but acknowledged that the Secretary of State ought to take whatever steps were possible to restore successful out-of-country appellants to the position that they would have been in but for the impugned decision. After the conclusion of the hearing the Treasury Solicitor on 30 October 2017 wrote to the Court as follows:

> "… I have been asked to clarify my client's position in circumstances where an out of country appeal has taken place and the Tribunal has allowed the Migrant's appeal and, in doing so, has found against the Secretary of State.
>
> For the avoidance of doubt in such circumstances, the Secretary of State accepts that she is bound by the findings of the Tribunal in a successful out of-country appeal and that any detriment to the

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17 This was a case where, remarkably, the Secretary of State had failed to lodge even the evidence of Ms Collins and Mr Millington, let alone any look-up evidence, and was refused an adjournment in order to do so.

> appellant should be minimised as far as possible. This is likely to include the need to grant entry clearance.
>
> The Secretary of State will use her best endeavours to ensure that appropriate steps are taken to give effect to the Tribunal's decision."

It is not necessary or appropriate for this Court to express an opinion on any disputed matters that do not arise in these appeals and were not the subject of argument. But I hope that the Secretary of State will indeed ensure that Entry Clearance Officers are properly aware of the need to give full effect to decisions of the FTT and UT.

CONCLUSION ON THE SECTION 10 APPEALS

134. I would allow all three appeals and give permission to the Appellants to apply for judicial review of the section 10 decisions in their cases and thus, in that context, for a determination of the question whether they cheated in their TOEIC tests. I would remit the cases to the UT for that purpose. In AF's case consideration will need to be given to how those proceedings relate to his stayed application in relation to the certification of his subsequent human rights claim.

(B) MR AHSAN'S APPEAL

THE FACTS AND THE PROCEDURAL HISTORY

135. NA is a Pakistani national, now aged 30. He came to this country on 23 August 2006 on a student visa valid until 30 November 2007. His leave was extended on various occasions. In support of applications made on 2 October 2012 and 26 July 2013 he submitted a TOEIC test certificate issued by Colwell College in London on the basis of a test taken on 27 June 2012. The most recent grant of leave was to 19 June 2015.

136. In August 2014 the licence of NA's sponsoring college was revoked. On 23 October he made a further application for leave to remain on the basis of continuing his studies at a different college, the Centre of Training and Management ("CTM"). It is common ground that while that application was pending he enjoyed leave to remain under section 3C of the 1971 Act.

137. In the meantime, on 28 October 2014 the Home Office wrote to NA enclosing a section 10 notice dated 24 October notifying him that he was liable for removal on the basis that he had used a proxy for the tests on whose results he had relied in his 2012 and 2013 applications. The notice was in essentially the same terms as in the cases of the section 10 Appellants. In fact it was invalid because under the applicable commencement provisions NA's case fell under the 2014 Act regime, under which, as we have seen, section 10 in its original form had been replaced.

138. On 9 February 2015 NA commenced judicial review proceedings challenging the section 10 decision. The grounds contained an explicit statement that he had taken the TOEIC test himself and advanced at least some reasons in support of that

statement. By that time the Secretary of State had appreciated that the section 10 decision was invalid. The proceedings were accordingly compromised by a consent order dated 6 May. By the recitals to that order the Secretary of State (a) agreed to withdraw the section 10 notice; (b) acknowledged that she had to consider the outstanding application of 23 October 2014; (c) allowed NA a further 60 days to update that application; and (d) confirmed that he "has been and remains on section 3C leave since he submitted his application" (I have slightly re-ordered those points for ease of summary).

139. On 17 June 2015 NA's solicitors, Maliks & Khan ("MK"), wrote to the Home Office purportedly submitting updated information in accordance with recital (c) of the order of 6 May. As I understand it, the original purpose of that recital was to enable NA to submit a fresh application supported by a CAS from CMT; but that proved impossible because, as MK explained in the letter, CMT's licence had been revoked on 12 June. They asked for a further 60 days to enable him to find a new sponsor. But they also indicated that NA was submitting a separate application on form FLR (FP) seeking leave to remain "due to the extensive private life he has established under Article 8 of the ECHR".

