



Neutral Citation Number: [2026] EWHC 1413 (KB)

Case Nos: QB-2020-003667; QB-2022-001062;
QB-2020-004075

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 June 2026

Before :

THE HONOURABLE MRS JUSTICE HEATHER WILLIAMS DBE

Between :

(2) MOSARAF HOSSAIN
(6) NAVEED KHAN
(11) ASHIQUR RAHMAN

**Claimants/
Applicants**

- and -

THE HOME OFFICE

**Defendant/
Respondent**

Tom de la Mare KC, Greg Ó Ceallaigh KC, Alex Schymyck and Isabelle Agerbak
(instructed by Bindmans LLP) for the Claimants/Applicants
Vikram Sachdeva KC, Colin Thomann KC, Daniel Kozelko (instructed by Government
Legal Department) for the Defendant/Respondent

Hearing dates: 28 & 29 April 2026

Approved Judgment

This judgment was handed down remotely at 10.30am on 10 June 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mrs Justice Heather Williams:

Introduction

1. In each of these linked cases the Claimants have applied to strike out specified passages in the Defences filed by the Home Office. The claims seek damages and declaratory relief for breaches of the Data Protection Act 1998 and/or the Data Protection Act 2018 and GDPR / UK GDPR and for breaches of rights guaranteed by Article 8 of the European Convention on Human Rights (“ECHR”). The claims relate to immigration decisions that were made on the basis that the Claimants had cheated when taking the Test of English for International Communication (“TOEIC”), administered by the Educational Testing Service (“ETS”). Two of the three Claimants successfully challenged these allegations in appeals to the First-tier Tribunal (“FTT”), with the FTT either positively finding they had not cheated or that the Defendant had failed to prove its case. The Defendant chose not to appeal those decisions. In the third case, that of the Second Claimant (“C2”), the Defendant withdrew the appealed decision just before the FTT appeal was due to be heard. In defending the current claims, the Defendant alleges that each of the Claimants committed fraud in relation to their TOEIC tests. The Claimants argue that in light of the course of the earlier litigation before the FTT, the Defendant is precluded from doing so.
2. Settlement has been agreed in a number of linked cases, including two claims that settled between the hearing in late April 2026 and the completion of this judgment. In the circumstances, I only address the claims of: C2, Mr Hossain; the Sixth Claimant, Mr Khan (“C6”); and the Eleventh Claimant, Mr Rahman (“C11”).
3. The agreed list of issues for the hearing of the strike-out applications (adapted to reflect the reduced number of cases now before me) is as follows:
 - i) Is the Defendant prevented from relying on the assertion in its Defences or Amended Defences that C6, and/or C11 obtained their results in a TOEIC test by fraudulent means, on the basis of the principle of issue estoppel?
 - ii) Is the Defendant prevented from relying on the assertion in its Defences, Amended Defences or Part 18 Responses that each or any of C2, C6 and C11 obtained their results in a TOEIC test by fraudulent means, on the basis of the principle of abuse of process?
4. Although the abuse of process issue was expressed as applying to all three Claimants, at the hearing counsel agreed that the abuse of process arguments did not add anything, one way or the other, to the issue estoppel arguments in relation to C6 and C11. Accordingly the abuse of process issue is focused upon the position of C2. I will refer to C6 and C11 collectively as the “IE Claimants”.
5. The Claimants rely upon a generic strike-out application detailing the contentions advanced and individual strike out applications referring to the material paragraphs in the respective Defences, Amended Defences and/or Part 18 Responses that they say should be struck out in whole or in part. The applications are supported by a general witness statement dated 7 April 2026 from Theodora Middleton, one of the solicitors at Bindmans LLP with conduct of this matter. Ms Middleton has also provided individual witness statements, dated 8 October 2025, in relation to each of the three cases.

