Response of the Immigration Law Practitioners' Association to the Home Affairs Select Committee Inquiry into the Home Office's use of English-language testing in relation to the issuing of visas, 06 June 2016

Executive Summary

1. The Immigration Law Practitioners' Association (ILPA) is a registered charity and a professional membership association. The majority of members are barristers, solicitors and advocates practising in all areas of immigration, asylum and nationality law. ILPA members have represented both visa applicants and organisations/institutions sponsoring visa applicants who have been affected by the Home Office approach to allegations of fraud in Secure English Language Tests for visa purposes. Our evidence therefore focuses on the impact of the Home Office response on applicants and sponsors.

2. The Upper Tribunal in *SM and Qadir (ETS – Evidence – Burden of Proof)* [2016] UKUT 228 found that the Home Office relied entirely on the information provided by ETS in making its decisions in individual cases and that it was 'far from clear' that the Home Office examined each case individually to identify relevant factors militating against removal of the applicant. This reflects the experience of ILPA members in these cases who found the Home Office identified applicants as deceptive even when there was other evidence available in their application that would disturb such a finding. Expert evidence accepted by the Upper Tribunal highlighted the risk of false positive results in the ETS data, indicating that there were applicants wrongly accused of cheating. It is apparent that the Home Office refused applications or curtailed (cancelled) leave on the sole ground that students had taken the test at a centre where large numbers of invalid and questionable test results had been diagnosed so students were penalised simply for having taken their English language test at a centre that was on the Home Office list of approved test centres which also led to unfairness.

3. Tier 4 sponsor clients were proactive in stopping accepting ETS test certificates once BBC Panorama broadcast its documentary on fraudulent activity. The premature action taken against sponsors by the Government to suspend or revoke their Tier 4 sponsorship licences, including the naming of universities suspected of non-compliance in its parliamentary statement, resulted in reputational damage to these institutions and their students and in loss of income as a result of action being taken during the main recruitment period ahead of September start dates. There were delays in reinstating sponsorship licences and in being able to issue Confirmations of Acceptance onto Studies compounding financial losses. Many letters issuing decisions to suspend/revoke licenses provided unfair and irrational reasoning for selecting the sponsor for investigation.

4. The blanket Home Office response to allegations of fraud had a negative impact on applicants innocent of any wrongdoing who were studying at institutions whose sponsorship license was revoked or suspended as well as a devastating and wide-reaching impact on visa applicants unfairly accused of obtaining their TOEIC certificate through fraudulent means. In the latter case, the impact on applicants was compounded by the limited scope to challenge decisions by the Home Office in their cases.

5. The limited scope to challenge unfair Home Office decisions on ETS/TOEIC cases may only be fully understood in the context of:

- The removal of statutory rights of appeal from immigration decisions that do not raise asylum or human rights protection; the relevant provisions of the Immigration Act 2014[1] were brought into force on 20 October 2014;
- The limitations on challenging Home Office decisions to curtail (cancel) leave to enter/remain from within the UK by those with rights of appeal preserved under transitional provisions made by regulations under the Immigration Act 2014.
- The conduct of litigation by the Secretary of State where applicants have brought challenges to decisions.

6. The concerns that gave rise to the issues raised by this inquiry rare ongoing. Many applicants under the old appeals regime remain in the appeal process facing continuing difficulties challenging unfair and arbitrary decision-making by the Home Office in ETS/TOEIC cases. In other cases, applicants face removal from the UK before being able to bring an appeal, causing disruption to their established life in the UK. Many more applicants will be unable to an adequate remedy to challenge the accusations levelled at them by the Home Office. The unfair and arbitrary Home Office decision-making in ETS/TOEIC cases is being repeated in other types of decisions on immigration applications with similar difficulties for applicants in accessing redress.

7. The extent of poor quality Home Office decision-making and the difficulties faced by applicants in accessing remedies in these cases highlight the impact of the removal of statutory rights of appeal in most immigration decisions following the commencement of section 15 of the Immigration Act 2014. The report of the Independent Chief Inspector into the system of Administrative Review implemented in its place[2] has not identified practice that can give sufficient confidence in the process of Administrative Review as a means of ensuring the Home Office can be held to account in ensuring high quality decision-making in immigration cases.

Introduction

8. The Immigration Law Practitioners' Association (ILPA) is a registered charity and a professional membership association. The majority of members are barristers, solicitors and advocates practising in all areas of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Founded in 1984, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on advisory and consultative groups convened by Government departments, public bodies and nongovernmental organisations.

9. ILPA members have represented both visa applicants and organisations/institutions sponsoring visa applicants who have suffered harm as a result of the Home Office approach to allegations of the use of fraud in Secure English Language Tests for the purpose of securing Test of English for International Communication (TOEIC) certificates necessary

[1] Section 15.
[2] Available at http://icinspector.independent.gov.uk/work-in-progress/administrative-review/ (accessed 6 June 2016).

for certain visa applications requiring evidence of proficiency in English. Our evidence therefore focuses on the following issues to be considered by the inquiry:

- The response of the Home Office to the allegations
- The process for determining whether applicants acted fraudulently
- The role of visa sponsors, both before and after the allegations
- The impact on applicants innocent of any wrongdoing
- The scope for those accused to challenge decisions

10. In addition, we highlight that the issues under examination by this inquiry are of ongoing concern. Many applicants face continuing difficulties in challenging incorrect Home Office decisions in this context and many other applicants affected have no access to an adequate remedy. The Home Office practice that led to the situation in ETS/TOEIC cases is being repeated elsewhere in the determination of immigration applications.

11. The extent of poor quality Home Office decision-making and the difficulties faced by applicants in challenging decisions in these cases highlights the harmful impact of the removal of statutory rights of appeal in most immigration decisions following the commencement of section 15 of the Immigration Act 2014. The experience of applicants also demonstrates the need for remedies to be effective and accessible and highlights the need for urgent reforms.