140. That application was submitted under cover of a further letter from MK dated 22 June 2015, which asks that it be accepted as a "variation" of the extant application. Form FLR (FP) is described on its face as appropriate for an application for leave to remain based either on family life as a parent or partner or on "private life in the UK (10 year route)": qualification by the last of those routes at least would entitle the applicant to indefinite leave to remain under paragraph 276DE of the Immigration Rules. NA had no child or partner, and he had been in the UK for less than nine years, so the form does not appear very apposite. The way it is completed yields almost no information about the basis on which the application is made[18], but I assume that the terms of MK's covering letter are intended to be incorporated. These are somewhat diffuse but they appear to say that the application is for leave to remain (not specified as being indefinite leave) under article 8 outside the Rules and/or as a matter of common law fairness. The basis of the application is explained as follows:

> "The Applicant seeks to extend his stay in the UK in order for him to complete his education in the United Kingdom.
>
> The Applicant came to the UK to complete his studies. The Applicant came to the UK at the age of 18 and is now 27 years old.
>
> The Applicant has invested a lot of time and money on his education in the UK. Therefore, it is unfair for the client to go back to Pakistan without completing his education.
>
> The Applicant's current Tier 4 institution licence has been revoked and therefore, the Applicant cannot rely on the CAS submitted in his last Application for extension as a Tier 4 Student. The Applicant cannot be held responsible for the Home Office revoking the Tier 4 Sponsors

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18 There appear to have been one or more attachments which may have contained such details, but they are not in the bundle.

> Licence. The Applicant has not contributed and is at no fault in the revocation of the Licence. The Applicant is not able to complete his education to the end due to this recent hindrance by his Tier 4 Sponsor."

MK then refer to the well-known decision of the UT (Blake P and UTJ Batiste) in *Patel v Secretary of State for the Home Department* [2011] UKUT 00211 (IAC). That decision establishes, in short, that in cases where a sponsor's licence has been revoked a student ought generally to be given an extension of leave sufficient to give him or her a reasonable opportunity to make an application to vary their current leave by naming a new sponsor; and that an extension of 60 days would be sufficient for that purpose. They continue:

> "Therefore, as per the judgment, the appellant ought to have been afforded a reasonable opportunity to vary the application under s. 3C(5) Immigration Act 1971 by identifying a new sponsor before the application is determined. However, the Applicant is unable to secure a new Tier 4 sponsor without having current valid leave. The Applicant has approached a number of Tier 4 institutions however they have declined to issue the Applicant a valid CAS for the purpose of continuing with his education. Due to recent restrictions placed on Tier 4 Sponsor's by the SSHD most college/universities are reluctant to take on students that have no valid leave or where the students previous Sponsor has had their Licence revoked."

This passage is rather obscure, but I understand it to raise a different point than merely needing a further 60 days: what appears to being said is that sponsors will not issue a CAS on the basis of section 3C leave only.

141. I do not understand why MK advanced the application for further leave to remain in the way they did. Seeking to rely on the original application of October 2014, as varied by the application on form FLR (FP)[19], itself glossed by the terms of the covering letter, was a recipe for confusion. Nevertheless it is adequately clear that a, if not the, central thrust of the application was that NA was entitled under article 8 to leave to remain for a sufficient time to find a new sponsor and to complete his studies thereafter. It was on any view a human rights claim within the meaning of section 113 of the 2002 Act.

142. By a decision dated 31 December 2015 NA's application was refused. The reasoning in the decision letter proceeds methodically through the various bases of application for which form FLR (FP) is designed. This results in a fair amount of repetition, but the reasons can for present purposes be sufficiently summarised as follows:

(1) NA did not qualify under any of the positive provisions of the Immigration Rules relating to private or family life. In particular, so far as private life was concerned he had not been in the UK for ten years.

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[19] When this judgment was circulated in draft we were told that form FLR (FP) was selected because there is no other appropriate form.

