Upper Tribunal
Immigration and Asylum Chamber

JR/03527/2017

Field House,
Breams Buildings
London
EC4A 1WR

Heard on: 23rd September 2019

BEFORE

UPPER TRIBUNAL JUDGE KEITH

Between

The Queen (on the application of Mohammad Alamin)

Applicant

v

Secretary of State for the Home Department

Respondent

R Jesurum, *Counsel*, instructed by Zahra Solicitors, appeared on behalf of the Applicant
E Wilsdon, *Counsel*, instructed by the Government Legal Department appeared on behalf of the Respondent.

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APPLICATION FOR JUDICIAL REVIEW
JUDGMENT

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The application

(1) The applicant applied on 18 April 2017 for judicial review of the respondent's decision of 18 February 2017, following an administrative review process, to maintain her earlier decision on 17 January 2017 (the

'Decision'). The Decision is the substantive decision under challenge, rather than the later decision in February 2017.

(2) In the Decision, the respondent refused the applicant's application for an extension of leave to remain in the United Kingdom (the 'UK') under the 'points based system' of Tier 2 of the Immigration Rules.

The basis of the Decision

(3) The gist of the respondent's refusal was that she believed that the applicant had participated in obtaining an English language certificate or 'TOEIC,' by way of deception, specifically by the use of a proxy test taker, at tests undertaken on 18 October 2011. He had then used the TOEIC to apply on 28 November 2011 for leave to remain, which was granted.

(4) The respondent had partly based her conclusions on analysis carried out by a third-party provider, Educational Testing Service, or 'ETS.' ETS provided an analysis both of the test centre at which the applicant took the test, Elizabeth College, at which wide-spread cheating had taken place; and also a test analysis or 'look up' result for the applicant specifically, indicating that the applicant's test was 'invalid' (as opposed to 'questionable'). In addition, the respondent referred to an interview with the applicant on 17 August 2015, to which the applicant had been invited by a letter of 20 July 2015. The letter of invitation had referred to the respondent considering curtailment of the applicant's leave to remain in the UK. At that interview, the applicant was asked about various aspects of the circumstances of his taking the English language test in 2011. The interviewer concluded that the applicant's 2011 TOEIC scores were not reflected in the applicant's poor level of spoken English during the 2015 interview; and during which he had referred to previously failing an English language test, having only entered the UK in October 2010, barely a year before taking the second English language test.

(5) As a result of the respondent's conclusions, she gave the applicant no points under appendices A and B of the points based system, pursuant to paragraph 245 HD(f) of the Immigration Rules.

(6) The applicant requested an administrative review of the Decision on 27 January 2017, putting the respondent to proof of the claim of deception and also referring to having obtained a Level 6 diploma in business management on 5 September 2011, shortly before taking the second TOEIC test. The applicant asserted that the interview in August 2015 was 'not worthy of weight' because if the respondent had had concerns based on the interview, she should have immediately curtailed the

respondent's leave in 2015, rather than waiting to refuse the applicant's subsequent 2016 application. The applicant asserted that the 2015 interview had been brief; and at the end of it, he had been told that everything was well.

(7) In her administrative review decision of 18 February 2017, the respondent reiterated the 'look up' evidence; the level of cheating at Elizabeth College, where the test had been taken; and the points raised by the applicant in his administrative review request, particularly his having obtained a diploma, but nevertheless concluded that the evidence was sufficient that the applicant had engaged in deception.

Previous orders and decisions

(8) The applicant's solicitors wrote to the respondent with a pre-action letter on 27 March 2017, to which the respondent responded on 31 March 2017. Following the applicant's application for judicial review on 18 April 2017, Upper Tribunal Judge Macleman initially refused to admit the application on the basis that it was out of time. Whilst the use of administrative review was to be encouraged, he concluded that reference to it as the decision under challenge was not to be used to 'dress up' a delay, when the substantive decision under challenge was the Decision. In any event, Judge Macleman considered the grounds did not have arguable merit.