The response of the Home Office to the allegations

12. On 10 February 2014, the BBC broadcast its *Panorama* programme showing fraudulent activity in two Secure English Language Test centres run by Educational Testing Services (ETS), a contracted Home Office supplier administering English language tests for the issue of TOEIC certificates necessary for certain visa applications to enter or remain in the UK that require the applicant to demonstrate a level of proficiency in English.

13. The Home Office suspended tests administered by ETS, stopped accepting TOEIC certificates issued by ETS for in-country visa applications and placed all pending visa applications relying on ETS tests on hold[3].

14. Following an internal review conducted by ETS, the company informed the Home Office that It had been able to identify the use of impersonation and proxy testing using voice recognition software and began sending results from this analysis to the Home Office in late March 2014[4].

15. ETS categorised the results highlighted through this exercise as either 'invalid' or 'questionable', both of which led to the cancellation of the test certificate[5]. At 31 December 2015, ETS reported 33,725 test results as 'invalid' and 22,694 results as

[3] Gazi, R (on the application of) v Secretary of State for the Home Department (ETS – judicial review) (IJR) [2015] UKUT 327 (IAC) (27 May 2015), available at: http://www.bailii.org/uk/cases/UKUT/IAC/2015/327.html, para 7
[4] Ibid, para 8
[5] SM and Qadir (ETS - Evidence - Burden of Proof) [2016] UKUT 229 (IAC) (21 April 2016), available at: http://www.bailii.org/uk/cases/UKUT/IAC/2016/229.html, para 14(8)

'questionable' from its 96 test centres[6]. The Home Office matched the ETS testing analysis outcomes to individual applicants using their name, date of birth and nationality under a system known as the 'Lookup Tool'[7] from which a computerised spreadsheet relating to an applicant may also be printed[8].

16. The Home Office relied on this data to allege that the TOEIC certificate submitted by applicants was fraudulently obtained and to refuse visa applications that were pending, curtail (cancel) the leave to enter or remain of individuals whose visa application had been granted and who were living in the UK, and make decisions to remove applicants from the UK. Home Office statistics indicate that as of 31 December 2015, more than 28,297 decisions had been made of this kind[9].

17. The process (or, more accurately, absence of an adequate process) for determining whether applicants acted fraudulently and the impact on applicants of being unfairly accused of deception are criticised under the relevant sections below. The impact of the Home Office response to allegations of fraud on institutions sponsoring students is discussed in a separate section on the role of sponsors.

Process for determining whether applicants acted genuinely or fraudulently

18. In its conclusions on the shortcomings in the evidence of the two principal witnesses for the Secretary of State in *SM and Qadir (ETS – Evidence – Burden of Proof)* [2016] UKUT 228, the Upper Tribunal found that the Home Office was entirely dependent upon the information provided by ETS in making its decisions in individual cases[10]. Earlier in the judgment, the Tribunal found that it was *'far from clear'* whether the Home Office examined each case individually to consider all relevant factors that might mean that removal was not appropriate[11].

19. These findings reflect the experience of ILPA members. Clients who are visa sponsors have identified through their own investigations and interviews with students that some of the contents of the lists of students with invalidated test results provided were unreliable. In some of these cases, the Home Office has confirmed to the education provider that the student in question should not have been on the list.

20. The lists of students given to education providers contained the names of students who had sat a TOEIC test at any point, regardless of whether they had ever relied on this certificate in any application:

> *In one case, a student who was not happy with how the ETS test was run chose not to rely on the test and instead undertook and submitted an IELTS test, an alternative Secure English Language Test approved by the Home Office. She was identified to the education provider as*

[6] UK Visas and Immigration, Temporary and permanent migration data: February 2016, available at: https://www.gov.uk/government/publications/temporary-and-permanent-migration-data-february-2016, table SELT_01
[7] *SM and Qadir*, *op. cit.* para 12
[8] *SM and Qadir, op.cit.,* para 10(a)
[9] UK Visas and Immigration, Temporary and permanent migration data: February 2016, available at: https://www.gov.uk/government/publications/temporary-and-permanent-migration-data-february-2016, table SELT_02
[10] *SM and Qadir*, *op. cit.* para 63(ii)
[11] *SM and Qadir*, *op.cit.,* para 14(8)

a person who had used deception. The sponsor was pressured by the Home Office to withdraw their sponsorship of the student but refused to do so as, from their own checks, they were satisfied as to her English language ability and that she was a genuine student.

21. Expert evidence accepted by the Tribunal in *SM and Qadir* with 'no hesitation' highlighted that the automatic speaker recognition system and the human analysts verifying matches are capable of false positive errors[12] which would lead to test takers being incorrectly identified as having fraudulently taken the TOEIC test. The evidence also set out an 'unremitting critique' of the Secretary of State's evidence which failed to provide the information necessary to evaluate the various relevant factors known to affect voice sample analysis in order to assess the reliability of the process and the scale of false positive results.

22. During the hearing of *SM and Qadir*, it emerged for the first time that the Home Office also refused visas or curtailed (cancelled) leave to enter or remain, in cases where voice sample analysis conducted by ETS did not indicate an 'invalid' or questionable result. The Home Office cancelled visas on the sole ground that the student had taken the test at a centre where large numbers of invalid and questionable test results had been diagnosed[13]. Applicants were therefore treated as having used deception and action taken against them simply for having taken their English language test at a centre that was on the Home Office list of approved test centres to fulfil a requirement of their visa imposed by the Home Office. We have seen a number of such cases of unfairness towards applicants.