6. The Defendant relies upon witness statements dated 16 January 2026, made by Adam Sewell, an Intelligence Analyst within the Immigration Intelligence Directorate of the Home Office, in respect of each of the Claimants. The statements present the ETS TOEIC test results data and associated reports in relation to the particular Claimant and provide some background information. It is common ground that this material does not contain new evidence that was not adduced, or could have been adduced, during the Claimant's appeals to the FTT, save, as I will come on to detail, in one respect in relation to C6, Mr Khan.
7. The parties agree that unless the Defendant can bring the circumstances within a relevant exception, issue estoppel does apply in these proceedings, so that the High Court is bound to proceed on the basis that the IE Claimants did not obtain their TOEIC test results by fraudulent means. As clarified by Mr Sachdeva KC during the hearing, the Defendant's central argument is that the guidance provided by the Upper Tribunal ("UT") in *DK and RK (ETS: SSHD evidence: proof) India* [2022] UKUT 112 (IAC) ("*DK and RK*") and in *Varkey and Joseph (ETS – Hidden rooms)* [2024] UKUT 142 (IAC) ("*Varkey*") subsequent to the IE Claimants' FTT appeals, constitutes a change in the law that brings the circumstances within the exception recognised in *Arnold v National Westminster Bank Plc* [1991] 2 AC 93 ("*Arnold*"). Mr de la Mare KC contests this, arguing that there has been no change of law in the *Arnold* sense, that reliance upon *DK and RK* and *Varkey* in this jurisdiction would offend the rule in *Hollington v Hewthorn & Co* [1943] KB 587 and that, in any event, the circumstances are insufficient to engage this narrow exception.
8. The Defendant's secondary argument is that expert evidence given before the UT in *DK and RK* and in *Varkey* constitutes new evidence, such that it would be unjust if issue estoppel were to prevent the Defendant from arguing in these proceedings that the IE Claimants had obtained their TOEIC results by fraudulent means. Mr Sachdeva KC says either: (a) this new evidence could not with reasonable diligence have been adduced at the time of the IE Claimants' FTT appeals; or (b) *Takhar v Gracefield Developments Ltd* [2019] UKSC 13, [2020] AC 450 ("*Takhar*") establishes that where fraud is relied upon as an exception to issue estoppel, there is no due diligence requirement to be met. In response, the Claimants do not accept that the expert evidence in *DK and RK* or in *Varkey* is capable of establishing the new evidence exception, nor that *Takhar* has any relevance, as it concerned an application to set aside an earlier judgment where fraud was not an issue, on the ground it was obtained by fraud. The Claimants also deny that the "reasonable diligence" requirement is satisfied and contend that the Defendant must, in addition, meet the *Phosphate Sewage Co Ltd v Molleson* (1878) 4 App Cas 801 ("*Phosphate Sewage*") requirement of showing that the new evidence entirely changes this aspect of the case. As I have mentioned, there is also a discrete argument over whether the new evidence exception is met in C6's case.
9. It is accepted that the onus lies on C2 to establish the alleged abuse of process. Mr de la Mare submits that the Defendant's exercise of its immigration powers meant that C2 was denied the opportunity to present his case before the FTT and obtain a positive finding that he had not cheated in the TOEIC test. The FTT was the proper time and place for the Home Office to have litigated the claim of fraud and the material it now relies upon was all available at that time. It is said that the *Henderson v Henderson* (1843) 3 Hare 100 ("*Henderson v Henderson*") principle operates to exclude the Defendant from re-opening the allegation of fraud, which it chose not to pursue in the

FTT and that even if this principle does not apply, the circumstances amount to an abuse of process.

10. The Defendant says that there was no relevant determination by the FTT in C2's case, so that the *Henderson v Henderson* form of abuse of process does not arise. Further, that the circumstances do not amount to an abuse of the process; the doctrine involves a broad merits-based judgment, which plainly favours the Defendant in the present circumstances. There was good reason for the Defendant to withdraw the appealed decision and it now faces a substantial High Court damages claim in circumstances where there is cogent evidence that fraud was committed.
11. The structure of this judgment is as follows:

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The TOEIC litigation

The background

12. I will explain the TOEIC testing system, the concerns around fraudulent test taking and the TOEIC-related litigation in the UT, before I turn to the Claimants' individual circumstances. I have gratefully taken much of the early background from Underhill LJ's summary in *Ahsan v Secretary of State for the Home Department* [2017] EWCA Civ 2009 ("*Ahsan*").
13. The Immigration Rules require applicants for leave to remain in some circumstances to pass a test of proficiency in written and spoken English and TOEIC is the principal form of approved test. It is administered by ETS, who are a US-based business. The TOEIC tests were available at a large number of test centres in Britain. There are two parts to the test, a Listening and Reading Test and a Speaking and Writing Test. The allegations of fraud were primarily concerned with the latter. The tests are scored on a six-level scale: A1 – A2 is a Basic User, B1 – B2 an Independent User and C1 – C2 a Proficient User. The Speaking and Writing Test awards a maximum of 200 points for each of the Speaking and the Writing elements. Whilst the level of competence required varies between immigration categories, scoring at least a B2 level is required for most immigration rules. The Speaking part of the test involves the candidate being recorded reading a text and the recording is then sent to the ETS assessor for marking.
14. In February 2014, a BBC *Panorama* programme revealed that there was widespread cheating at two of the test centres, Universal Training Centre ("UTC") and Eden College. Although not the only method used, a common form of cheating was by the use of proxies to take the Speaking element of the test. In response, ETS, at the request of the Home Office, employed voice recognition software to go back over the

recordings of the Speaking tests to try and identify cases in which it appeared that the same person had spoken in multiple tests and thus could be assumed to be a professional proxy. By this method, many tests were assessed as “invalid” and many others as “questionable”. The “invalid” designation was used where ETS regarded the evidence of cheating as “certain”. In reliance on ETS’s findings of invalidity, the Secretary of State for the Home Department (“SSHD”) cancelled or refused leave to remain in over 40,000 cases where people were said to have obtained leave on the basis of cheating in their TOEIC test. Large numbers of claims were then brought in the FTT and in the High Court by individuals who said that the Defendant’s decision in their particular case had been wrong as they had not cheated when taking the test.

