



Neutral Citation Number: [2023] EWHC 1828 (Admin)

Case No: CO/3351/2022

**IN THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 18/07/2023

**Before :**

**TIM SMITH**  
**(sitting as a Deputy High Court Judge)**

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**Between :**

**THE KING**

**Claimant**

**(ON THE APPLICATION OF HAMMAD  
TAZEEM)**

**- and -**

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

**Defendant**

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**Jay Gajjar, Muhammad Zahab and Stefanie Alvarez (instructed by SAJ Legal) for the  
Claimant**

**William Irwin (instructed by Government Legal Department) for the Defendant**

Hearing date: 3<sup>rd</sup> May 2023  
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**Approved Judgment**

This judgment was handed down remotely at 10.30am on [date] by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg <https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html>).

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**MR TIM SMITH (sitting as a Deputy High Court Judge):**

**Introduction and Procedural Matters**

1. This claim is a challenge brought by the Claimant against a decision by the Defendant to cancel his leave to enter the UK.
2. The claim lists four grounds of challenge which may conveniently be summarised as follows:
  - a) Ground 1: in failing to give the Claimant notice of the allegation/concern about the authenticity of the documentation for his English qualifications the Defendant adopted an unfair procedure
  - b) Ground 2: the decision to cancel the Claimant's leave to enter the UK was irrational and/or procedurally unfair
  - c) Ground 3: the Defendant's rejection of the Claimant's application for administrative review of the decision cancelling his leave to enter was irrational and/or procedurally unfair
  - d) Ground 4: the Claimant was detained unlawfully by the Defendant
3. Permission to proceed to a substantive hearing was granted by Susie Allegre (sitting as a Deputy High Court Judge) on all four grounds on 17<sup>th</sup> January 2023, whereupon the Defendant filed Detailed Grounds of Defence on 23<sup>rd</sup> February 2023. Subsequently the Claimant sought permission to amend his Grounds. This was permitted by Order of the Court dated 23<sup>rd</sup> March 2023. The Defendant filed amended Detailed Grounds of Defence on 29<sup>th</sup> March 2023.
4. It was on this basis that the case proceeded before me.

**Background Facts**

5. The Claimant is a 20 year old student from Pakistan. On 3<sup>rd</sup> September 2022 he was granted leave by the Defendant to enter the UK and remain for a course of study at De Montfort University in Leicester. The course was a three-year bachelor's degree in Business and Management preceded by a one-year foundation course.
6. Admission by the University to study the course was conditional upon the Claimant demonstrating a sufficient command of English. The Claimant's case is that he had demonstrated this by providing a results card for his intermediate examination by the AJ and K Board of Intermediate Education in Mirpur, and that prior to registering for the course he also took and passed a test for proficiency in English conducted by the Oxford International Education Group ("OIEG").
7. The claim bundle includes a one-page screenshot, apparently from OIEG's website, which appears to indicate in a drop-down field that the Universities whom OIEG supports include De Montfort University. More relevantly there is also an email dated 1<sup>st</sup> July 2022 (obtained subsequently by the Claimant) from a Rochelle Barker of OIEG bearing the subject heading "Hammad, Tazeem 632675" addresses to **an email address at Maria Consultancy** and copied to **"wkwan" at OIEG** which advises:

“To all

Hammad, Tazeem with the student number: 632675 passed their credibility interview.

I can confirm, I, Rochelle Barker, conducted this interview with the above applicant”

8. On 8<sup>th</sup> September 2022 the Claimant left Pakistan for the UK. He arrived at Heathrow Airport on 9<sup>th</sup> September 2022 at around 18:00 hours.
9. Prior to being permitted to enter the UK the Claimant was interviewed by Ms Richards, one of the Defendant’s Heathrow Border Force desk officers. The interview took place at 21:30 hours on 9<sup>th</sup> September and was conducted by Ms Richards with the Claimant alone. Ms Richards has said in a written note that:

“On arrival the passenger was asked where had just come from, however despite asking him three times he did not appear to understand what I was asking until I rephrased the question to, “have you come from Pakistan””

This note did not purport to be a witness statement but Ms Richards did subsequently provide sworn witness evidence having consulted her notes.

10. Ms Richards’s witness statement goes on to record that she asked the Claimant a question about his intended course of study which he answered in the same way as it was answered on his form. She then asked him a question about his previous course of study which she says he was unable to answer at all.
11. Ms Richards explains that in light of the Claimant’s apparently poor command of English (despite the fact that his reason for entry was to pursue a course of higher education study) the Claimant was referred for further interviews.
12. The Claimant was then interviewed again at 23:43 hours on the same day by another of the Defendant’s Border Force officers, Mr Badal. Mr Badal has produced a sworn witness statement in this case. Whilst he does not append any verbatim records of the second and third interviews with the Claimant Mr Badal’s statement indicates that he checked his contemporaneous notes of the interviews before finalising his witness statement. Those hand-written notes are appended to his witness statement.
13. At this point I note that there is a dispute between the Claimant and Mr Badal as to what happened at the second and third interviews. The Claimant has filed a witness statement in the proceedings in which he gives his own account of the interviews. Where there is a dispute on a material issue of fact between the two witnesses I note it in the summary I give below.
14. Mr Badal’s account of the second interview includes the following elements:
  - a) The Claimant requested an Urdu interpreter at the outset of the interview. When asked by Mr Badal why he wanted an interpreter Mr Badal’s notes record that the Claimant answered “Because I cannot

speak in English”. Mr Badal does not understand Urdu and was unable to conduct the interview using Urdu. He therefore arranged for an Urdu interpreter from the Defendant’s approved supplier, Big Word, to assist. (By contrast the Claimant’s witness statement records that he had asked for an interpreter because, in summary, he was tired after a long journey and anxious at being interviewed by an official at the conclusion of what was his first solo journey overseas; that the officer conducting the interview spoke quickly with a strong British accent; and that the officer spoke with him abruptly in a hostile manner frequently speaking over him. Mr Badal denies that he spoke quickly or over the Claimant, or that he has a strong British accent)

- b) At the outset of the interview the Claimant was asked through his interpreter whether he was “fit and well to be interviewed” and he confirmed that he was
  - c) During the interview the Claimant was asked twenty five questions about his degree course and the Oxford International English Test he took beforehand to demonstrate his proficiency in English. Mr Badal’s hand-written notes of the question and answer session he conducted with the Claimant run to 7 pages. The Claimant signed each of those pages
15. Mr Badal explains that the results of this second interview gave him cause for concern as to whether the Claimant’s level of proficiency in English was what he had represented it to be. Mr Badal therefore referred his findings and his concerns to a more senior Border Force officer, Mr Brown. In discussions they concluded that the Claimant should be served with notices cancelling his leave to enter and requiring him to return to Pakistan. The relevant notices were drafted by Mr Badal and reviewed by him with Mr Brown.
16. Having concluded that the Claimant should be refused entry Mr Badal then accompanied the Claimant to an interview room at 02:32 where he commenced a third interview with him. This third interview was more procedural than investigatory and was for the purpose of presenting and explaining to the Claimant the decision to cancel his leave to enter. Mr Badal’s witness statement records the following elements of this third interview:
- a) The Claimant again requested an Urdu interpreter at the outset and one was arranged for him from Big Word
  - b) The Claimant again confirmed through his interpreter at the outset that he and the interpreter understood one another well and that he was fit and well to conduct the interview. Mr Badal adds that at this point the Claimant appeared to him to be alert and “attentive and responsive”
  - c) In view of the decision to cancel the Claimant’s right of entry Mr Badal had generated two other documents in advance of the interview. One was a form by which, if signed, the Claimant would waive his right to an administrative review of the decision to cancel his leave (the “AR Waiver Form” IS301) and the other was a separate document

explaining the content and effect of the AR Waiver Form (the “AR Waiver Explanation form”). The forms were explained to the Claimant through the interpreter. Mr Badal said that the Claimant “chose to take his time” to consider the form as explained to him. He then answered “No” to the question on the form asking “Do you intend to make an application for Administrative Review of the decision to refuse you entry to the UK?”. Finally Mr Badal confirms that in his view the way in which the AR Waiver Form was completed is consistent with the answers the Claimant was giving verbally as he was taken through the form by the interpreter. The form was then signed and dated by the Claimant; Mr Badal had indicated where to sign with a cross because (according to his evidence) the Claimant had said he did not know where to sign. (The Claimant’s account in his own witness evidence differs from this account by Mr Badal in that the Claimant states that he was “jerked awake” at around 02:25 hours; that he was presented with a pre-populated form and asked to sign it; that he signed because he was anxious and tired; and that Mr Badal volunteered to him that if he elected to fight the decision to cancel his leave “it would cost me too much money and it would not do any good for me, so I should just sign”. By reason of all of this the Claimant therefore considered that his signature of the AR Waiver Form was coerced. Mr Badal in his own witness statement specifically denies this last part, saying that “At no time was I made aware by the Urdu interpreter that Mr Tazeem asked the question “what would happen if I took this matter to Court?” At no time did I tell Mr Tazeem via the Urdu interpreter “it would cost me too much money and it would not do any good for me, so I should just sign””)