The role of sponsors, before and after the allegations

23. To maintain their sponsorship licence enabling them to sponsor students under Tier 4 of the Points Based System, education providers need to make sure that their refusal rate (i.e. number of students refused a visa) is below 10%; their enrolment rate (i.e. students with visas who enrol with them) is at least 90%; and their course completion rate (i.e. students who complete their course with them) is at least 85%. Therefore, they need to make sure that they only recruit students who intend and are able to undertake the course. Part of that assessment is checking a student's English language ability. In the majority of cases, sponsors ask students who are required to meet the English language requirement to provide a Secure English Language Test certificate from the list of providers approved by UK Visas and Immigration as this is same certificate required by UK Visas and Immigration to meet the requirements of the visa. Until June 2014, ETS was on that list of approved providers and until the Panorama programme was aired in February 2014, sponsors would have had no reason not to accept a TOEIC English language certificate.

24. The Home Office failed to provide adequate guidance to sponsors when it decided not to renew its licence agreement with ETS which expired on 05 April 2014. The Home Office did not notify Tier 4 sponsors of its decision until 17 April 2014 when it sent an e-mail to all sponsors advising that ETS TOEIC and TOEFL tests were no longer valid as evidence of a Secure English Language Test (SELT). No further guidance was sent to sponsors in the email prompting ILPA members representing them to contact the Home Office policy team and overseas visas posts for clarification. The Home Office policy did not provide further

[12] Op.cit., para 27(19)
[13] Op.cit., para 16

guidance, but simply advised overseas visa posts to hold all applications relying on ETS test until further notice.

25. ILPA members representing sponsors pointed out to the Home Office that as details of approved English language providers are set out in the Immigration rules, any changes, including the removal of ETS tests, would need to be put before Parliament, and the Rules would need to be amended by way of a Statement of Changes. It was not, however until 10 June 2014 that the government laid the changes to the Immigration Rules before Parliament to remove ETS from the list of approved English language providers, that took effect from 01 July 2014.

26. Despite this delay by the Home Office, Tier 4 sponsor clients were proactive and immediately stopped accepting ETS certificates as evidence of English language following the broadcasting of the Panorama programme and before the government took any action. Clients also reported that they reviewed students who had been issued with a Confirmation of Acceptance for Studies and had presented an ETS test certificate asking these students to undertake a different approved English language test and rechecking the English language level of these students. Some Tier 4 sponsors retested all their students that were on the ETS "questionable" list to determine their English language level.

27. On 24 June, the Minister for Immigration and Security the Rt Hon James Brokenshire MP made a statement to Parliament publicly naming three universities as non-compliant and suspending their ability to sponsor students together with the licences of 57 private further education colleges[14].

28. It is unclear why the government chose to publicly name, in Parliament, educational institutions, which included three universities, as non-compliant with their sponsor responsibilities, particularly when investigations had yet to be carried out in relation to two of the universities named.

29. The premature action taken against sponsors by government to suspend or revoke their Tier 4 sponsorship licences and the naming of universities in its parliamentary statement resulted in reputational damage to these institutions and their students and undue stress and anxiety to students about their future. It jeopardised students' studies and future and resulted in loss of income in millions to *bona fide* education providers and in turn to the wider economy as action was taken during the main recruitment period ahead of September start dates. Once investigations (some lasting a over a number of days and involving the review of hundreds of files) were concluded, there were then further delays of some two months in some cases in reinstating sponsorship licences or the ability to issue Confirmations of Acceptance onto Studies to students, further compounding losses.

30. Many of the suspension/revocation letters issued to sponsors by UK Visas and Immigration stated that they were responsible for non-compliance with their duties as a sponsor even whilst acknowledging that the student may not have presented a TOEIC certificate as part of their application to the education provider. The irrational reasoning given is that by virtue of their sponsorship "*before; during or after the offence took place"* the Tier 4 sponsor "*has contributed to the risk to immigration control".*

[14] https://www.gov.uk/government/speeches/statement-on-abuse-of-student-visas--2

31. Tier 4 sponsors that lost their licence suffered such financial losses that some simply closed down; others sought to challenge the Home Office decision by way of Judicial Review which was the only legal avenue available to them.

32. During the investigations into educational institutions following the identification of fraud in ETS test centres, education providers were being put under pressure to withdraw their sponsorship of students who were on the list provided to them of students with 'invalid' ETS test results without being provided with evidence of the student's alleged fraud. When pressed for the evidence, the Home Office first stated that ETS would be providing this evidence directly to sponsors and then when this did not materialise, the Home Office provided the two witness statements, of Rebecca Collings and Peter Millington, which are generic, do not relate to any specific student and were heavily criticised in *SM and Qadir*, having been presented as evidence on behalf of the Secretary of State in numerous appeals.

33. It was within the remit of the Home Office to curtail the leave of these students if it believed its own evidence that these students did indeed obtain a Tier 4 visa through fraudulent means. In pressuring education providers to withdraw sponsorship without providing them with the evidence that supported allegations of fraud, it left the education provider open to legal challenge by these students. As a result, many sponsors refused to withdraw students where they had presented a TOEIC certificate and they were satisfied they were genuine students who spoke English to the requisite standard. Many other sponsors however did withdraw students.

The impact on genuine applicants

34. The blanket Home Office response to allegations of fraud had a negative impact on applicants innocent of any wrongdoing who were studying at institutions whose sponsorship license was revoked or suspended as well as on visa applicants wrongly and unfairly accused of obtaining their TOEIC certificate through fraudulent means. In the latter case, the impact on applicants was compounded by the limited scope to challenge decisions by the Home Office in their case, discussed separately in the section below.

<u>Applicants sponsored by Tier 4 institutions whose sponsorship license was suspended/revoked</u>

35. Tier 4 sponsorship licences were suspended for institutions subject to investigation after ETS test fraud was identified. International students already studying at these institutions were able to continue their studies and students who had already obtained their visa were permitted to enter the UK and commence their studies. Students who had submitted a visa application that remained pending however had their application placed on hold,causing disruption to students seeking to enter education in the UK. Students who required an extension to complete their studies also had to await the allocation of a Certificate of Accepted Studies from the Home Office.