(9) However, at an oral hearing seeking permission before Upper Tribunal Judge Jackson on 2 February 2018, she granted permission, regarding it as arguable that the respondent had failed to discharge the evidential burden of establishing that the applicant had used deception. The other grounds that the respondent had failed to place appropriate weight on evidence in the applicant's favour (the Level 6 diploma) or that there had been a procedural irregularity in reaching the Decision, appeared to be weaker, but Judge Jackson did not limit the scope of the grant of permission to proceed.

(10) The proceedings were subsequently stayed pending the outcome of appeals in the Court of Appeal in the linked cases of R (Hossain) v SSHD (C6/2016/3560) and R (Islam) v SSHD (C8/2017/1385). The stay was lifted following case management directions issued by Upper Tribunal Judge O'Connor, and the respondent was permitted to file detailed grounds of defence.

Grounds of challenge

(11) Ground (1) was that in reaching her Decision, the respondent failed to consider material, which was in the applicant's favour, specifically the

fact that the applicant had entered the UK as a Tier 4 student. In September 2011, he had obtained a Level 6 diploma in business management, only a month before he had allegedly used a proxy to take the TOEIC test. His proficiency in English was a relevant factor to consider, in accordance with the authority of Majumder & Qadir v SSHD [2016] EWCA Civ 1167, at [18].

(12) Ground (2) was that there was procedural unfairness in the process by which the respondent reached the Decision, and after it. The respondent had given the applicant no opportunity to comment on, or respond with evidence to, the allegation of deception. The respondent had not disclosed that she was minded to refuse the applicant's 2016 application on such grounds and the applicant had every reason to consider that concerns about curtailment had been resolved following the August 2015 interview. As per the authority of R (on the application of Mohibullah) v SSHD [2016] UKUT 561 (IAC), the respondent was under an obligation to convey the gist of the serious allegation before any final decision was taken. The ETS 'look up information' and the interview record of August 2015 had not been disclosed to the applicant before reaching the Decision. Instead, the respondent suggested that the applicant could make a data subject access request for disclosure of information, in breach of the duty of candour – R (on the application of Saha) v SSHD [2017] UKUT 17 (IAC).

(13) Ground (3) was that the decision was '*Wednesbury*' unreasonable, as the respondent could not rationally rely solely on the 'look up' result in reaching the conclusion that the applicant had engaged in deception, given the weakness of the respondent's evidence, as highlighted by Dr Harrison in Majumder & Qadir.

The basis of the respondent's resistance to the orders sought

(14) The respondent filed detailed grounds of defence on 30 August 2019, the summary of which is set out below.

Grounds (1) and (3)

(15) The respondent regarded these grounds as essentially two aspects of the same challenge, namely that factors that should have been taken into account were not; so that the Decision was '*Wednesbury*' unreasonable. In response, the respondent referred, at [31], to the generic and the specific evidence relating to the applicant, including witness statements of Rebecca Collings and Peter Millington; an expert report of Professor Peter French; a criminal report for Project Façade into Elizabeth College, London dated 15 May 2015; the respondent's

letter dated 28 July 2015 inviting the applicant to an interview; the notes of that interview; and the 'look up' results. In that context, the respondent had discharged the initial evidential burden of proving deception in an ETS case, in line with the case of SSHD v Shehzad & Anor [2016] EWCA Civ 615 and also the Majumder case already referred to.

(16) The respondent had considered not only the 'look up' tool but the 2015 interview and was entitled to do so. The applicant knew of the contents of that interview because he was present at it, so the fact that he was only provided the notes after the Decision, particularly where he did not dispute the accuracy of those notes, was not relevant. His case could be distinguished from marriage interview cases, where an applicant might not be aware what a spouse had said during interview.

(17) Based on the totality of evidence, which the respondent had considered, the respondent was unarguably entitled to conclude that the applicant had engaged in TOEIC deception. Factors included the 'look up' tool; the applicant's poor English when interviewed in August 2015; the fact that he had had to take the TOEIC test twice, including the second time at Elizabeth College, where there had been widescale fraud; and the applicant's vagueness in describing the circumstances of taking the test at Elizabeth College. The respondent was not aware, when filing the grounds of defence, that the applicant had sought a copy of his TOEIC voice file from ETS, which weakened his challenge further, as per the authority of Ahsan v SSHD [2017] EWCA Civ 2009. This was not a case where the respondent's decision attracted a right of appeal to the First-tier Tribunal. He had not made a human rights claim, so any challenge to the Decision by way of judicial review lay only on conventional public law grounds.