(2) In any event his application would fall for refusal under the suitability provisions of Appendix FM (which apply also to private life claims) because he had relied on a fraudulently obtained TOEIC certificate: the allegation that he had used a proxy for the spoken English part of the test was in substantially identical terms to those in the abortive section 10 notice, and I need not set them out here. No reference is made to his denials in the compromised judicial review proceedings.

(3) There were no exceptional circumstances justifying the grant of leave to remain under article 8 outside the Rules. In that connection the letter says, among other things:

> "You have stated that you wish to study in the UK. This has been carefully considered. However, it is open to you to return to Pakistan and pursue your studies there. Alternatively, you can apply for entry clearance from Pakistan to study under the appropriate route."

143. The decision letter concluded with a certification decision in the following terms:

> "After consideration of all the evidence available, your claim has been certified under section 94(3) of the Nationality, Immigration and Asylum Act 2002 because the Secretary of State is not satisfied that it is not clearly unfounded. This is because you lived in Pakistan for 18 years before entering the UK and have stated that you have family there. It is therefore not considered that it would be reasonable to expect you to return to Pakistan as explained above."

(The reference to section 94 (3) must be an error, since sub-section (3) has no application to NA's case. But the case has proceeded on the basis that the intended reference is to sub-section (1).) The letter explains that the effect of that certification is that NA's right to a human rights appeal could only be pursued from outside the UK.

144. It will be noted that the reasons given for the certification focus entirely on the fact that NA would be able to integrate in Pakistan if returned, which was evidently believed to be decisive of his case based on article 8 generally. Nothing is said about his case based on the need for a further period of 60 days (or more) as a result of the revocation of CMT's licence. Nor is it said that his claim not to have used deception was clearly unfounded: indeed, as I have noted, his denials are not referred to at all.

145. The present proceedings were issued on 31 March 2016. The only ground pleaded is that the certification of NA's human rights claim was unlawful. I need not summarise in detail the particular contentions advanced under that ground. It is sufficient to say that it is contended that neither NA's case based on his private life nor his denial that he had committed TOEIC fraud could be said to be wholly unfounded.

146. Permission to apply for judicial review was refused by UTJ Rimington on the papers on 14 June 2016, essentially on the basis that, irrespective of the deception issue, it was not arguable that NA could be entitled to leave to remain on the basis of his private life.

147. NA renewed his application at an oral hearing before UTJ Kekic on 26 August 2016. She refused permission. Her written summary of her reasons reads:

> "(1) The evidential burden on the respondent with respect to the allegation of deception has been discharged.
>
> (2) The applicant's private life application does not meet the requirements of the Immigration Rules and does not disclose any compelling or exceptional factors which would warrant a grant of discretionary leave.
>
> (3) The applicant has the remedy of pursuing an out of country appeal."

148. On 10 July 2017 Sir Stephen Silber gave permission to appeal in the same terms as in HK's and RK's cases, i.e. by reference to *Kiarie and Byndloss*.

THE ISSUES

149. The history of the case has not conduced to the issues being clearly defined in advance of the hearing. The best way of identifying them is to summarise the parties' cases as they appear from the skeleton arguments and the oral submissions.

150. I start with how Ms Giovannetti put her case. In her initial skeleton argument she contended that, viewed as a straightforward private life claim based only on the length of time that NA had been in the UK, it was, as both UT judges had held, hopeless. To anticipate, I agree; and Mr Knafler did not attempt to argue otherwise. In her oral submissions she addressed the case based on NA's interest in continuing his education, and submitted that that too was hopeless. This was a case of a not unusual type where a student's college had lost its licence and he had been unable to find another college within the 60-day period which *Patel* had held to be reasonable. That being so, any challenge to the certification on the basis that it was arguable that NA had not cheated in his TOEIC test was immaterial, since even if that was the case he had no basis for leave to remain.