36. Tier 4 sponsorship licences were revoked from 87 colleges[15]. In these circumstances, all students studying at the college were affected as follows:

    - Their studies were halted;

[15] UK Visas and Immigration, *Temporary and permanent migration data: February 2016*, available at: https://www.gov.uk/government/publications/temporary-and-permanent-migration-data-february-2016, table SELT_02

- Their leave to enter or remain in the UK was curtailed to 60 days during which time they had to find an alternative sponsor or leave the UK;
- Any pending applications submitted by the applicant were refused;
- If they sought entry to the UK on the basis of their visa they were refused entry;
- They had to meet the requirements of the immigration rules anew in any new application, which included meeting financial maintenance requirements again. This was especially difficult where students were unable to obtain a refund of fees already paid to their previous sponsor;
- They were unable to rely on qualifications awarded following the revocation of the institution's sponsorship license, for example for the purpose of points awarded under an application to work in the UK as a skilled migrant under Tier 2 of the Points Based System.

37. Following the statement made by the Minister to parliament on 24 June 2014 and the action that was being taken against visa sponsors, Tier 4 sponsor clients were extremely reluctant to take on a student from a revoked institution as they were worried about the impact this might have on their own sponsor licence. This was especially the case since the government stated that the investigation was ongoing; because there was no way of knowing for certain whether a student was going to be added to the ETS lists of persons with invalid/questionable test results and because action was being taken against sponsors whether or not students they recruited presented them with the TOEIC certificate. The situation was not helped by the government's having refused to give any assurance that these sponsor's Highly Trusted Sponsor status (now Tier 4 sponsor status) licenses would not be affected if they took on students they assessed as genuine.

38. The result was that many students who were forced to leave their studies as a result of the institution having its license revoked by the Home Office were unable to find alternative education providers willing to sponsor their continued study in the UK and were forced to leave the UK by the end of the 60-day period.

Applicants accused of fraudulently obtaining their TOEIC certificate

39. The impact on individuals of being accused by the Home Office of using deception can be wide-reaching and devastating, as the following example from an ILPA member illustrates:

> *A degree level student studying in the UK had taken an ETS test to obtain a prior grant of leave to remain. The student strongly maintains that he took the test himself legitimately. His level of English is excellent and so would have had no need for someone to take the test on his behalf. He and his brother sat tests at the same centre on the same day which could have resulted in the false positive result. Both were refused.*
>
> *He arrived at Heathrow after a return from holiday with valid leave. On entry he was refused admission and served with removal directions on the basis that he had had his leave cancelled, and been served with removal directions without his knowledge. As the Home Office had no current address for him it was served on file, and only came to his knowledge on entry to the UK. He was removed from the UK. He was told that he had no right of appeal against that decision, nor the right to request an Administrative Review because a 'curtailment' decision does not attract one.*

He subsequently applied for entry clearance as a visitor, to return to the UK to seek out a new university, but was refused and issued with a mandatory re-entry ban valid for 10 years, imposed under paragraph 320(7B) of the Immigration Rules.

The student in question was sponsored by the government of his home country as he is employed there as a police officer. He was suspended from the police force on his return home due to the allegation of fraud levelled against him in the UK immigration authority's decision. He had no legal representation at the time and has now sought advice following the judgment in SM & Qadir.

40. Students were forced to interrupt their studies and leave the UK part way through their course, in many cases following enforcement action through distressing immigration raids and detention. Home Office statistics report that by 31 December 2015 3,600 enforcement visits had been made, 1400 individuals were issued removal directions and detained and more than 4,600 individuals were removed or involved in a Home Office departure scheme as a result of decisions related to allegations of ETS testing fraud[16]. Students have been left unable to complete the education in which they have invested heavily and with the shame and stigma of being accused of cheating or of a forced return.

41. The Home Office decision to refuse a visa or curtail (cancel) leave to enter or remain in the UK has further long term consequences for the applicant as the use of deception in an application for leave to enter or remain is a mandatory ground for refusal under paragraph 320(7B) of the Immigration Rules[17] any further application to enter the UK for a specific period of time. The use of deception in an entry clearance application (to enter the UK), means that re-entry is not permitted for a period of ten years. The Home Office decision to refuse a visa may also affect travel to other countries which, like the UK, seek information in entry clearance forms about whether a visa for travel to another country has been refused.

42. As the above example illustrates, an allegation of deception is extremely serious and may carry wider consequences for applicants than their immigration application to the UK.

43. Whilst most of those affected by Home Office decision-making in relation to ETS/TOEIC cases have been students, refusals have similarly been issued, without any regard to the quality of the evidence against them or their ties to the UK, to skilled migrants, investors and entrepreneurs who have established businesses and who employ UK residents. In the case of one individual whose leave as a Tier 1 Entrepreneur under the Points-Based System was curtailed due to allegations about his TOEIC certificate, the damage to his business may lead to the loss of the business to the UK altogether:

My client runs a successful radio telescope business with his wife, they are involved in multiple international projects with academia and other corporates across Europe. He has successfully appealed the decision in his case but the belligerence of the Secretary of State for the Home Department in pursuing further appeals against the decision of the Tribunal and pursue what appears to be a lost cause for her is causing severe damage to his business, to the extent that

[16] UK Visas and Immigration, *Temporary and permanent migration data: February 2016*, available at: https://www.gov.uk/government/publications/temporary-and-permanent-migration-data-february-2016, table SELT_02

[17] HC 395 as amended.

he's considering embarking, thus abandoning his appeal, and setting up in another European country where he holds residence.