17. Following the third interview Mr Badal served the Claimant with Form IS 82 advising that he had been refused entry to the UK. The notice, served pursuant to section 120 of the Nationality, Immigration and Asylum Act 2002, recorded the following:

“You have confirmed your intentions to study a Bachelor’s degree in Business and Management, a full time course at your Higher Education Provider (HEP) Leicester De Montfort University. The university has issued you with a Confirmation of Acceptance for Studies (CAS) after being satisfied by your English language ability in four components. The method of assessment used was a Result Card Intermediate Annual Examination issued by AJ and K Board of Intermediate and Secondary Education Mirpur, dated 2021, and the Oxford International English test, which is considered equivalent to a CEFR B2. The University did not request any further evidence of your English language ability.

However, on your arrival to the UK today you have been unable to demonstrate an ability to speak basic English, which has been made further evident by the need for you to request an Urdu interpreter for your further interview. In your visa application you stated that your preferred language to communicate in was English, however your request for an interpreter clearly demonstrates that this is not the case. Furthermore, during your interview in Urdu today, you failed to give a basic account of the questions posed to you in each of the four components of the Oxford International English test, the recent test which you

presented as evidence to the Entry Clearance Officer of your English ability. You claim that the reason for not being able to remember details is due to the course being taken several months ago, however, when also taking into account that you have not even been able to relay the exact course title of your degree, serious concerns are raised about your ability to undertake such a course of study.

In light of the above, it is evident that you have falsely represented yourself to the Entry Clearance in order to obtain your student visa. You clearly are unable to communicate in the English language, and I have doubts about the authenticity of the English tests”

18. The contents of the notice and of the “One Stop Warning” which followed the summary of the reasons for making the decision were explained to the Claimant through the Urdu interpreter.
19. Removal directions were set for 15:05 hours on 10<sup>th</sup> September 2022.
20. Within a few hours on the same day the Claimant instructed solicitors, SAJ Legal. They sent a letter before claim to the Defendant as a result of which the removal directions were cancelled. They also sought disclosure of the notices and interview transcripts from the Defendant’s Border Force officers.
21. On 12<sup>th</sup> September judicial review proceedings were commenced.
22. On the same day the Claimant’s solicitors received a response to the original request for disclosure from the Defendant’s Border Force officer. This provided a copy of officer Badal’s hand-written notes of the second interview with the Claimant together with copies of all the notices with which the Claimant had been served.
23. This partial disclosure prompted the Claimant’s solicitors to seek disclosure of additional information and further documents. The further details were provided by email on 16<sup>th</sup> September.
24. On 21<sup>st</sup> September the Claimant’s solicitors submitted an application for administrative review of the decision to cancel his leave to enter. On 23<sup>rd</sup> September the application was rejected by the Defendant. The rejection notice, sent pursuant to paragraph 34M(4) of the Defendant’s Immigration Rules, gave as the reason for rejection:

“On the 10 September you signed a waiver withdrawing your intention to request an administrative review. By signing the waiver you withdraw the right to seek an administrative review of the decision to refuse you permission to enter made on 10 September 2022”
25. Following receipt of the rejection notice the Claimant’s solicitors wrote an email to Border Force requesting further information in these terms:

“Thank you for promptly rejecting AR.

We note that you have avoided to address the following:

1. Who filled out the alleged waiver forms;
2. Why would the Applicant be required to sign on marked areas if he was reading the forms?
3. Applicant's position that he was not explained the contents and was coerced into signing.
4. Where is the interview transcript from 0230 hours (approx.) to 0315 hours (approx.) on 10 September 2022?
5. Where are signed statement of truth from the officer(s) who got these alleged waiver forms signed?
6. Remaining disclosure as sought in the Admin Review

Clearly there will be circumstances when alleged waiver of AR will be invalid e.g. mental capacity, coercion, duress, misrepresentation. You have failed to consider this completely. The Applicant has taken a position that your officers did not act within the law and this should have been considered appropriately and seriously”

26. A pre-action protocol letter was then sent by the Claimant's solicitors on 26<sup>th</sup> September alleging that the waiver of the right to administrative review was invalid because the Claimant had been coerced into signing it. The Defendant provided a response to this pre-action protocol letter on 10<sup>th</sup> October.
27. Amended grounds for judicial review were then served on 18<sup>th</sup> October to absorb the ground of claim regarding invalidity of the administrative review waiver form.
28. As noted above the grounds were amended again with the permission of the Court following receipt of the Defendant's detailed grounds of resistance.

### **The Law**

29. It is common ground between the parties that the Defendant has a statutory power to turn away those arriving at the borders even if they have been granted leave to enter. This power derives from section 3 of the Immigration Act 1971. Section 3 provides, so far as is material to this case, as follows:

#### **“3 General provisions for regulation and control.**

(1) Except as otherwise provided by or under this Act, where a person is not a British citizen —

(a) he shall not enter the United Kingdom unless given leave to do so in accordance with the provisions of, or made under, this Act;

(b) he may be given leave to enter the United Kingdom (or, when already there, leave to remain in the United Kingdom) either for a limited or for an indefinite period;

(c) if he is given limited leave to enter or remain in the United Kingdom, it may be given subject to all or any of the following conditions, namely—

(i) a condition restricting his work or occupation in the United Kingdom;

(ia) a condition restricting his studies in the United Kingdom;

(ii) a condition requiring him to maintain and accommodate himself, and any dependants of his, without recourse to public funds;

(iii) a condition requiring him to register with the police.

(iv) a condition requiring him to report to an immigration officer or the Secretary of State; and

(v) a condition about residence.

(2) The Secretary of State shall from time to time (and as soon as may be) lay before Parliament statements of the rules, or of any changes in the rules, laid down by him as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons required by this Act to have leave to enter, including any rules as to the period for which leave is to be given and the conditions to be attached in different circumstances; and section 1(4) above shall not be taken to require uniform provision to be made by the rules as regards admission of persons for a purpose or in a capacity specified in section 1(4) (and in particular, for this as well as other purposes of this Act, account may be taken of citizenship or nationality).

If a statement laid before either House of Parliament under this subsection is disapproved by a resolution of that House passed within the period of forty days beginning with the date of laying (and exclusive of any period during which Parliament is dissolved or prorogued or during which both Houses are adjourned for more than four days), then the Secretary of State shall as soon as may be make such changes or further changes in the rules as appear to him to be required in the circumstances, so that the statement of those changes be laid before Parliament at latest by the end of the period of forty days beginning with the date of the resolution (but exclusive as aforesaid)”

30. In relation to those arriving in the UK with leave to enter already having been granted Schedule 2 Part 1 to the Immigration Act 1971 also provides at paragraph 2A:

“2A



(1) This paragraph applies to a person who has arrived in the United Kingdom with leave to enter which is in force but which was given to him before his arrival.

(2) He may be examined by an immigration officer for the purpose of establishing—

(a) whether there has been such a change in the circumstances of his case, since that leave was given, that it should be cancelled;

(b) whether that leave was obtained as a result of false information given by him or his failure to disclose material facts; or

(c) whether there are medical grounds on which that leave should be cancelled.

(2A) Where the person's leave to enter derives, by virtue of section 3A(3), from an entry clearance, he may also be examined by an immigration officer for the purpose of establishing whether the leave should be cancelled on the grounds that the person's purpose in arriving in the United Kingdom is different from the purpose specified in the entry clearance.