151. I turn to Mr Knafler's submissions. He contended that it was impossible to hive off the deception issue in the way argued for by Ms Giovannetti. There was plainly an arguable issue on the human rights claim which arose from the interruption of NA's studies by the revocation of CTM's licence. That had occurred only ten days before the letter of 22 June 2015 and on any view NA should have been given 60 days to find a new sponsor; but he said that the point raised in the final passage quoted from MK's letter (para. 140 above) might have required a longer grant. This aspect was not addressed in the decision letter and was not the basis of the decision.

152. That being so, the decision stood or fell by the finding that NA had used deception, and the certification of his claim in that regard was indefensible since there was clearly an arguable issue as to whether he had cheated as alleged. Mr Knafler reminded us of the well-known authorities on certification, most recently reviewed at paras. 48-62 of the judgment of Beatson LJ in *R (FR (Albania)) v Secretary of State for the Home Department* [2016] EWCA Civ 605. He relied on the many

observations in the UT and this Court to the effect that the question whether an applicant or appellant had cheated was fact-sensitive and could not be decided without consideration of their oral evidence. He also relied on the fact that NA had very recently – in mid-August 2017 – sought and obtained a copy of his voice-files and that his solicitors, who have been representing him for many years, have made witness statements saying that the voice on it is clearly recognisable as his.

DISCUSSION AND CONCLUSION

153. The first question is whether NA's article 8 case was clearly unfounded, so that it is, as Ms Giovannetti submits, unnecessary to consider the deception issue at all. If that case were being run on the basis simply of nine years' residence, together with difficulty of re-integration on return, it would be impossible to challenge the certification. But there is of course the more specific case based on the interruption of NA's studies by the successive revocation of the licences of his most recent sponsors. I am doubtful about this. NA may well have had an arguable case that he was entitled to a further 60 days leave in order to find another sponsor, but by the time of the Secretary of State's decision that period had long passed. On the other hand, MK do appear to have been contending that he could not get a CAS unless and until leave, other than section 3C leave, was granted. We were not addressed on the detail of all this, and it may be that that argument is spurious. However, the point was not specifically addressed in the decision letter, and it is important to bear in mind that this is a certification case and the benefit of any real doubt must go to the appellant. I am not prepared to say that this aspect of NA's human rights claim was wholly unfounded.

154. The certification can thus only be upheld on the basis that the case that NA had cheated was, in effect, unanswerable. However, that was not the reason for the certification given in the decision letter. There is the further problem that the letter did not advert in any way to NA's denial of having cheated pleaded in the previous judicial review proceedings, let alone seek to explain why any such denial was clearly unfounded. In my judgment those points are sufficient to render the certification unlawful.

155. It is not strictly necessary in those circumstances to consider whether, if the Secretary of State had addressed the question, she could reasonably have concluded that the case against NA was unanswerable, and accordingly certified that his human rights claim was clearly unfounded. But I find it hard to see how she could have. It is clear from the authorities summarised in *FR (Albania)* that the question would have to be decided on the basis of the information reasonably available to the Secretary of State at the time of her decision. The emphasis placed in the case-law on the fact-sensitivity of cases of this kind means that any certification will be vulnerable unless it is based on a thorough review of the evidence said to demonstrate cheating in the particular case, including any denial by the person in question. I do not see how, on the materials apparently available to the Secretary of State at the end of 2015 (being the date of the decision in his case), as assessed in the case-law from the following year, she could reasonably have been sure that his case that he took the test personally would be disbelieved by a tribunal.

156. I recognise that, as Ms Giovannetti has emphasised, the nature of the available evidence has since then changed and that those changes are reflected in the more recent case-law. As I have already said, we were not taken to the evidence in question ourselves. I do not rule out the possibility that it may be capable of supporting certification in some cases; but if the Secretary of State intends to certify in any given case she will need to confront the repeated admonitions to the effect that these cases are fact-sensitive and say with particularity why there is in the circumstances of the particular case nonetheless no prospect that the appellant's oral evidence could discharge the evidential burden on them. I took Ms Giovannetti to be floating the possibility that an appeal could not succeed where the claimant had not taken the elementary step of obtaining a copy of his or her voice-file. I accept that that may well be a weighty consideration; but I am not prepared to say that it will in all cases be decisive.