44. We have seen cases where fraud has been alleged in obtaining the TOEIC certificate necessary for applications to enter or remain in the UK as a spouse. These can be particularly difficult as they can lead to the couple being separated. In one case, the applicant was refused despite speaking English. The couple are from different countries and English is their common language.

45. Other cases where unfair accusations of cheating in obtaining English language test scores cause particular harm include those of individuals who have lived in the UK for extended periods of time and are renewing their visa or applying for Indefinite Leave to Enter or Remain. An ILPA member states:

We are seeing individuals with fluent English who have lived in the UK for long periods of time and where their whole lives are here served with removal decisions. They have other English language test certificates that have not been impugned, degrees in English but have still been accused of deception.

The scope for those accused to challenge decisions

46. The impact on applicants accused of fraudulently obtaining TOEIC certificates has been exacerbated by the limited scope for them to challenge unfair decisions made by the Home Office. This arises as a result of the following s:

- The removal of statutory rights of appeal from immigration decisions that do not raise issues of asylum or human rights protection; section 15 of the Immigration Act 2014 were brought into force on 20 October 2014[18];
- The limitations on challenging Home Office decisions to curtail (cancel) leave to enter/remain from within the UK by those with rights of appeal preserved under transitional provisions. These were made by regulations under the Immigration Act 2014[19].
- The way in which the Secretary of State has conducted litigation where applicants have brought challenges to decisions.

<u>The pre-October 2014 appeals regime</u>

47. Up until 20 October 2014[20] the refusal of an in-country application for leave to remain carried a right of appeal which was in most cases exercisable from within the UK. This meant that the applicant could remain in the UK to bring their appeal, often with protected leave by virtue of Section 3C of the Immigration Act 1971 which permitted them to remain

[18] Partially, SI 2014/2771 (C. 122), see the Immigration Act 2014 (Commencement No. 3, Transitional and Saving Provisions) Order 2014, SI 2014/2771 (C. 122); the Immigration Act 2014 (Transitional and Saving Provisions) Order 2014, SI 2014/2928 and the Immigration Act 2014 (Commencement No. 4, Transitional and Saving Provisions and Amendment) Order 2015, SI 2015/371 (C.18).

[19] *Ibidem*.

[20] See SI 2014/2771 (C. 122).

lawfully in the UK, and retain their right to study/work until a final decision on their case was made.

48. Whilst some decisions generated an in country right of appeal, others generated only an out of country appeal. This is determined by the procedural background to each case. In certain circumstances, the Home Office may remove an appellant from the UK and require their appeal to be pursued out of country[21]. This is the case where appeal rights arise from a decision under both the old and the revised[22] section 10 of the Immigration and Asylum Act 1999 to curtail or revoke leave. Such a decision would typically be made where a person is detected breaching the conditions of their leave or alleged to have used deception in their application. Under the appeals regime in place prior to the enactment of the Immigration Act 2014[23] which removed statutory rights of appeal for most immigration decisions, a person can only normally appeal against the decision in their case from outside the UK, after they have been removed or departed voluntarily[24].

49. Individuals whose leave to enter or remain was curtailed by the Secretary of State under section 10 of the Immigration and Asylum Act following allegations of fraudulent TOEIC tests lodged judicial review proceedings arguing that an out-of-country appeal was inadequate remedy. It was determined in these cases, however, that the Home Office was permitted to remove such students from the UK before they had a chance to lodge an appeal and that it would not, save in exceptional compassionate circumstances, be possible instead to pursue an application for judicial review against that decision from within the UK[25]. The appellant had to interrupt their work or studies and wait outside of the UK until the appeal was determined. They had no right to enter the UK to attend the appeal hearing and therefore their evidence could not be heard in person.

50. In *SM and Qadir*, the Upper Tribunal finds that by a 'narrow margin', the Secretary of State has discharged the burden of establishing sufficient evidence of deception, with the effect that an Appellant then needs to raise an innocent explanation[26]. Following the approach in *SM and Qadir*, those who have an outstanding appeal may produce evidence at a hearing of, among other things, what happened on their test day, their general good character and their English language skills so that their explanation and credibility can be assessed by the Tribunal. The value in this context of presenting evidence at the hearing in person can be seen in other successful appeals to the First-tier Tribunal. One ILPA member commented:

> *Two individuals alleged to have obtained their TOEIC certificates fraudulently exercised a right of appeal to the First-tier Tribunal. On both occasions their appeals were allowed on the basis of the Secretary of State not having discharged the burden of proof. In both cases my clients were able to recall clear details of having attended the test centre. One of them had actually sat and passed another test (IELTS) but had chosen to rely on the TOEIC (ETS) result as it was slightly higher.*

[21] Nationality, Immigration and Asylum Act 2002, s 94.
[22] As substituted by s 1 of the Immigration Act 2014.
[23] Nationality, Immigration and Asylum Act 2002, part V.
[24] Nationality, Immigration and Asylum Act 2002, s 94.
[25] R (On the Applications of Mehmood & Ali) v Secretary of State for the Home Department [2015] EWCA Civ 744 and R (Gazi) v Secretary of State for the Home Department (ETS – judicial review) [2015] UKUT 00327 (IAC)
[26] SM and Qadir, op.cit, para 68

51. At paragraph 104 of the *SM and Qadir* judgment the President of the Upper Tribunal (Immigration and Asylum Chamber) makes some important remarks which are relevant to the efficacy of an out- of country appeal:

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

The post October 2014 Administrative Review regime

52. Since the commencement of section 15 of the Immigration Act 2014[27], there is no longer a right of appeal against most immigration decisions. The only remaining rights of appeal are against decisions raising asylum or human rights issues and these appeals may also usually be pursued from within the UK.

53. Since the Immigration Act 2014 provisions came into force, decisions which are not based on a human rights or asylum claim may be reviewed internally by the Home Office on payment of a fee in a process called Administrative Review. If the Administrative Review is also refused, or in the case of curtailment decisions where there is no right of appeal or Administrative Review, an individual may only challenge the decision through judicial review. It is believed that the majority of ETS/TOEIC cases were ones which generated judicial review challenges rather than the exercise of a statutory right of appeal[28].