(3) He may also be examined by an immigration officer for the purpose of determining whether it would be conducive to the public good for that leave to be cancelled.

(4) He may also be examined by a medical inspector or by any qualified person carrying out a test or examination required by a medical inspector.

(5) A person examined under this paragraph may be required by the officer or inspector to submit to further examination.

(6) A requirement under sub-paragraph (5) does not prevent a person who arrives—

(a) as a transit passenger,

(b) as a member of the crew of a ship or aircraft, or

(c) for the purpose of joining a ship or aircraft as a member of the crew,

from leaving by his intended ship or aircraft.

(7) An immigration officer examining a person under this paragraph may by notice suspend his leave to enter until the examination is completed.

(8) An immigration officer may, on the completion of any examination of a person under this paragraph, cancel his leave to enter.

(9) .....

(10) A requirement imposed under sub-paragraph (5) and a notice given under sub-paragraph (7) must be in writing”

31. In relation to the power to detain pending a decision on whether or not to cancel or refuse leave to enter paragraph 16 of Schedule 2 to the Immigration Act 1971 provides as follows:

“16(1) A person who may be required to submit to examination under paragraph 2 above may be detained under the authority of an immigration officer pending his examination and pending a decision to give or refuse him leave to enter.

(1A) A person whose leave to enter has been suspended under paragraph 2A may be detained under the authority of an immigration officer pending—

(a) completion of his examination under that paragraph; and

(b) a decision on whether to cancel his leave to enter”

32. Paragraphs 34M to 34S of the Immigration Rules (made pursuant to the Immigration Act 1971) allow for a person whose leave to enter has been cancelled to apply for an “administrative review” of the cancellation decision.

33. Appendix AR makes provision for persons to challenge an “eligible decision” on the basis of a “case working error”. “Eligible decisions” include (AR3.2(aa)) a decision on the right of a student to remain in the UK. “Case working errors” include (AR2.11) errors in cancelling leave to enter that is already in existence.

34. Pursuant to paragraph AR2.8 of the Immigration Rules the Defendant agrees not to take steps to remove a person from the UK whilst an administrative review is pending.

35. Paragraph AR2.10 of the Immigration Rules provides that:

“Administrative review is not pending when:

(a) an administrative review waiver form has been signed by an individual in respect of whom an eligible decision has been made. An administrative review waiver form is a form where the person can declare that although they can make an application in accordance with paragraphs 34M to 34Y of these Rules, they will not do so ...”

36. It is lawful for the Defendant to establish and apply policies setting out her normal approach to immigration decisions (R (Lumba) v Secretary of State for the Home Department [2012] 1 AC 245). But policy is not law and it can be departed from (R (Begum) v Secretary of State for the Home Department [2021] AC 765).
37. The requirements of procedural fairness have to be judged in the context of a particular decision (R v Secretary of State for the Home Department ex parte Doody [1994] 1 AC 531).
38. The law governing the power to detain somebody under the Immigration Act 1971 was clarified by the judgment of Woolf J (as he then was) in R v Governor of Durham Prison, ex parte Hardial Singh [1984] 1 WLR 704. The key elements of that case were synthesised into four principles – known as the “Hardial Singh principles” – by the Court of Appeal in R (I) v Secretary of State for the Home Department [2002] EWCA Civ 888, per Dyson LJ (as he then was) at [46]-[47]. The formulation of Dyson LJ in R (I) was approved by the Supreme Court in Lumba.

## **The Grounds**

### *Ground 1 – procedural unfairness - submissions*

39. For the Claimant Mr Gajjar submitted that inadequate notice had been given to the Claimant about the Defendant’s real concerns prior to the decision to cancel his leave and that, as a consequence, he had been deprived of the opportunity to face the allegations made against him.
40. The IS 82 with which the Claimant was served to cancel his leave to enter summarised the circumstances of the Claimant’s interview, noting the results of the OIEG test but also noting what was said to be the Claimant’s inability to describe details about his degree course and his apparent inability to converse in English. The form continued:

“In light of the above, it is evident that you have falsely represented yourself to the Entry Clearance in order to obtain your student visa. You clearly are unable to communicate in the English language, and I have doubts about the authenticity of the English tests you claim to have passed which you presented”
41. But, submits Mr Gajjar, the Claimant had been given inadequate notice of these allegations of inauthenticity. Nowhere did the Defendant’s Border Force officers articulate this concern in the interviews with the Claimant. He added that the position is akin to that which the Court of Appeal considered in Balajigari v Secretary of State for the Home Department [2019] 1 WLR 4647 where it was held that, faced with an allegation of deception or dishonesty, the proper course for the Secretary of State was to issue the claimants there with a “minded to ...” decision to give them due notice of the allegations and a proper opportunity to respond. This is also consistent with the Defendant’s own guidance to its case-workers (“Suitability: false representations, deception, false documents, non-disclosure of relevant facts” of which the then current version was version 2.0 dated 22<sup>nd</sup> December 2020).
42. For the Defendant Mr Irwin emphasised that the starting point must be that the legislation affords wide powers to the Defendant to cancel the leave to enter (see

Immigration Act 1971 Schedule 2 Part 1 paragraph 2A(8)) that was previously granted to someone arriving into the UK (paragraph 2A(1)), and that these powers can be exercised by one of the Defendant's officers (paragraph 2A(2)). The context is therefore important: these are powers capable of being exercised at the moment of arrival and they need to be exercised quickly with little scope for protracted investigation. The notion of procedural fairness – submitted Mr Irwin – should be viewed against that background and common law concepts of fairness cannot frustrate what Parliament intended through the legislation to be an expedited procedure.

43. Mr Irwin added that the Claimant's reliance on Balajigari is misplaced because the circumstances of that case were wholly different. They related to the Defendant's reliance on generic forms of evidence being applied indiscriminately to individual cases. The evidential picture there was much more likely to require a complex and detailed explanation, a review of records, and the likely need for professional input. That is in stark contrast to the facts of this case where an impression of the levels of fluency in English demonstrated by the Claimant were much easier to ascertain.
44. Having regard to the Defendant's December 2020 guidance relied upon by the Claimant Mr Irwin submitted that (1) there is no immutable rule that a "minded to ..." provisional decision needs to be given in every case; (2) if a suspicion of deception needed to be identified then on the facts it was clearly identified here. Concerns were raised repeatedly with the Claimant in the course of his interview and there is no requirement for them to be put in writing; and (3) even if that point were not accepted it is a compressed process that the Defendant's officers are required to conduct. There was no reference in the Claimant's witness statement to the email from Ms Barker at OIEG (which was in any event addressed not to the Claimant but to an agent) despite it being produced only two days after the interview and hence there was nothing to suggest that the Claimant was even aware of it at the time of his interview.
45. Mr Irwin also placed reliance on a separate set of guidance notes produced by the Defendant - "Students: Border Force guidance" (version 3.0, 26<sup>th</sup> April 2022) - which, amongst other things, gives guidance to Border Force officers about the circumstances in which students arriving with leave to enter could have their leave cancelled. He submitted that "Example 3", which is where "Student arrives and has very limited or no English", is on all fours with the facts of the current case. No challenge is made by the Claimant to the lawfulness of this guidance and any decision taken by one of the Defendant's officers on the strength of it would be amenable to challenge only on conventional *Wednesbury* grounds. Mr Irwin submitted that no such grounds existed here: the clear impression left with the Defendant's officers was that the Claimant did not have a basic command of English and hence there was more than enough evidence for the Defendant rationally to conclude that there were grounds for cancelling the Claimant's leave to enter.

*Ground 1 – discussion and conclusions*

46. At the heart of the Claimant's complaint is the fact that it was never made clear to him the view later expressed by the Defendant in her IS 82 decision that the Claimant's English qualifications must not be authentic, and consequently he was never given the opportunity to explain the position.