157. For those reasons it seems to me that permission to apply for judicial review should have been granted in NA's case, and his appeal should accordingly be allowed. Formally, whether permission should have been granted is the only issue before us, and the application for judicial review should be remitted to the UT for a substantive hearing. However, the nature of the issue – i.e., essentially, whether NA's human rights claim is arguable – is such that it follows from my reasoning that the substantive application also would inevitably succeed, and I would accordingly be minded to order now that the certificate be quashed so that NA can proceed with an in-country human rights appeal. I would, however, be prepared to consider any representations about that course before making a final order.

SUMMARY

158. I am conscious that the discussion and analysis in the previous 157 paragraphs is very elaborate. In case it is of assistance to practitioners and others I will give a short summary of my reasoning on the points of possible wider application raised by these appeals. But I emphasise that any summary of this kind carries the risk of being over-broad and omitting important subtleties, and on any point of difficulty it is necessary to go back to the detailed reasoning. Since I understand that the judgment is agreed by Floyd and Irwin LJJ I will refer to my conclusions as those of the Court:

(1) In deciding by what route a decision to remove someone on the basis that they cheated in a TOEIC test can be challenged, the starting-point is to establish whether the decision was made under the 2014 Act regime or its successor. (If it was made prior to 20 October 2014 it will fall under the old regime, and if it was made after 5 April 2015 it will fall under the new regime; in between those dates the position depends on the effect of the applicable commencement and transitional provisions.)

(2) If the decision falls under the old regime it will have been taken under section 10 of the 1999 Act in its unamended form. The person affected by the decision will generally have a right only to an out-of-country appeal, under section 82 of the 2002 Act, read with section 92 (1): they will not, except by unusual chance, have a right to an in-country appeal under the "human rights claim" provision of section 92 (4), because they will not typically have made such a claim prior to the removal decision: see para. 15.

(3) What the Court holds in part (A) – see in particular paras. 72-98 – is that an out-of-country appeal is not an effective remedy where (a) it would be necessary for the appellant to give oral evidence on such an appeal and (b) facilities for him or her to do so by video-link from the country to which they will be removed are not realistically available. It accordingly holds, subject to (4) below, that persons against whom such a decision is made will be entitled to challenge the decision by way of judicial review; that is so whether or not their article 8 rights are engaged. In reaching that conclusion the Court follows the approach of the Supreme Court in *Kiarie and Byndloss* to what are substantially similar circumstances and distinguishes its previous decisions in *Mehmood and Ali* and *Sood*. The Court finds that both conditions were satisfied in the present cases and observes that condition (a) is likely to be satisfied in TOEIC cases generally (see para. 91) and that in typical cases condition (b) is likely to be satisfied also (see para. 90).

(4) Notwithstanding (3), the Court at para. 99-127 accepts that in principle permission to proceed by way of judicial review could be refused if the person in question could achieve an equivalent remedy by an in-country human rights appeal under the 2014 Act regime, subject to the Home Secretary's power to certify the claim as wholly unfounded. But such a remedy would only be equivalent if the three conditions identified at para. 116 above are satisfied, which they were not in these cases.

(5) Part (B) of the judgment concerns a challenge to the certification of a human rights claim in a particular case to which the 2014 Act regime applies. The Court finds that the certificate is liable to be quashed. The decision does not directly depend on the issue of whether the Appellant cheated in his TOEIC test, but the Court makes some observations about the appropriateness of certification where that is the determinative issue: see para. 156.

(6) The judgment also discusses the authorities on the extent to which the article 8 rights of students may be engaged by their removal prior to completion of their studies (see paras. 84-88) and the obligations of the Secretary of State to facilitate return in cases where a person who has been removed is successful in an out-of-country appeal (see para. 133).

Lord Justice Floyd:

159. I agree.

Lord Justice Irwin:

160. I also agree.