Ground (2)

(18) On the issue of procedural fairness, the applicant had been invited to attend, and attended, the interview on 17 August 2015, at which he was asked to explain the circumstances of his participation in the TOEIC test and given an opportunity to provide an account, to address the respondent's concerns. The fact that he was unable to do so further damaged his credibility. The recent Court of Appeal decision of Balajigari v SSHD [2019] EWCA Civ 673, and the endorsement of a "minded to refuse" procedure in cases involving 'earnings discrepancies' was distinguishable. That case considered a two-stage process under paragraph 322(5) of the Immigration Rules whereby an applicant's dishonesty might nevertheless be outweighed by other factors at the second stage.

(19) In any event, there was no unfairness in the specific facts of this case. The applicant had been informed sufficiently clearly, by the date of the 2015 interview, there was a concern about his honesty and he was given an opportunity to respond.

Additional ground of resistance

(20) In addition to the grounds relied on by the applicant, the respondent relied on section 31(2A) of the Senior Courts Act 1981, on the basis that were this Tribunal to conclude that the respondent had reached the Decision by a process that could be impugned on public law grounds, the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred, because the respondent would have reached the same conclusion. The applicant had no answer to the observation that his English during his 2015 interview was so poor as to be not consistent with his having taken the second TOEIC test in 2011 at Elizabeth College, where there was substantial evidence of systematic fraud.

Submissions

The applicant's submissions

(21) Mr Jesurum provided a skeleton argument and made additional oral submissions. Both he and Ms Wilsdon accepted that, as the Decision was taken after 2014 and so post-dated any changes to section 10 of the Immigration and Asylum Act 1999, there was no need for the Upper Tribunal to make any findings of 'precedent fact' as to whether the applicant had in fact engaged in deception, as would be required if the Decision had pre-dated the changes to section 10, following the analysis in Ahsan. Instead, both representatives accepted that the challenge to the Decision was on conventional public law grounds.

(22) Mr Jesurum accepted that a person may be inclined to cheat, even if they had good English, and it was quite possible that if the respondent had adopted a fair process, she may have reached the same decision, but that was not the appropriate question. Instead, the correct question was whether the outcome could have been different, so that the process by which the respondent reached the Decision was important. The principles of public law review stressed the importance of protecting the process by which decisions were reached. It was not a question of whether the applicant was at fault.

(23) The authority of Balajigari, at [48] and [49], confirmed that the ability to make submissions after the Decision had been made, but before the

administrative review decision was taken, was not sufficient to cure defects in the Decision, because it risked "confirmation bias", i.e. the respondent merely confirming what she had previously decided. The respondent was required to indicate clearly to the applicant if she suspected him of using a proxy test taker; to give him an opportunity to respond, both as regards the conduct itself and as regards any other factors that she was considering; and then to take those answers into account, before drawing a conclusion that there had been such conduct.

(24) Balajigari could not be distinguished on the basis that it only applied to a two-stage process under paragraph 322(5) of the Immigration Rules, in contrast to different considerations for refusal under 322(2). The latter also involved a two-stage process, with both provisions requiring consideration of the exercise of discretion. In the applicant's case, Mr Jesurum did not go so far as to say that there needed to be a "minded to refuse" procedure; what the respondent should have done was to specifically and categorically put the allegation of the use of a proxy test taker to the applicant, even as late as the 2015 interview and consider the applicant's response, before reaching the Decision.

(25) In contrast, the letter dated 28 July 2015, inviting the applicant to the 2015 interview, a copy of which was at [172] of the applicant's bundle ("AB") was in vague terms and did not sufficiently convey the specific concern about the use of a proxy test taker to the applicant. Instead, it stated in general terms:

"We are currently considering your existing leave to enter/leave to remain and require you to attend an interview for the purposes of assessing whether any of the grounds of curtailment under paragraphs 245DE(c), 245EE(c), 276BD1, 276BN1, 276BS1, 323 (other than 323(vii), 323A, 323B, or 323C apply."