Administrative Review

54. The Administrative Review conducted internally by the Home Office does not offer applicants an adequate remedy. There is no right to apply for Administrative Review of a curtailment decision despite statements that there would be during the passage through parliament of the Immigration Act 2014, a concern highlighted by the Independent Chief Inspector in his recent inspection report on Administrative Review[29].

55. The Government's I*mmigration Bill – Statement of Intent on Administrative Review in lieu of Appeals*[30] said of administrative review:

1. Who will be able to apply for administrative review?

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[27] See the Immigration Act 2014 (Commencement No. 3, Transitional and Saving Provisions) Order 2014, SI 2014/2771 (C. 122); the Immigration Act 2014 (Transitional and Saving Provisions) Order 2014, SI 2014/2928 and the Immigration Act 2014 (Commencement No. 4, Transitional and Saving Provisions and Amendment) Order 2015, SI 2015/371 (C.18).

[28] *Gazi, R (on the application of) v Secretary of State for the Home Department (ETS – judicial review)* (IJR) [2015] UKUT 327 (IAC) (27 May 2015) at: http://www.bailii.org/uk/cases/UKUT/IAC/2015/327.html, para 45

[29] *Op.cit*.

[30] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/254851/SoI_Administrative_review.pdf,

- *Individuals who will no longer have a right of appeal as a result of changes to the appeals system.*

[…]

14. Will existing leave continue while an administrative review is conducted?

- *Yes where an individual with leave applies for further leave before their current leave expires and, following a refusal, applies for administrative review; their current leave will be extended until their administrative review has been concluded.*

56. The Explanatory Notes accompanying the Bills, published on both 10 October 2013[31] and 03 February 2014[32] stated:

> *Where an application is refused and there is not a right of appeal, the applicant may be able to apply for an administrative review. Similarly, an administrative review may be sought when a person's leave is curtailed or is revoked. The Immigration Rules will set out when an applicant may seek an administrative review. In Schedule 8, Part 4 extends the effect of section 3C and 3D where an administrative review can be sought or is pending. The question of whether an administrative review is pending will be determined in accordance with the Immigration Rules.*

57. Thus parliament was led to understand that there would be an administrative review of a decision to curtail leave.

58. Despite this however, when the Home Office subsequently published the immigration rules on administrative review[33], decisions to curtail leave were excluded from the scope of administrative review. Thus, for example, a person, who on or after 20 October 2014 makes a Tier 4 application in respect of which he or she is granted leave, is without a remedy save by judicial review, against a subsequent decision to curtail that leave. He or she may make a human rights (or asylum) claim, which if refused will carry a right of appeal. If, however, having had his or her leave curtailed before making such a claim, he or she will not have the advantage of section 3D (or section 3C) in continuing his leave statutorily.

59. ILPA raised this in its comments on a draft version of the rules[34],

60. The scope of Administrative Review is limited and it is only available for the review of a decision to decide whether it wrong due to a 'case working error'[35]. No new evidence will be considered at the Administrative Review stage except in the following very limited circumstances[36]:

- Where the decision was based on the general grounds for refusal (deception / fraud);

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[31] http://www.publications.parliament.uk/pa/bills/cbill/2013-2014/0110/en/14110en.pdf, para 73
[32] http://www.publications.parliament.uk/pa/bills/lbill/2013-2014/0084/en/14084en.htm, para 77
[33] C 395, Appendix AR.
[34] ILPA, 15 August 2014.
[35] Immigration rules, Appendix AR 2.3 and 2.11: https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-ar-administrative-review.
[36] Immigration rules, Appendix AR 2.4

- Where the refusal was based on a mistake as to the application being made beyond a permissible time limit;
- Where the original decision maker's decision not to request specified documents under paragraph 245AA of these Rules was incorrect.

61. In May 2016 the Independent Chief Inspector of Borders and Immigration issued his recent report, *Report of An Inspection of the Administrative Review processes introduced following the 2014 Immigration Act*[37] criticised the operation of the Administrative Review process by the Home Office.

62. The Independent Chief Inspector identified that:

> *Staff in the AR Team in Manchester told us they had not had any specific training on assessing credibility. The interview transcript was available on file if an interview had been conducted, but they did not review it in detail and, generally, they felt that assessing interview evidence was outside their remit*[38].

63. This highlights the inadequacy of administrative review for identifying incorrect decisions. Given that the grounds for Administrative Review relate principally to 'identifying case working errors', it is even less of a suitable remedy for dealing with refusals under the general grounds for refusal[39] which often require an assessment of credibility.

64. The Independent Chief Inspector made the following further findings:

- 21 out of 140 in-country administrative reviews inspected were incorrect.
- Case records and Administrative Review responses showed that reviewers had not given adequate scrutiny to the issues raised by the applicant in over half of the cases sampled, though these were not always linked to the failure to identify errors[40];
- The bulk of the Administrative Officers redeployed into the Administrative Review Team had no experience in Points Based System casework and limited experience of other immigration casework, with permanent staff in the minority; quality assurance was ineffective; and that there was no evidence of cases being identified as complex and passed to more senior caseworkers to review[41];
- The success rate for Administrative Review in-country was 8%, overseas 22% and border at 21%[42], with the in-country figure much lower than might have been predicted. It would have been reasonable to expect the Home Office to examine this type of issue closely to assure itself of the quality of decision-making as it had committed to doing[43]. There was no evidence that the success rate had been questioned[44] and there was a '*clear and pressing*' need for accurate data overall.