47. I accept the submission from Mr Gajjar that from the terms in which the IS 82 notice was written (in particular the extract I have quoted from above) it can only reasonably be understood as alleging deception on the part of the Claimant.
48. The first encounter between the Claimant and the Defendant's officers is the interview conducted by Ms Richards. As I have noted above, her witness statement was said to have been prepared after consideration of her contemporaneous note of the interview with the Claimant at 21:30 on 9<sup>th</sup> September. That note is one page long. It does not mention the OIEG certificate. It does mention the CAS form issued by the University but nowhere does it assert that the CAS form – still less the OIEG certificate – was inauthentic. I therefore conclude that no question as to the validity of the documentation was put to the Claimant at this first encounter.
49. The second interview with the Claimant was conducted by Mr Badal. Mr Gajjar submits that the absence of any transcribed record of the interview is telling. If this submission is inviting me to infer that there is something suspicious in the Defendant's failure to produce a transcribed record then I have no basis for so concluding. There is no transcript available and so none could be produced. In the absence of a transcript the best evidence about what transpired at this interview is provided by a combination of Mr Badal's witness statement and the manually-completed question and answer form from the interview (on the one hand) and the Claimant's witness evidence (on the other hand).
50. In the twenty five questions that followed in this second interview, the Claimant submits, not one of them put to him a concern that the qualifications he had put forward were falsified. Whilst Mr Gajjar accepts that such questions are not required to come at the beginning of the interview they are, he submits, required at some point before a conclusion is reached by the officer conducting the interview. He submits that an explicit allegation is wholly absent.
51. I agree. Here as close as one gets are:
  - a) Question 2 in which the Claimant was asked "Why do you want this interview in Urdu?" His response was recorded as being "Because I cannot speak in English"; and
  - b) Questions 13 to 18 which asked questions about the content of the OIEG test and how the Claimant had answered it at the time. Some questions he answered in this interview, others he responded to by saying that the test was taken 6-7 months ago and so he could not remember
52. Mr Gajjar submitted that the fair procedure for the Defendant to adopt in these circumstances was to issue a provisional "minded to ..." decision, with reasons, to see whether the Claimant could overcome the concerns harboured by Mr Badal about the quality of the Claimant's English and, consequently, the authenticity of the third party documentation appearing to verify an ability to speak English up to level B2 on the Common European Framework of Reference for Languages (CEFR).
53. Mr Gajjar relies on the judgment of the Court of Appeal in Balajigari in support of his submission that the Defendant should have done no more than issue a "minded to ..."

decision. This, he submits, would have given the Claimant the opportunity to address concerns about the apparent disparity between the level of fluency in English exhibited in his interviews and the level certified by the independent documentation.

54. Delivering the judgment of the Court in Balajigari, Underhill LJ held as follows (at [221]):

“... the approach taken by the Secretary of State in deciding to refuse the applications for leave to remain in each of these cases on paragraph 322 (5) grounds – which we take to have been his general approach in all earnings discrepancy cases – was legally flawed (except, for particular reasons, in Albert). This is principally because he proceeded directly from finding that the discrepancies occurred to a decision that they were the result of dishonesty, without giving applicants an opportunity to proffer an innocent explanation. But nor does he address the further questions of whether the dishonesty in question renders the presence of the applicant in the UK undesirable or whether there are other factors which outweigh the presumption in favour of removal, or give applicants the opportunity to raise any matters relevant to those questions: such cases will no doubt be exceptional, but the step cannot simply be ignored. The availability of administrative review is not an answer, not least because the applicant is not normally allowed to produce evidence that was not produced before the original decision. That unlawfulness can be avoided for the future by the Secretary of State adopting a "minded to" procedure, which informs applicants of his concerns and gives them the opportunity to show cause why ILR should not be refused by offering an innocent explanation of the discrepancies (which will need to be particularised and documented so far as possible) and/or drawing attention to matters relevant to the "undesirability" or "discretion" issues.

55. In response Mr Irwin submitted that the facts of Balajigari are very different from the facts in the present case. That much is plain, but it does not follow that the principle enunciated by the Court is any less applicable to the facts of the current case. Indeed in R (Karagul) v Secretary of State for the Home Department [2019] EWHC 3208 (Admin), to which Mr Gajjar also referred, Saini J expressed this view about a similar submission made to him in that case (at [102]):

“In my judgment, the Balajigari judgment is an application of well-established general principles and is not to be regarded (as the Secretary of State submits) as a decision simply about unfairness in a specific set of circumstances. Based on that decision, and also the decision of Martin Spencer J in Shahbaz Khan [2018] UKUT 384 (IAC) (which I respectfully record I have found to be of considerable assistance) there is in my judgment a general public law principle in operation in the cases”

56. Saini J went on at [103] to summarise this general public law principle by reference to three propositions, of which I emphasise the first:

“I summarise that general principle as follows but with the caveat that its application will of necessity be modified depending on the terms of the statutory regime:

(1) Where a public authority exercising an administrative power to grant or refuse an application proposes to make a decision that the applicant for some right, benefit or status may have been dishonest in their application or has otherwise acted in bad faith (or disreputably) in relation to the application, common law fairness will generally require at least the following safeguards to be observed. Either the applicant is given a chance in a form of interview to address the claimed wrongdoing, or a form of written "minded to" process, should be followed which allows representations on the specific matter to be made prior to a final decision"

57. As regards the Defendant's December 2020 guidance document "Suitability: false representations, deception, false documents, non-disclosure of relevant facts" Mr Gajjar noted that the section entitled "Procedural fairness" under paragraph 9.7.3 ("Discretionary cancellation") includes the following guidance to Border Force officers:

"If you are considering refusing or cancelling on the basis of false representations or deception, you must provide a 'Minded to Refuse/Cancel notification', which means simply that you must tell the applicant you are thinking of refusing the application and/or cancelling entry clearance or permission, based on false representations. You must set out exactly what the allegation is and make it clear you are alleging dishonesty/deception, including whether you allege the deception was that of the applicant or another. You must also give the applicant the chance to respond to the allegation before you make your decision.

You may give the Minded to Refuse/Cancel notification and ask for any response either in a person (usually an interview at the border or by appointment) or by written notification if the person is in the UK or Overseas. You must then consider, in the light of the response (if any is given), whether there is sufficient evidence that the applicant (or, if relevant, a third party) has been dishonest.

You must give the applicant a reasonable period in which to respond to the Minded to Refuse/Cancel notification or, if the applicant states they want to provide documentary evidence to support an explanation given in an interview. What is reasonable will depend on the circumstances, but at the border an explanation ought to be forthcoming, in other cases 10 working days will normally be sufficient. You must then consider, in the light of the response (if any is given), whether there is sufficient evidence that the applicant (or, if relevant, a third party) has been dishonest"

58. Mr Gajjar placed particular emphasis on the repeated use of the word "must" throughout the extract. This, he said, illustrates the Defendant's recognition of the requirements deriving from Balajigari (to which reference is made specifically in the same paragraph of the guidance) as refined by the Court of Appeal the previous year.
59. As I have noted above, for the Defendant Mr Irwin relies instead upon the Defendant's policy contained in her guidance note "Students: Border Force guidance". "Example 3" in that guidance relates to "Student [whom] arrives and has very limited or no English" and provides as follows:

“You may cancel the passenger’s permission to enter because they cannot speak English without the assistance of an interpreter ... *[There then follows the description of an exception to this in the case of gifted students, which does not apply here]* ...

You must assess whether or not the student can speak English without an interpreter only by following the normal line of questioning. **On no account are you permitted to give the passenger a test of any kind.**

It is possible that a student has genuinely obtained the required secure English language test (SELT) to prove their competence. However, if the student cannot demonstrate an ability to speak basic English on arrival without the help of any interpreter, then you may be able to cancel their Entry Clearance.