(26) Even had the applicant sought legal advice on the provisions referred to above, it would have been impossible for him to know that these related specifically to allegations of deception by use of a proxy test taker. The subsequent declaration form that the applicant was asked to sign at [74] AB merely referred to the applicant being asked a series of questions to discuss his current leave to remain. It did refer to him being reminded that it was an offence to seek leave remain in the UK by deception, but that referred to answers to be given in the interview, rather than any alleged historic deception. The interview notes at [178] to [182] AB gave no further confidence that the applicant would have been aware that the respondent was concerned about his participation in TOEIC deception. It was never put to him that he had cheated.

(27) While the interviewing officer referred in the interview notes at [182] AB to the applicant as "not credible" at interview, the interviewer also concluded that he was able to answer questions in basic English and had not been coached. This Tribunal needed to bear in mind that the TOEIC test that the applicant had taken was at "B1" level, a relatively modest one; his TOEIC test scores were a bare pass. His lack of proficiency in oral English during the interview could be explained by a variety of factors, including the applicant's lack of ease or unfamiliarity, on a day-to-day basis, with the subject matter that interviewer was asking him about. The methodology by which the interviewer assessed the applicant's English was never explained, nor did the evidence state what qualifications the interviewer had to be able to assess verbal English.

(28) The respondent's reasoning in the Decision, at [19] to [25] AB, as to why the respondent believed that the applicant had been party to a TOEIC deception, was not sufficient. While the Decision had included references to the TOEIC and the 2015 interview, there was no reference to the respondent having considered his Level 6 diploma, until the administrative review decision. Reference to it at this stage was a classic example of 'confirmation bias'. The Decision had not referred to the concern that the applicant had been vague during the 2015 interview about the circumstances in which he had taken the TOEIC test.

(29) The applicant had asked ETS in February 2018 for recordings of his TOEIC test, as confirmed in correspondence and a witness statement from the applicant's solicitors at [61A] to [62] AB. The solicitor's statement confirmed that no recording had been provided, although in his experience, in other cases, where recordings had been provided, they were invariably not the same speaker as the test-taker, but ETS would not provide further details of the evidence trail.

(30) If this Tribunal reached the conclusion that there was procedural unfairness and a failure to consider relevant evidence in reaching the Decision, then I did not need to go on to consider whether the Decision was '*Wednesbury*' unreasonable.

(31) The case of Shehzad was not authority which equated the discharge of the initial evidential burden with the eventual legal burden. The frailty of the respondent's evidence in Majumder needed to be considered. It was not enough for the respondent to rely merely on the initial evidential burden having passed to the applicant, even if the applicant then failed to raise a satisfactory innocent explanation. The respondent needed to go on and discharge the legal burden of proof. The 'look up' evidence was not enough to discharge the legal burden,

in the absence of an evidence or audit trail, indicating, for example, the qualifications of the human assessor at ETS who had marked the TOIEC test as 'invalid.'

The respondent's submissions

(32) The challenge to the Decision could only be on conventional public law grounds. Shehzad had confirmed that the generic evidence, when combined with the 'look up' result, was sufficient to discharge the evidential burden of proof in relation an allegation of deception. Where the applicant had failed to raise an innocent explanation, that was sufficient to meet the legal burden as well, as there was no need to go behind the 'look up' result to challenge an assessor's qualifications, or provide an audited evidence trail analogous to a criminal investigation.

(33) The respondent had clearly taken into account the applicant's studies prior to reaching the Decision, referring in the Decision itself to his previous Tier 4 (student) visa. The administrative review response also referred expressly to the applicant's Level 6 diploma, but also considered, as the respondent had referred to in the Decision, to the applicant's poor verbal English in 2015, nearly four years after supposedly taking his TOEIC for a second time in 2011. The respondent was entitled to attach limited weight to the Level 6 qualification. The lack of express reference to the Level 6 diploma in the Decision did not mean that the respondent had not considered it.