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[37] http://icinspector.independent.gov.uk/2016/05/26/admin-review-inspection-report-and-annual-report-201516-published/
[38] Par 9.12
[39] HC 395, Part 9.
[40] Para 2.10
[41] Para 2.4
[42] Para 2.29
[43] Para 2.30
[44] Para 2.31

65. It is of very real concern that only 8% of in-country Administrative Reviews resulted in the decision being overturned and while the statistics were higher in out of country. Administrative Reviews where 21% were successful, both statistics are in stark contrast to the 49% of appeals against the Home Office allowed under the former regime. One ILPA member comments:

> *I have only ever had one Administrative Review application result in the overturning of a decision, and none where the general grounds for refusal were invoked. Entry Clearance Officers are ill equipped to address matters of credibility, and how are they even able to do so without interviewing the application to question the truthfulness of his answers?*

Judicial review

66. Judicial review is the only remedy available to applicants where the Administrative Review has failed to identify errors in decision-making. However, it has been held by the Tribunal that judicial review is unsuitable for determining issues in relation to ETS/TOEIC decisions:

> *We take this opportunity this opportunity to re-emphasise that every case belonging to the ETS/TOEIC will invariably be fact sensitive. To this we add that every appeal will be determined on the evidence adduced by the parties. Furthermore the hearing of these appeals has demonstrated beyond peradventure that judicial review is an entirely unsatisfactory litigation vehicle for the determination of disputes of this kind.*[45]

67. Individuals with no statutory right of appeal as a result of the commencement of the Immigration Act 2014 therefore have no adequate means of challenging decisions in ETS/TOEIC where fraud has been alleged.

68. Judicial review is an expensive remedy and so applicants may be unable to pursue a High Court challenge because of the cost.

<u>Home Office conduct of the ETS/TOEIC litigation</u>

69. The conduct of the Home Office in litigation presents additional challenges for applicants seeking to remedy unfair decisions made by the department.

70. Appellants and claimants in judicial review are placed in the difficult position of having to demonstrate they were not involved in wrongdoing, trying to prove a negative without being served the evidence relied upon by the Home Office in support of its allegation of fraud. ETS have not provided copies of the voice recordings that would enable appellants to challenge this evidence.

71. There are cases in which the Home Office has failed to provide even the more limited documentary evidence of the spreadsheet with the test analysis result in accordance with court directions, sometimes only producing this at the hearing if they produce it at all.

72. The only evidence relied upon by the Secretary of State is her 'generic evidence' in the form of two witness statements from Home Office civil servants. In *SM and Qadir*, the

[45] *SM and Qadir*, op.cit. para 104

Tribunal criticised the failure of the Secretary of State to address the expert criticisms of the generic evidence despite the expert report being in the possession of the Secretary of State for over a year. The Tribunal also identified the failure to produce documentary evidence in support of assertions in one of the *witness statements, which may potentially have strengthened the Secretary of States's case as being "in breach of every litigant's duty of candour owed to the court or tribunal".*[46]

73. Since the Tribunal judgment in *SM and Qadir*, the Secretary of State has sought to introduce new expert evidence challenging the points raised in the expert evidence and accepted by the Upper Tribunal in *SM and Qadir* in relation to the assessment of reliability of the voice sampling analysis used by ETS. This adds to the costs of litigation and increases the difficulties faced by appellants and claimants, who are having to address new expert evidence whilst the underlying evidence relied upon by the Home Office remains undisclosed.

74. It is ILPA's experience that onward appeals are pursued routinely by the Home Office in the Upper Tribunal in ETS/TOEIC cases when applicants are successful in their appeals before the First-tier Tribunal, without any apparent assessment of the prospects of success or the impact on genuine appellants of bringing further litigation. After they have spent many months in limbo, the Upper Tribunal upholds the original decision. In at least one case, the Secretary of State has applied for permission to appeal against a decision of the Upper Tribunal to the Court of Appeal, been refused permission on the papers and then renewed the application for an oral hearing, the listing of which remains pending. One ILPA member says:

> *The SSHD has actually applied for permission to appeal the First-tier Tribunal decision in this one, notwithstanding the decision in SM & Qadir v SSHD. Horrible waste of time and resources not to mention a resulting interference with his right to family life – the decision which was subject to appeal was the refusal of ILR, and his wife is unable to apply for a settlement visa (as he is unable to travel to see her) until this is resolved.*

75. Current First-tier Tribunal (Immigration and Asylum Chamber) appeal waiting times can be upwards of 12 months. There is a inherent unfairness in the Home Office pursuing appeals, at public expense, that they have little prospect of winning.

76. The facts of *An Immigration Officer v Rajib Dev Nath* [2015] UKAITUR IA/30193/2014 are worth setting out in detail as they are indicative of many of the ETS/TOEIC cases:

> 2. *The respondent to this appeal was last granted leave to remain in the United Kingdom as a Tier 4 (General) migrant until 30 August 2015. He returned to the United Kingdom on 22 July 2014, was refused entry on that date and his leave to remain cancelled. That earlier decision was supplemented by a decision dated 20 December 2014, which took place following a second interview with the respondent. The reason for the latter decision is that an immigration officer considered that the respondent had obtained his previous grant of leave to remain in the United Kingdom as a Tier 4 migrant by deception. Reference was made to a test taken at Synergy Business College on 17 July 2012.*

[46] SM and Qadir, op,cit., para 15

3. At the hearing before the FTTJ, the respondent gave evidence, maintaining that he sat the test in person and that he had not needed to use a proxy. With regard to his initial inability to recall the name of the test centre and the date of the test, the respondent explained that he was tired when interviewed following 18 hours of travel. The FTTJ concluded that the spreadsheet provided did not indicate the basis on which the respondent's test result was invalidated; that there was no direct evidence to support an allegation of dishonesty and that he had provided a credible response to the said allegations.