If the passenger requires an interpreter you must cancel their Entry Clearance or Biometric Residence Permit (BRP) in the normal way, using grounds of **misrepresentation or change of circumstances or change of purpose**, as appropriate. The passenger will have an in-country right of appeal unless there is evidence of a change of purpose”

(in each case the emphasis is from the original text)

60. Against the guidance relied upon by the Claimant Mr Irwin submits that the recommended procedure for giving a provisional “minded to ...” decision is redundant on the facts because there was no explanation that could be proffered for the Claimant. He notes that the only evidence advanced by the Claimant after his leave was revoked and the allegation of deception was made clear in the IS 82 form was the email from Ms Barker which – he submitted – hardly advances the Claimant’s case very far.
61. Mr Gajjar responded to Mr Irwin’s submission characterising it as “dangerously binary”. Whilst I may not go quite that far, for sure it was a bold submission. It assumes that on the facts there could be no explanation advanced by the Claimant which was capable of displacing the provisional conclusion of the Defendant’s officers that any documentation verifying the Claimant’s ability to speak English to a standard suitable for studying a bachelor’s degree with a foundation course must have been falsified.
62. The case of R (Wahid) v Entry Clearance Officer [2021] EWCA Civ 346, to which Mr Gajjar also referred, is germane on the facts. In that case it was alleged that Mr Wahid had falsely represented when completing a visa application that he had not been given any police cautions. He had omitted to mention a previous occasion when he had been detained leaving the UK for Pakistan after a blunt butterfly knife on a key-chain had been found in his luggage. That was considered to be a prohibited item and airport security officers had explained that the police needed to be called as a matter of protocol. Mr Wahid was questioned by the police but released without charge. He explained that so far as he was aware no further action had been taken by the police, but later investigation revealed that he had in fact been cautioned by the



police for the offence of being in possession of a dangerous item at an airport. Mr Wahid was refused leave to enter as a visitor on the strength of this alleged deception.

63. In the Upper Tribunal Mr Wahid's appeal against refusal was dismissed, with the Judge holding:

“6. I am also not persuaded that the decision was procedurally unfair. The applicant disclosed his conviction in 2009 and he attended the police station in 2012. It is accepted the knife was in his luggage and it was a prohibited item. The fact that the applicant claims he was unaware of the caution being recorded against him is not material. **An interview or minded to refuse letter would not have altered the factual situation**” (my emphasis)

64. He appealed this decision to the Court of Appeal. His appeal was allowed. Commenting on the above extract from the judgment of the Upper Tribunal, Carr LJ, giving the leading judgment in the Court of Appeal, held as follows at [31]-[32]:

“31. In my judgment, the Judge fell into error in the penultimate sentence of paragraph 6 of his decision. He failed to consider the position from the perspective of Mr Wahid's state of mind and, in particular, the question of his honesty. The requirement of procedural fairness depend upon the facts and the context in which a decision is taken, including the nature of the legal and administrative system within which the decision is taken (see R v SSHD, ex parte Doody [1994] AC 531 (at 560 D-G) and Taj (at [50])).

32. I am persuaded, broadly for the reasons identified by Mr Gajjar, that it is arguable that, where an ECO harbours suspicions of dishonesty, procedural fairness requires the applicant to have the opportunity to respond. The Judge was wrong to conclude otherwise. This is an important point which does not appear to have been considered directly in any of the authorities to date”

65. In the present case there was a tension between what the Defendant's Border Force officers observed and what the documentation appeared to show. The documentation included:

- a) A CAS provided by De Montfort University,
- b) The OIEG test certification, and
- c) A result card from the intermediate annual examination issued by AJ and K Board of Intermediate Education

66. Of this documentation we know that the Defendant's officers were aware of at least (a) and (b) before the decision to cancel the Claimant's leave was taken: (a) was referred to by Ms Richards in the first interview with the Claimant and (b) was referred to by Mr Badal in the second interview with the Claimant. But despite the several questions asked of the Claimant about the latter in his second interview there was, according to my reading of the interview notes, no direct allegation that the Claimant's English credentials were inauthentic. If it were being alleged that the Claimant had obtained his qualifications by deception then it was not suggested to the

Claimant how officers believed this to have occurred, for example by the use of a proxy to sit the English tests on his behalf.

67. In oral argument Mr Irwin candidly admitted that his case “would be much easier” had there been a direct allegation of deception but, he submits, the necessary inference from the questioning is that the authenticity of the documentation was being disputed.
68. I do not agree.
69. It seems to me that where something as important as a decision to cancel leave to enter is being contemplated on the assumption of falsified documentation, procedural fairness requires that a very clear allegation to that effect is put. It is not enough for a passenger to be left to infer that this is the case. The fact that such inference is expected to be discerned second-hand through an interpreter exacerbates the difficulties experienced by a passenger, let alone in circumstances where it is evident that public officials are intervening potentially to rescind permission to enter.
70. In my judgement the first time the Claimant could reasonably have been alerted to the allegation of deception was when he was served with the IS 82 document. In that document the link between the Claimant’s apparent lack of capability in English and the consequent questioning of authenticity of his documentation was spelled out for the first time. But by then it was too late. The decision had already been taken. The IS 82 document confirmed the terms on which his entry clearance had been cancelled. Self-evidently he no longer had the opportunity to make representations to dissuade officers from their decision.
71. The Defendant relies in part on the fact that the Claimant sought assistance from an interpreter for the whole of his second and third interviews, and on the fact that the reason he gave for his request was “Because I cannot understand English”. This appears as supplementary reasoning in the IS 82 document:

“However, on your arrival to the UK today you have been unable to demonstrate an ability to speak basic English, **which has been made further evident by** the need for you to request an Urdu interpreter for your further interview” (my emphasis)
72. The Defendant does not rely heavily on the Claimant’s request for an Urdu interpreter as proof of an inability to speak English. That is prudent. It seems to me that the request for an interpreter is not necessarily inconsistent with the Claimant’s case that he could speak English to a suitable level to study in English. When it became apparent after the first interview that there was real jeopardy for the Claimant it is hardly surprising that he elected to conduct the future interviews in his mother tongue rather than in English. He was no doubt anxious to ensure that he did not misunderstand any vital detail and that he was able to get across his point of view very clearly. I also do not find this to be inconsistent with the Claimant’s stated preference on his visa application form to converse in English. In answering that question he may well not have anticipated having to converse in a second language on a matter of critical importance in circumstances of extreme anxiety compounded by fatigue from a long journey.

73. I stress that this conclusion is not a finding by me that the interviews were conducted in a hostile and over-bearing way, but nor does it need to be. I am also not at all persuaded by the fact that the Claimant could not produce the letter regarding collection of his biometric residence permit and did not appear to know even what it was; I strongly suspect that most people fluent in English would struggle to describe what it was either.
74. The parties have each relied on two separate guidance documents produced by the Defendant for her entry clearance officers. The correct approach to the application of policy in public law decision-making is as set out by Richards LJ in R (LE (Jamaica)) v Secretary of State for the Home Department [2012] EWCA Civ 597 at [29(iii)]:
- “The role of the court is supervisory, not that of a primary decision-maker: the court is required to review the decision in accordance with the ordinary principles of public law, including Wednesbury principles, in order to determine whether the decision-maker has acted within the limits of the discretionary power conferred on him by the statute”
75. It is noteworthy that the extracts from section 9.7.3 of the December 2020 document relied upon by the Claimant express the need to give a “minded to ...” indication mostly in the mandatory terms of “must”.
76. By contrast the 2022 document upon which the Defendant relies appears to be internally inconsistent. In certain places the guidance points to a discretion in the decision-making officer rather than a mandatory conclusion to be reached; for example:
- “**You may** cancel the passenger’s permission to enter because they cannot speak English without the assistance of an interpreter ...” (my emphasis)
- and:
- “It is possible that a student has genuinely obtained the required secure English language test (SELT) to prove their competence. However, if the student cannot demonstrate an ability to speak basic English on arrival without the help of any interpreter, then **you may be able to** cancel their Entry Clearance” (my emphasis)
77. Only once is the 2022 guidance expressed in mandatory terms:
- “If the passenger requires an interpreter **you must cancel** their Entry Clearance or Biometric Residence Permit (BRP) in the normal way, using grounds of **misrepresentation or change of circumstances or change of purpose**, as appropriate. The passenger will have an in-country right of appeal unless there is evidence of a change of purpose” (the first emphasis is mine, the second is found in the original text)
78. I consider that this last extract (referring to “must”) can still be reconciled with the previous extracts (referring to “may”) by reading the latter as applying only to situations in which the passenger on presentation at the border cannot converse without an interpreter and there is no other evidence provided which suggests an

ability to converse in English. These were not the facts of the present case. The Claimant was in receipt of external certification of his English capabilities.