(34) In terms of procedural fairness, the High Court in R (on the application of Islam) v SSHD [2017] EWHC 3614 (Admin) established that to establish fairness, a 'minded to refuse' warning was not necessarily required and that procedural fairness was depended on context. The critical question was whether the process, when considered as a whole, was fair. The interview invitation letter of July 2015 had referred expressly to the possibility of curtailment under paragraph 323, which itself referred back to paragraph 322 of the Immigration Rules. The questions put to the applicant in the 2015 interview referred explicitly to the TOEIC test. The applicant had also signed a declaration prior to the interview which included a warning of obtaining leave by deception being a criminal offence. The applicant had further notice of the respondent's concerns in the Decision, and the respondent provided a further response in the administrative review decision of 18 February 2017. The case of Balajigari did not assist the applicant, as it related to the two-stage process under paragraph 322(5).

(35) The Decision could not be impugned as being *'Wednesbury'* unreasonable. The respondent did not reach the Decision purely on

the basis of the invalid 'look up' result, as incorrectly asserted by the applicant in the grounds. The respondent had relied on the generic evidence; the 'look up' results; the applicant's poor English when interviewed in August 2015; the applicant's vague answers in interview about the circumstances in which he had taken the TOEIC test; the fact that he had taken the test twice, the second time at Elizabeth College; and the fact that he had not sought to obtain recording of his alleged test until 2018, and after the initial request, had not chased for a response from ETS.

(36) On the issue of section 31(2A) of the Senior Courts Act 1981, it was highly likely that regardless of any procedural concerns, even if valid (which was not accepted), any decision regarding the applicant would not have been substantially different because the applicant had never given a cogent answer to the case against him. The fact that he had obtained a Level 6 diploma was not an answer to the challenge that his verbal English in the 2015 interview was so poor that it was unlikely that he had genuinely obtained a TOEIC pass in 2011.

Discussion and conclusions

(37) As already noted, it is not necessary for this Tribunal to determine any question of precedent fact. Mr Jesurum accepted that Shehzad was authority for the proposition that the generic evidence and 'look up' result for the applicant was sufficient to discharge the initial evidential burden on the respondent of proving a TOEIC deception, so that the evidential (but not legal) burden then passed to the applicant to present an innocent explanation, prior to the respondent reaching her Decision.

(38) In this context, I am conscious that the challenge to the Decision is not a statutory appeal and instead I must consider the challenge on public law grounds, so that it is not for me to decide whether the respondent met the overall legal burden of deception, but whether the conclusion that the applicant had engaged in TOEIC deception could be impugned on public law grounds.

Grounds (1) and (3)

(39) The evidence which the applicant says that the respondent failed to consider in reaching the Decision was the fact of his college studies, resulting in his obtaining his Level 6 diploma in September 2011, the month before he allegedly arranged a proxy to take his TOEIC.

(40) The assertion in the grounds that the respondent failed to consider the fact of his college studies was demonstrably incorrect, as the Decision

referred expressly to his entering the UK on a Tier 4 (general student) visa in October 2010, in the year immediately prior to the second TOEIC test in October 2011 ([20] AB). While the Decision does not refer expressly to the Level 6 diploma, I conclude that the reasoning in the Decision needs to be read in the context of the applicant having entered the UK for the very purpose of studies at a UK institution, through teaching in the medium of English. I do not accept that because the Decision does not refer to a single piece of evidence, that it follows that the respondent did not consider the fact of the applicant having obtained his Level 6 diploma in reaching the Decision, particularly when the same immigration history referred to in the Decision included other applications for leave to remain, for which the applicant had previously submitted that same diploma. To find that the Decision could be impugned on public law grounds because of the omission of a single piece of evidence would otherwise require the respondent to list each and every document that she had considered in reaching a decision. While Mr Jesurum submits that it would be open to the respondent to have submitted a witness statement as to precisely what documents had been considered, that in practice amounts to an identical requirement, which I do not accept is imposed on public law grounds. Instead, what is necessary is for a decision to summarise the gist or broad thrust of the evidence, and how the decision in question is reached, so that a person affected by a decision can be satisfied that all relevant factors have been taken into consideration. I do not accept the submission that the Decision failed to convey consideration of the applicant's studies and attainments, when read as a whole.