4. The grounds of application submit that the FTTJ failed to give adequate reasons for findings on a material matter, namely her finding that there was "no direct evidence" to support a finding of deception. Reference was made to the witness statements of Home Office employees and an email from ETS Taskforce dated 10 September 2014. It was argued that in order to be recognised as invalid, " the case" has to have been analysed by a computer programme and two " independent" voice analysts. It was further argued that had the FTTJ " properly" taken the evidence into account, she would had found that the burden of proof had been discharged. It was also said that the FTTJ inadequately explained why no weight was attached to the appellant's initial failure to provide the date and venue of his English language test.

5. FTTJ PJM Hollingworth granted permission on the following basis; "An arguable error of law has arisen in relation to the degree of weight to be attached to the evidence adduced by the (appellant before me) appertaining to the concept of invalidity."

6. Those representing the respondent lodged a Rule 24 response, which was received on 6 July 2015. Essentially, it was argued that there was no error of law; that matters of weight were for the individual judge and in the absence of perversity, cannot be set aside. It was said that the FTTJ had carried out a comprehensive assessment of the evidence and had provided valid reasons for rejecting the Secretary of State's evidence.

77. The Home Office appeal was dismissed, Deputy Upper Tribunal Judge Kamara finding "*that the appellant's arguments in this case amount to little more than a disagreement with the FTTJ's view of the generic evidence and her ultimate conclusion in this case*".

78. There have been a number of other Upper Tribunal decisions, which demonstrate a similar pattern of conduct: *Singh v Secretary of State for the Home Department* [2015] UKAITUR IA/27483/2014, *Secretary of State for the Home Department v Taha Alam* [2015] UKAITUR IA/42717/2014 and other cases. These cases are indicative of more numerous ETS/TOEIC cases that ILPA members have seen in practice.

Continuing concerns related to issues raised by this inquiry

79. The concerns that gave rise to the issues raised by this inquiry remain ongoing. Many appellants remain in the appeal process facing continuing difficulties challenging unfair and arbitrary decision-making by the Home Office in ETS/TOEIC cases. In other cases, applicants face removal from the UK before being able to bring an appeal, causing significant upheaval and a period of disruption in their established life in the UK that is likely to be lengthy in light of listing delays in the Tribunal. Many more applicants will be unable to access an adequate remedy to challenge the accusations levelled at them by the Home Office.

80. The blanket and arbitrary treatment of cases by the Home Office that led to the challenges in the ETS/TOEIC cases is currently being repeated elsewhere in the determination of immigration decisions. We identify an emerging practice of the Home Office in relation to applicants who submit amended tax records confirming their earnings in support of applications under Tier 1 (General) of the Points Based System for extensions of their leave and indefinite leave to remain. The Home Office is treating applications containing amended tax returns as involving deceit, making no assessment or distinction between those who have made errors and those who have falsified information for their application. Applicants are then refused under paragraph 322(5) of the Immigration Rules for the alleged use of deception in an application for leave to remain.

81. As there is no longer a right of appeal against these decisions, applicants may only apply to the Home Office for Administrative Review. As described, this is an inadequate remedy where the case turns on credibility. Judicial review is then the only available remedy which, as discussed above, is out of the financial reach of some applicants and is also unsuited to fact-sensitive assessments of credibility.

82. The extent of poor quality Home Office decision-making and the difficulties faced by applicants in accessing remedies in these cases highlight the impact of the removal of statutory rights of appeal in most immigration decisions following the commencement of section 15 of the Immigration Act 2014[47]. The report of the Independent Chief Inspector into the system of Administrative Review[48] implemented in their place has not identified practice that can give sufficient confidence in the process of Administrative Review as a means of ensuring the Home Office can be held to account in ensuring high quality decision-making in immigration cases.

83. This latest evidence was not available to parliament during the passage of the Immigration Act 2016 as both the judgment in *SM and Qadir* and the report of the Independent Chief Inspector on Administrative Review were both published after the Act received Royal Assent.

Recommendations for action by the Secretary of State

84. The Secretary of State must take the necessary steps to inform all those affected by the decision in *SM and Qadir* of the Tribunal's findings and put in place measures to provide them with eedress. ILPA makes the following specific recommendations for action that should be undertaken by the Secretary of State:

    1. The Secretary of State should get in touch with all applicants whose test results were invalidated by the Secretary of State or by ETS to advise them of how they may seek redress for an incorrect decision.

    2. The Secretary of State should not remove applicants who have a right of appeal against the immigration decision in their case and, where necessary, should grant a period of leave to facilitate the exercise of their right of appeal from within the UK.

[47] SI 2014/2771 (C.122).
[48] *Op.cit.*

3. The Secretary of State should make provision for appellants in ETS/TOEIC cases who are already outside the UK to attend their appeal hearing in the United Kingdom.

4. The Secretary of State should implement a policy toward former students and others who wish to provide evidence to rebut the Secretary of State's *prima facie* evidence of deception where their appeal rights have been exhausted. This could be done through a process of reconsidering cases.

5. The Secretary of State should bring forward legislation restoring rights of appeal against immigration decisions removed under the Immigration Act 2014 and Acts before it. The Secretary of State should not bring section 63 of the Immigration Act 2016, which further limits rights of appeal, into force.

6. Sponsors who had their sponsor licence revoked on ETS results alone should be allowed to reapply without prejudice.

7. A right of appeal to be introduced for Sponsors who have had action taken against them by the Secretary of State be it in reducing allocations of Confirmation of Acceptance for Studies/Certificates of Sponsorship to zero or in suspending/revoking their sponsors licence. At the moment the only avenue is judicial review.

8. The Secretary of State should take steps to safeguard the reputation of the UK Education Sector and its value to the economy and be responsible in handling investigations into sponsors. This includes ensuring that the status and reputations of *bona fide* institutions are not imperilled before investigations of concerns identified have been concluded.

Immigration Law Practitioners' Association
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