79. On this basis the two guidance documents can be read as being consistent with one another. But even if I am wrong about this I prefer the approach of the December 2020 guidance to the approach of the April 2022 guidance because it pays far greater heed to the requirements of Balajigari and it strikes a more satisfactory balance from the requirement to adopt a fair procedure as commended in Doody.
80. Mr Irwin submitted that neither Balajigari nor Doody gave rise to an immutable principle that a “minded to ...” decision must be given in every case. I agree. But on the facts of this case it seems clear to me that such an approach was required in order to meet the basic elements of a fair procedure.
81. I accept that one does not need to be a linguistic expert to harbour doubts about a passenger’s ability to converse competently in English. But against that impression the documentation available to the Defendant’s officers gave a contrary impression and the Claimant should have been given an opportunity to explain the apparent discrepancy between how he presented himself and what the documentation appeared to verify. The fact that within a very short space of time his solicitors were able to procure the email from Ms Barker apparently supporting the authenticity of the OIEG certification illustrates that given the opportunity the Claimant was able to introduce additional information supporting his account.
82. Mr Irwin asks the rhetorical question: what more could the Claimant have done to explain the situation had he been given the opportunity? Nobody knows. It may be that given the opportunity it emerges that he can offer no satisfactory explanation after all and that suspicions of false documentation were reinforced rather than dispelled. The same outcome would then be reached. But at this time it is inappropriate to speculate: the Claimant has been deprived of any opportunity for explanation by the procedure adopted by the Defendant, and in my judgment that renders the decision unlawful.
83. I observe in passing that my conclusion need not be at odds with the architecture of the legislation and the objective of preserving swift decision-making by the Defendant. A provisional “minded to ...” decision need not have resulted in wide-ranging enquiry or extensive delay to a final decision, during which time the Defendant enjoys the power to detain the Claimant in any event. The interests of fairness must be balanced against the benefits of swift decision-making. In this case that balance was not properly struck.
84. Ground 1 therefore succeeds.
85. Strictly speaking the success of Ground 1 is enough to dispose of the claim in favour of the Claimant but in deference to the written and oral arguments of the parties I go on to consider Grounds 2 to 4.

*Ground 2 – irrational and/or procedurally unfair to cancel Claimant’s leave to enter - submissions*

86. There is, as Mr Gajjar conceded, a degree of overlap between Grounds 1 and 2. Indeed I see quite some repetition in the way in which both were pleaded and argued by the Claimant.
87. The only way sensibly to separate Ground 2 from Ground 1 is to consider the rationality of the Defendant's decision based on the information known to the Defendant at the time rather than also speculating on the additional evidence that would or might have become available to the Defendant following further enquiry after the issue of a "minded to ..." decision, for that would be to trespass back into Ground 1.
88. For the Claimant Mr Gajjar accepted that Ground 2 does not entail a precedent fact review. That must be right. But, he submitted, the substance and quality of the evidence relied upon by the Defendant is wholly lacking such that it was irrational in the *Wednesbury* sense.
89. The starting point, Mr Gajjar submits, must be the OIEG certification. This verifies that the Claimant can read, speak, write and listen in English up to level B2 on the CEFR. It has since been supplemented by the email from Ms Barker of Oxford International confirming that she supervised the Claimant undertaking the test. Moreover there is the evidence from the result card of the AJ and K Board attesting to the Claimant's proficiency in English. By contrast, submits Mr Gajjar, the Defendant's officers relied mostly on a subjective assessment of the Claimant's speaking ability (which case-law holds to be inappropriate) but without factoring in the surrounding circumstances such as fatigue from a long journey.
90. For the Defendant Mr Irwin submits that the Defendant's decision was not taken solely on the basis of the officers' impression of the Claimant's English ability in the interviews. He was also, in Mr Irwin's submission, unable to relay the basic details of the course he was about to study and unable to describe convincingly what the OIEG test he had taken entailed. As to whether the Claimant's long journey from Islamabad was likely to affect the lucidity of his answers Mr Irwin points to the question asked of the Claimant at the beginning of the second and third interviews whether he was fit and well to be interviewed, to which on each occasion he had responded "yes".
91. Mr Irwin further submitted that the cases relied upon by the Claimant (such as Balajigari and Karagul) in which the Upper Tribunal considered questions of fairness related to its own procedures were not apposite here because, unlike in the Administrative Court, the Upper Tribunal is a forum in which merits-based reviews of decisions take place. He submitted that the proper approach is to conduct an assessment based on *Wednesbury* rationality. For this submission Mr Irwin relied upon the approach confirmed by Richards LJ in R (Giri) v Secretary of State for the Home Department [2016] WLR 4418 at [19]:

“The key point is that the statute confers the power on the Secretary of State, or the immigration officers acting on her behalf, to make the decision whether to grant or refuse leave to remain. It is for the Secretary of State or her officials, in the exercise of that power and in reaching their decision, to determine which provisions of the Rules apply and whether relevant conditions are satisfied, including the determination of relevant questions of fact. On the reasoning in Khawaja and Bugdaycay, their findings on such matters are open to challenge in

judicial review proceedings only on Wednesbury principles; it is not a situation in which their powers depend on some precedent fact the existence of which falls for determination by the court itself’

*Ground 2 – discussion and conclusions*

92. It seems to me that there are two limbs to considering the rationality challenge here: what was said and how it was said.
93. In relation to what was said the Defendant emphasises that the Claimant was unable to offer a convincing explanation of what the course he was about to embark upon would entail. For example he gave these answers to questions in the second interview:

“Q5: What will you study at De Montfort University?

A5: Business Management with International Incorporated Bachelor

...

Q7: Why did you choose to study this particular subject?

A7: When I graduate in a country abroad it is easier to get a good job in Pakistan in banks or insurance company. I also like this subject

Q8: what can you tell me about what business is in general?

A8: Business means you do business and make money and your life becomes easier

Q9: Do you know what business is or not?

A9: When we do business degree we can get a good job

Q10: Do you know what management is?

A10: I don’t know what management is but I will learn when I do my foundation year. At the moment I have not got a clue what management is

Q11: Your course is called “International Incorporated Bachelors in Business Management BA Hons”. Can you at least give me a very basic answer to what business management is?

A11: I don’t know

...

Q24: Can you give me a basic answer of what Business and Management might be?

A24: I applied for this course because this was the only course available for me, I spoke to my father about it and then I applied. I don't know the meaning of Business and Management but I know that people who do this degree get good jobs in Pakistan"

94. Whilst Mr Gajjar submits that the questions in the extract above were unfair in that they all involved "abstract concepts", even so one would have expected something more concrete from the Claimant than the very superficial answers he gave. The responses from the Claimant do not reveal any apparent understanding of what the key elements of the course – business and management – actually are. It is fair to observe that the main tenets of each will probably be learned on the one-year foundation course but the apparent lack of insight by the Claimant about the course he was about to embark upon for four years gives rise to reasonable concerns.

95. In relation to how the Claimant gave his answers, as I have noted above the Defendant has published guidance for its Border Force officers - "Students: Border Force guidance" (version 3.0, 26<sup>th</sup> April 2022). Within "Example 3" (to which I have referred in connection with Ground 1) is the following guidance:

"You must assess whether or not the student can speak English without an interpreter only by following the normal line of questioning. **On no account are you permitted to give the passenger a test of any kind**" (emphasis is in the original document)

96. Mr Gajjar referred to the case of SM and Qadir v Secretary of State for the Home Department [2017] 3 All ER in which both the parties to the litigation and the Court of Appeal all accepted that the evidential burden of proving deception to secure entry clearance lay with the Secretary of State. Mr Gajjar submitted that the burden has not been discharged in this case. He also relied on the dicta of McCloskey J in the Upper Tribunal decision in SM and Qadir [2016] UKUT 00229 at [80], undisturbed by the Court of Appeal's subsequent judgment, about the dangers of Judges relying on their own impressions of fluency in the English language:

"In some of the FtT decisions in this field one finds observations concerning the appellant's apparent fluency in, and command of, the English language. We consider that Judges should be cautious in adopting this approach for at least three reasons. The first is the passage of time. The second is that Judges are not language testing or linguistics experts. The third is that, to date, there has been no expert linguistic evidence in any of these cases"

By analogy, submits Mr Gajjar, it is equally unsafe for Border Force officers to reach a similar value judgement.