(41) The submission in relation to '*Wednesbury*' unreasonableness is the mirror aspect of the assertion about not attaching appropriate weight to the Level 6 diploma. While Mr Jesurum now makes submissions in relation to the adequacy of the 2015 interviewer assessing the applicant's English; that a formal assessment tool and relevant qualifications of the assessor were required, the grounds (particularly at [5]) were far more limited, asserting that if the interview was a material factor, the respondent should have curtailed the applicant's leave straightaway. In relation to these points, first, I do not accept the submission that the respondent is not entitled to rely on the contemporaneous impression of an interviewer, even in the absence of a formal assessment methodology, where a person's English is so poor that the claim of previous attainment of a TOEIC is unlikely to be accurate. In this context, I was referred by Ms Wilsdon to the example during the 2015 interview (without ignoring the totality of the whole), where the applicant was asked, at [180] AB:

"What are you doing now in the UK?" [Answer] "Yes".

(42) Mr Jesurum does not seek to challenge the accuracy of the interview notes, but instead asserts that a basic level 'B1" in TOEIC, which is what the applicant obtained, might be so basic that someone with very limited English could still obtain the qualification. He referred to the "TOEIC correlation table", on a final unpaginated page of the applicant's bundle, which refers to someone understanding the main points of familiar matters regularly encountered and being able to describe hopes and ambitions. I am conscious that I am not considering the Decision afresh, and I do not accept that his submission assists the applicant, in the sense that the TOEIC framework at B1 level so obviously describes such a low standard of English that the respondent's conclusion that it was unlikely that he had passed the TOEIC test was '*Wednesbury*' unreasonable. I also do not accept that the lack of another formal assessment by reference to the TOEIC methodology (akin to a second TOEIC test) was '*Wednesbury*' unreasonable. Further, I do not accept that by not curtailing the applicant's leave immediately in 2015, but instead considering it in 2016, the Decision was unreasonable, in the public law sense. The quality of the applicant's English at interview in 2015, in the context of the generic evidence 'look up' result, was clearly still relevant in 2016; the delay between 2015 and the applicant's application of November 2016 was not extensive; and the applicant has not provided any specific evidence to support his contention that he had been assured at the time that the interview had 'gone well', or words to that effect, such that it would be improper to have relied on the interview evidence.

(43) I also accept Ms Wilsdon's submission that the respondent was entitled to take into account what she perceived to be the vagueness of the applicant's answers given during interview, including when he was asked whom he had paid in order to take the test:

"*I am not understand, again please*" ([179 AB]);

and then when asked again, the applicant said:

"*Actually I not remind that, its too longs ago*" ([180 AB]).

(44) In that regard, Mr Jesurum's criticism was not focussed on the respondent's assessment of vagueness, but rather that it was not referred to specifically in the Decision, and only added in the detailed grounds of defence. However, as with the issue in relation to the Level 6 diploma, I accept Ms Wilsdon's submission that the Decision needs to be read in context, and that it clearly referred to concerns about the poor quality of the applicant's answers in the 2015 interview.

(45) In summary, I conclude that the respondent did not fail to take into account relevant evidence (the Level 6 diploma); or take into account evidence that she should not have done (the contents of the 2015 interview) in reaching the Decision, so as to make it unlawful on public law grounds.

(46) In addition, the Decision cannot be impugned on the ground that having discharged the initial evidential burden (which was met, by virtue of the generic evidence and 'look up' result), the respondent then failed to consider the weakness of that evidence, in the absence of an innocent explanation having been raised. The applicant's innocent explanation, to the extent that it was raised at all, was very narrow, referring to having a Level 6 diploma, to which, in the context of his answers giving during the 2015 interview, the respondent attached very limited weight and cannot be impugned for doing so. The applicant otherwise put the respondent to strict proof of the allegation of deception. Mr Jesurum does not contend that an innocent explanation has been raised, and submitted that that was an 'arid question,' in light of the weakness in the 'look up' process, such as an audit trail and details of the ETS human evaluator's qualifications. I do not accept that there is authority for the proposition that in the absence of an innocent explanation having been raised, the respondent needs to do more to satisfy the legal burden of proving deception; and Mr Jesurum has not sought to advance that an innocent explanation of any substance was raised.