15. As Underhill LJ observed in *Ahsan*, the evidence supplied by the SSHD in the TOEIC cases developed over the course of the litigation. In the earlier cases, the SSHD primarily relied upon (i) generic evidence given by two Home Office officials, Rebecca Collings and Peter Millington, about the reports from ETS identifying results as “invalid” or “questionable” and the methodology underlying those reports; and (ii) the use of an “ETS Look Up Tool” to marry up those reports with the test taken by the individual appellant. In due course, the SSHD supplemented this evidence with reports from Adam Sewell (para 6 above), who had analysed the tests results from a number of the test centres. On the basis of his evidence, the Defendant argued that certain centres were “fraud factories” and that all test results from those centres, or results on certain dates, were bogus. In due course it became known that ETS could provide a copy of the voice recording it had identified as showing the use of a proxy to the relevant individual, who could then listen to the recording to see if the voice was their own. This led to the instruction of voice experts in a number of cases. Where the voice appeared to be that of someone else, challenges focused on the “chain of custody”, that is to say the accuracy of the system used by ETS for storing and retrieving the relevant files.

SM and Qadir

16. On 21 April 2016, a Presidential Panel of the UT (McCloskey J, President and Deputy UT Judge Saini) promulgated its decision in *SM and Ihsan Qadir v Secretary of State for the Home Department (ETS – Evidence – Burden of Proof)* [2016] UKUT 00229 (IAC) (“*SM and Qadir*”). The UT had previously decided that the FTT had erred in law in dismissing appeals from two appellants who had challenged the cancellation of their leave to remain on grounds they had secured their TOEIC certificates by fraud. At this stage, the UT remade the FTT’s decision. The evidence before the FTT had consisted of the Look Up Tool data, a statement from a Home Office employee, Mr Greene, about the Look Up Tool and the generic statements I referred to in para 15 above, along with some specific documentation relating to each appellant. As well as their own accounts, the appellants relied upon the expert evidence of Dr Philip Harrison, a voice recognition expert. These cases were decided before ETS began providing the voice records in individual cases (para 15 above) and much of the UT’s decision was concerned with the reliability or otherwise of ETS’ assessment of the identities of the recorded voices.
17. At para 57, the UT set out the well-established approach that applies where the SSHD alleges that an applicant had practised dishonesty or deception in an application for leave to remain:

- i) There is an initial evidential burden on the SSHD to adduce sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue;
 - ii) If the SSHD does so, there is an evidential burden on the appellant to raise an innocent explanation, namely an account which satisfies a minimum level of plausibility;
 - iii) If the appellant does so, then the question is whether the SSHD has discharged the legal burden of showing on the balance of probabilities that the appellant's explanation is to be rejected.
18. The UT was critical of the SSHD's evidence regarding the voice recordings, listing "the principal shortcomings" at paras 63 – 65. Referring back to this material, the UT said it had "substantial reservations" about the strength and quality of the SSHD's evidence, as "its shortcomings are manifest" (para 68). The UT also referred to the "multiple frailties" it had identified in the SSHD's evidence (para 100). However, the UT was satisfied by "an admittedly narrow margin" that the SSHD had discharged the initial evidential burden. The UT provided a non-exhaustive list of factors to be weighed by tribunals when assessing appellants' accounts (para 69). In the appeals before it, the UT was satisfied that the appellants had provided plausible innocent explanations and found that the SSHD had failed to prove on a balance of probabilities that they had been dishonest. The UT emphasised that every case would be fact sensitive and decided on the basis of the evidence adduced (paras 102 - 103).