97. Having regard to all the evidence available to the Defendant's officers it seems to me that the conclusion they arrived at in this case was one that they were rationally able to reach. The lucidity of the Claimant's answers about the contents of his course gave

some cause for concern even if one accepts – as I am prepared to do - that the questions asked were abstract and generic. This lack of lucidity is not explained by the anxiety naturally experienced by a young passenger encountering Border Force officers asking him questions which may undermine his leave to enter the UK for study. It is also not explained by fatigue experienced after a long journey, especially given the observations of Mr Badal that the Claimant appeared to be “alert and responsive” during his interview and the Claimant’s answer to the first question in the interview that he was “fit and well”.

98. As to the dangers of decision-makers relying on their own impression of English fluency this was not a case involving fine margins. The gulf between what the Claimant exhibited as his proficiency in English compared with what the documentation appeared to show was great. His CAS and OIEG documentation suggested a proficiency equivalent to CEFR level B2 and yet the Claimant appeared barely able to converse in English at all. Mr Gajjar complains that the Defendant has declined to provide details of the education or training of the Border Force officers whom the Claimant encountered – with the obvious inference that they lacked the expertise to form a reliable judgement about English fluency – but in this case I do not consider that any special training is needed for officers to be able to recognise someone who can barely converse in the language.
99. Mr Gajjar also relied upon the decision of the Upper Tribunal in DK and RK v Secretary of State for the Home Department [2022] UKUT 00112. DK and RK arose out of an investigation into widespread cheating to obtain English qualifications in support of applications for leave to enter. In that case the Upper Tribunal was persuaded of the claimants’ deception by evidence derived from expert technical analysis including voice recognition software. It is, he submits, “inconceivable” that the Court in DK and RK and in SM and Qadir would have reached the same views regarding deception without this technical evidence. That may be so, but it is a *non sequitur* to therefore submit that the absence of such technical evidence in this case undermines the conclusion reached by the Defendant through her officers. Neither DK and RK nor SM and Qadir are authority for the proposition that voice recognition software must always be available before a finding about deception can be made. In this case we do not even know whether the Defendant’s case was that the Claimant’s deception came in the form of putting forward a proxy to sit the English tests for him because the allegation was never put to the Claimant and he never had the opportunity to answer it. I find the two cases relied upon by Mr Gajjar to be of no probative value in assessing the facts in this case beyond the general propositions I have extracted from SM and Qadir above.
100. The correct approach to viewing the substance of the Defendant’s decision here is to apply ordinary public law principles. Viewed through that lens I do not consider that the decision arrived at by the Defendant based on the evidence then available to her officers was irrational.
101. Ground 2 therefore fails.

*Ground 3 – irrational and/or unfair for the Defendant to reject the Claimant’s request for administrative review of the decision - submissions*



102. For the Claimant Mr Gajjar accepts that the form waiving the ability to request administrative review had been signed by the Claimant. But, he submits, that waiver should not be capable of being relied upon because it had been coerced from the Claimant. He relies on the Claimant's witness statement as showing that the coercion in this instance arises out of a combination of the hostile circumstances in which the Claimant was held and taken to interview, the strong discouragement to apply for an administrative review said to have been offered by Mr Badal, and the fact that the waiver form had been pre-populated by Mr Badal with the Claimant then being asked simply to sign where indicated by an 'x' on the form.
103. Mr Gajjar acknowledges that there is a fundamental factual dispute between the account given of the interview by the Claimant and that given by Mr Badal in their respective witness statements. There is, as I have noted above, no contemporaneous transcript of any of the interviews. But, Mr Gajjar adds, the circumstantial evidence also points to coercion because the Claimant elected to instruct solicitors very soon after signing the form and this is wholly inconsistent with the Claimant having made an informed decision to waive his rights to a review.
104. For the Defendant Mr Irwin submits that the evidence from Mr Badal makes clear that the Claimant was in no way pressurised into signing the waiver form and that the Claimant has not put forward cogent evidence to gainsay this assertion on behalf of the Defendant. He added that this ground is properly to be viewed on a *Wednesbury* basis, namely that the Claimant must establish that it was irrational for the Defendant to rely on the waiver form, and that the Claimant does not demonstrate this.

*Ground 3 – discussion and conclusions*

105. On the face of the documents it is clear that there was a waiver of the right to a review. If the Claimant seeks to go behind the documents to show that the waiver cannot be relied upon because it was coerced from him then it is trite law that the burden of proving that must lie with him. (I note that the Claimant appears to use the terms "coercion" and "duress" interchangeably in his written case. I take him to be referring to the same thing).
106. In my judgement the Claimant does not come close to discharging the burden that lies with him.
107. There is no transcript of the interviews available in this case. It is not suggested that there is a transcript in existence which the Defendant has withheld. Mr Gajjar submits that the availability of a transcript is important to ensure that interviews are conducted fairly. In support of this contention he relies upon decisions of the Upper Tribunal in *Miah* [2014] UKUT 515 and *R (Anjum) v Entry Clearance Office, Islamabad* [2017] UKUT 406.
108. *Anjum* was a case in which there was no audio recording of an interview that the Defendant's officer had transcribed and produced as a verbatim written note. At [21] of his judgment in the case *McCloskey J* cited with approval the dicta of Latham LJ in *R (Dirshe) v Secretary of State for the Home Department* [2005] EWCA Civ 421 at [14]:

“The interview is a critical part of the procedure for determining asylum decisions. It provides the applicant with an opportunity to expand on or explain his written account and for the respondent, through the interviewing officer, to test that account and explore any apparent inconsistencies in that account. The interview could well be critical to any determination by either the respondent or appellate authorities as to the credibility of the applicant. The record of the interview is created by the interviewing officer, who is acting on behalf of the respondent. It follows that fairness requires that the procedure should give to the applicant an adequate opportunity to challenge its reliability or adequacy”

109. The context for those comments is important, however. Dirshe was a case in which the Secretary of State had available to him what purported to be a verbatim note of evidence given by the claimant and where the claimant had asked for, but been refused, permission to tape record the interview. In those circumstances the Court was willing to hold that the absence of an audio recording amounted to unfairness because the claimant was deprived of the opportunity to verify the accuracy of the verbatim note taken by the defendant’s officer. Latham LJ added at [17]-[19]:

“17. Whilst it is true that the applicant has the opportunity to comment on the record, that is only of limited value. If English is not his first language the applicant will not be in a position to make any comment on the record until he has taken it to the representative and had an opportunity of going through the record with the representative and his own interpreter. If the applicant then wishes to challenge the record, he has no one to corroborate what he says. This puts the applicant at a significant disadvantage in practical terms in seeking to persuade either the respondent or an appellate authority that the record is indeed inaccurate.

18. So long as the applicant, however, was not only entitled, but able, to have his representative and interpreter present at the interview itself, that disadvantage was substantially reduced. Not only could the representative or interpreter make a note of what was said in the course of the interview but, either during the interview if appropriate, or at the end of the interview, they could make contemporaneous submissions as to the accuracy of the interpretation, or of the record, having read it after the interview. Such submissions would be much more likely to carry weight, or indeed result in amendments to the record, than the ipse dixit of the applicant himself some days afterwards. It follows that the presence of the representative or interpreter provided a real, practical safeguard against faulty interpreting or inadequate or inaccurate record keeping, and sufficiently protected the applicant's interests to ensure the requisite standards of fairness. In our view, Pitchford J came to the correct conclusion in relation to the practice and procedure in place at the time of his decision.