Conclusion on grounds (1) and (3)

(47) For the reasons set out above, I conclude that the respondent did not fail to consider evidence that she ought to have done; or considered evidence that she ought not to have done, so that the Decision can be impugned. I further conclude that the Decision cannot be impugned on the basis that it was '*Wednesbury*' unreasonable in concluding that the legal burden of proving TOEIC deception was met.

Ground (2)

(48) The real heart of Mr Jesurum's submissions, as he accepted, lay in the process by which the respondent had reached the Decision. Dealing with each part of that process, he accepted that the respondent did not need to have a 'minded to refuse' process. I accept, on the one hand, his submission that it is not sustainable to distinguish the authority of Balajigari, on the basis that it involves a two-stage process under paragraph 322(5), whereas the respondent's considerations under paragraph 322(2) do not. Both provisions require consideration of a residual discretion, as refusal is not mandatory. Instead, they provide

for circumstances where leave to remain "should normally be refused."

(49) At the heart of the Balajigari authority at paragraphs [45] to [61], is reaffirmation of a number of principles, including that the applicant should know the gist of the concerns about them, in order to be able to respond to them, before a decision is reached; and it also confirms that the process of administrative review does not cure any earlier defects in the failure to provide such an opportunity. That does not, however, prevent an appraisal of the process as a whole, as per R (on the application of Islam); nor does it depart from the principle that the process by which the respondent may enable a party to understand the gist of concerns about them is context-sensitive. In the context of the particular circumstances of the applicant's case, and when considering the process as a whole, the respondent wrote to the applicant in writing, warning him that she was considering curtailment, by reference to specified Immigration Rules, one of which she later relied on in refusing the applicant's application for indefinite leave to remain. The applicant was aware of the seriousness of the matter, having been warned, and having acknowledged the seriousness of the interview, when provided with a declaration to that effect at [175] AB. The entirety of the detailed questioning during the interview focussed on the second TOEIC test that he had taken in 2011 (when he took it; why he chose the test centre he did; with whom he had discussed taking the test; how he chose the course to prepare for the test; how much the test cost and how he paid for it and arranged it; what the test involved; and what happened afterwards).

(50) In the context of receiving a letter indicating the possibility of curtailment and an interview which focussed solely on every aspect of the second TOEIC test in 2011, the applicant can have been under no doubt that the respondent's concerns, which were serious, (given consideration of curtailment) related to the validity of his second 2011 TOEIC test. Those interview questions were put in an 'open' manner (as opposed to 'closed' questions), designed to elicit information in order to assist an understanding of what had occurred. I do not accept that the authority of Balajigari requires the respondent to go one step further and formally put a specific allegation to the applicant. To do so would needlessly introduce a further adversarial element to the process, when in the particular circumstances of this case, the respondent was entitled to believe that the applicant knew perfectly well what the gist of the concerns related to; namely the validity of his second TOEIC test. The respondent might also have been criticised for already having made up her mind on the issue, if she had put specific allegations to him in such adversarial terms. It would also necessitate the introduction of a two-stage process, with an initial information

gathering stage; and a second stage analogous to the laying of formal charges against the applicant.

Conclusions on ground (2)

(51) For the reasons set out, I conclude that the process by which the respondent reached the Decision cannot be impugned on public law grounds. The respondent was entitled to conclude that the applicant understood the gist of the concerns against him.

(52) Having reached the conclusion that the Decision and the process by which it was reached, cannot be impugned, it was unnecessary for me to reach any conclusions in relation to section 31(2A) of the Senior Courts Act 1981. While the grounds had also referred to a possible challenge on the basis of a duty of candour, this was not developed further by Mr Jesurum and he highlighted no area where the respondent had failed to disclose relevant information in her control.

(53) The application for judicial review is refused on all grounds.

J Keith

Signed: ____

Upper Tribunal Judge Keith

Dated: **11th October 2019**