19. But in practice, that safeguard is no longer in place. There is, therefore, real procedural unfairness as a result if a tape recording is not permitted when no representative or interpreter is present on behalf of the applicant. A tape recording provides the only sensible method of redressing the imbalance which results from the respondent being able to rely on a document created for him without an adequate opportunity for the applicant to refute it. This is not to suggest in any way that the respondent himself, or appellate authorities, would not

conscientiously seek to come to a fair conclusion in the event of any challenge being made on behalf of the applicant to the content of the record based upon the applicant's own account. But it would be unrealistic to expect the decision maker to be unaffected by the fact that the record has been made by someone with apparently no axe to grind, whereas the challenge to it has been made by someone who has a real interest in the decision, and therefore a clear motive for seeking to challenge any uncomfortable answers set out in the record. The only appropriate method of redressing that balancing is to permit a tape recording to be made, if the applicant so wishes, of the interview”

110. The circumstances of the present case are different. Here there was no purported verbatim transcript being relied upon without access to a contemporaneous audio recording from which to verify its accuracy. I do not read any of the cases relied upon by Mr Gajjar as authority for the proposition that procedural fairness always requires that an interview must be recorded and transcribed. Nor was there any submission made to me that any of the Defendant’s policies presumed that evidence at an interview would be recorded.
111. In this case the hand-written notes produced by Mr Badal as part of his witness evidence are self-evidently not purporting to be a verbatim transcript of the second interview. No notes are presented at all for the third interview in which the IS 82 was presented to the Claimant, its terms were explained, and (on the undisputed evidence of both parties) the Claimant signed a waiver of his rights to seek administrative review of the cancellation decision. The Court is therefore left having to weigh the competing evidence as best it can based on what is written and on its inherent plausibility, and with the starting point being that the Claimant bears the burden of proving coercion.
112. I am satisfied that Mr Badal’s account is to be preferred. I say so for the following reasons:
  - a) He records in his witness statement and in the GCID minutes of the interview that the process of explaining to the Claimant the content and effect of the waiver form took 45 minutes. He says in his witness statement that the Claimant “chose to take his time” in deciding what to do. The extract from the GCID minutes at 02:35 on 10<sup>th</sup> September records as follows:

“I have also explained that [the Claimant] has a right to AR and read the AR Waiver – Explanation pro-forma. PAX [*that is to say the “passenger”, i.e. the Claimant*] asked all questions about all his rights and asked whether there was any way for him to come to the UK to stay with his cousins. I explained again his rights and asked pax to make his decision as it took nearly 45 mins and the interpreter made me aware that he had to hang up soon. I explained the pax his rights and the choices he had and eventually pax decided to waive his rights to AR. He signed the AR – Explanation pro-forma and IS30”
  - b) The Claimant’s assertion that his understanding was clouded by fatigue is inconsistent with the question asked at the beginning of the second

and third interview whether the Claimant was “fit and well”. The answer on each occasion – that yes he was – was recorded in the documentary evidence

- c) I see nothing sinister in the fact that the short waiver form had been pre-populated by Mr Badal. The Claimant took 45 minutes to review the form, asking questions throughout, and I do not consider that the mere fact of pre-populating the form with suggested answers has constrained the Claimant in his decision whether to sign the waiver form, still less to contribute to the more serious allegation of coercion
- d) In response to the Claimant’s question as to why he felt he had to mark the waiver form with an ‘x’ if the Claimant understood what he was signing, Mr Badal explains that the Claimant was unsure where to sign the document. The Big Word translation service from which the Urdu interpreter was sourced is a telephone service and hence the interpreter will not have been in the room with the Claimant to show him where his signature was needed. I am satisfied that this is an entirely plausible explanation and is not consistent with coercion
- e) Mr Badal denies emphatically warning the Claimant that pursuing an administrative review would cost him too much money and would not be good for him. Moreover his evidence – undisputed by the Claimant – is that he read over to the Claimant the explanatory notes through the Urdu interpreter. The explanatory notes give an even-handed summary of the procedure and the costs involved. On balance, therefore, I do not consider that the evidence demonstrates a coercion based on warnings about the implications or cost of pursuing an administrative review
- f) Finally I do not accept the submission that the Claimant’s subsequent actions instructing solicitors very soon after signing the waiver form amount to strong circumstantial evidence supporting the claim of coercion. The decision to instruct lawyers could have been taken for any one of a number of reasons. The Claimant’s own account in his witness statement is that:

“I eventually asked the UKBF officers if I could get a lawyer after all as I did not see why I am being removed simply because an officer has decided that they can assess my English skills. I instructed my legal representatives by phone, and they eventually managed to cancel my removal from the UK”

This is not an assertion by the Claimant that he instructed lawyers because he was concerned by the waiver he had just signed and because he believed he had been coerced into signing it

- 113. It follows that the Claimant has not discharged the burden of proof that his signature of the administrative review waiver form was coerced.
- 114. For the above reasons I do not accept that the Defendant was required to go behind the clear waiver form signed by the Claimant. I see no grounds for disregarding it on

the basis of procedural unfairness and no basis for concluding that a reliance on it was Wednesbury irrational on the facts. For these reasons it was therefore entirely lawful for the Defendant to take the signed waiver form at face value and to decline to entertain the subsequent request for an administrative review.

115. Ground 3 therefore fails.

*Ground 4 – unlawful detention - submissions*

116. Mr Gajjar submitted that if the Court accepted either of his grounds 1 and 2, and thereby ruled that the decision to cancel his leave was unlawful, it followed necessarily that the Claimant's detention between 9<sup>th</sup> and 10<sup>th</sup> September was unlawful.

117. Mr Gajjar further submitted that the detention of the Claimant could not be justified under the Defendant's policy on immigration detention. The policy upon which he relied was Chapter 55 of the Defendant's "Enforcement Instructions and Guidance", in particular the following parts:

“The power to detain must be retained in the interests of maintaining effective immigration control. However, there is a presumption in favour of temporary admission or release and, wherever possible, alternatives to detention are used (see 55.20 and chapter 57). Detention is most usually appropriate:

- to effect removal;
- initially to establish a person's identity or basis of claim; or
- where there is reason to believe that the person will fail to comply with any conditions attached to the grant of temporary admission or release”

None of these circumstances were present here, he submitted

118. Finally Mr Gajjar submitted that a consequence of the Claimant's unlawful detention is that he may lose his right to enrol at De Montfort University (in which case he will make a claim for damages) and that the conditions of his bail mean that he is unable to access medical care.

119. For the Defendant Mr Irwin submitted, firstly, that if neither of grounds 1 and 2 are allowed then the claim of unlawful detention also falls away. Detention is permissible under paragraph 16 of Schedule 2 to the Immigration Act 1971 subject to it complying with the Hardial Singh principles. But in the alternative he submitted that even if the cancellation of leave were found to be unlawful it did not follow that the detention was therefore unlawful. The Defendant enjoys the power to detain for the purposes of examination and this is the power that she exercised.

*Ground 4 – discussion and conclusions*

120. In allowing Ground 1 I have found that the decision to cancel the Claimant's leave to enter was unlawful. Mr Irwin's primary submission does not therefore fall to be

considered. However his alternative submission would apply whether or not the decision to cancel the Claimant's leave were lawful.

121. In most cases involving claims of unlawful detention the detention in question runs to several months. In this case it was, at most, 20 hours (being the total period of detention from the first interview by Ms Richards to the Claimant's release). In oral argument Mr Gajjar conceded that I may prefer to rule that the period of unlawful detention only began when the final interview concluded at around 03:15 on 10<sup>th</sup> September, in which case the period of detention would be considerably shorter even than 20 hours.
122. I do not consider that the Claimant's detention – if such a short period can properly be termed that – was unlawful. Up until shortly before the beginning of the third interview the Defendant was assessing the evidence against the Claimant and reaching a view as to whether his leave to enter should be cancelled. Mr Badal was consulting with Mr Brown. All of this is a necessary part of the due process in reaching a decision whether to cancel the Claimant's leave to enter.
123. Paragraph 16 of Schedule 2 to the Immigration Act 1971 confers on the Defendant a power to detain pending the completion of an examination into a passenger's circumstances, in particular whether grounds exist for refusing or cancelling leave to enter. It is pursuant to those powers that the Claimant was detained.
124. The power of detention is not unconstrained. It is subject to, amongst other things, the four principles in Hardial Singh. But I see nothing in the circumstances of this case which render the Claimant's detention unlawful according to such principles. Ground 4 therefore fails.
125. For completeness I observe that the Claimant's possible claim for damages resulting from his unlawful detention includes prospective damages should he be charged by the University for being unable to commence his course. Reference is also made to the Claimant being unable to access medical assistance owing to the conditions on his immigration bail, albeit a damages claim is not particularised for this. No further details are provided about either potential head of damages. But in any event it seems to me as though any such damages would flow not from the Claimant's detention so such as from the decision to cancel his leave. That is not the case that has been pleaded and so it is not for me to answer it, but if a claim can properly be made for such damages then I do not consider it to be precluded by the decision that I have reached here.

### ***Conclusions***

126. It follows that for the reasons I have given above Ground 1 of this claim succeeds and Grounds 2, 3 and 4 fail.
127. I will now invite the parties to make submissions about appropriate relief.