MA

19. The next case I need to refer to is the decision of the Presidential Panel (McCloskey J, President and UT Judge Rintoul) in *Secretary of State for the Home Department v MA (ETS – TOEIC testing)* [2016] UKUT 00450 (IAC) ("**MA**"), promulgated on 16 September 2016. MA had been successful in his appeal to the FTT against the refusal of his leave to enter the UK and the cancellation of his entry clearance on the ground he had procured a TOEIC certificate by using a proxy in the Speaking test. The UT had previously found that the FTT had erred in law and now came to remake the decision.
20. **MA** was heard after the ETS began making voice recordings available and in this case the appellant accepted that the recording was not his voice. However, he raised "chain of custody" issues concerning whether his voice was properly recorded and/or transferred to ETS and whether the voice recordings provided by ETS related to the test he took. In addition to the generic evidence I referred to at para 15 above, the UT had reports from three expert witnesses from the fields of computing, database programming, computer forensics and computer security. Two of the experts, Mr Stanbury and Professor Peter Sommer, also gave oral evidence. The three experts had produced a joint memorandum. The UT listed a number of matters that were highlighted by the experts. To give a flavour, this included: that there was a lack of clarity as to the processes used by ETS, with inconsistent descriptions having been given; the integrity of the test taking procedures depended heavily on the reliability and probity of the test centre staff; the spreadsheets provided by Mr Sewell revealed a lack of nexus between the date supplied to him by ETS and the unique ID of individual candidates; and the "naming conventions" for the digital files of the voice recordings did not provide an explicit link between the candidate and the recording (para 15). The UT referred to the experts' consideration of potential methods of cheating, including the possibility of a

proxy using another computer securing access to the computer that was used by the candidate; and “hidden rooms” whereby the tests were taken simultaneously by the candidates and by proxies with only the proxies’ results submitted (para 15). The UT summarised some additional matters from the oral evidence of the two experts, including the lack of any evidence that password protection was used and the absence of metadata and audit logs. Mr Stanbury had pointed out that the “hidden room” method “could” involve the falsification of the completed tests of both genuine and fraudulent candidates (paras 16 – 17).

21. The UT said that in contrast with *SM and Qadir*, a markedly greater volume of evidence had been produced, which had “contributed significantly to the presentation of a more focused and considerably more substantial case” against the appellant (para 44). The UT said the expert evidence had highlighted “that there are enduring unanswered questions and uncertainties relating in particular to systems, processes and procedures concerning the TOEIC testing, the subsequent allocation of scores and the later conduct and activities of ETS” (para 47). However, the UT did not make specific findings about these matters, saying “whilst we bear this evidence in mind, ultimately, it was largely remote from the centre” of the appellant’s case (para 47). The UT was satisfied that in this case there was “cogent evidence” explaining the Look Up Tool (paras 50 - 51). The UT said that whilst it took into account “the questions and doubts expressed by the experts, there was no frontal challenge to this particular piece of evidence and overall it was satisfied it should treat the “invalid” assessment as reliable” (para 51).
22. Overall, the UT considered that the SSHD had discharged the initial evidential burden and the appellant had failed to raise a plausible innocent explanation as his claims were demonstrably false (paras 58 – 59). In so finding, the UT acknowledged that the appellant had no apparent reason to engage in the deception it had found proven, but that this had not deflected it from reaching this conclusion. There were a range of reasons why a person proficient in English would nonetheless engage in TOEIC fraud, including lack of confidence, fear of failure and contempt for the immigration system (para 57).
23. The IE Claimants’ respective appeals to the FTT were decided in the period between the UT’s decisions in *MA* and in *DK and RK*.

DK and RK

24. The decision of the Presidential Panel (Lane J, President and Mr Ockleton, Vice President) in *DK and RK* was promulgated on 25 March 2022. The opening paragraph of the decision described it as forming “the next episode in the saga of cases arising from” the TOEIC test certificates. Paragraph 4 described the UT’s decision in the following terms:

“In this decision we examine the evidence on which the Secretary of State relies to establish the frauds in individual cases. We conclude that despite the general challenges made, both in judicial proceedings and elsewhere, there is no good reason to conclude that the evidence does not accurately identify those who cheated. It is amply sufficient to prove the matter on the balance of probabilities, which is the correct legal standard. Although each case falls to be determined on its own individual facts and evidence, the context for any such determination is

that there were thousands of fraudsters and that the appellant has been identified as one of them by a process not shown to have been generally inaccurate.”

25. After explaining that the current appeals had been remitted by the Court of Appeal, the UT noted at para 6:

“They appeared to give an opportunity for an up-to-date evaluation of the state of the evidence produced by the Secretary of State in ETS/TOEIC cases. In this decision we consider the impact and effect of that evidence as a whole. We consider whether it is sufficient to call for a response by the present appellants and others in a similar position. We then determine the appeals before us on the basis of all the evidence adduced in these individual cases. We attempt to give some guidance on the approach to TOEIC/ETS appeals in general.”

26. Professor Sommer gave oral evidence before the UT, who also had transcripts of the evidence that he and Dr Harrison had given to the All-Party Parliamentary Group (“APPG”) in June 2019 (para 29 below).

27. Between paras 61 – 67, the UT addressed what it described as “the general evidence” of “widespread fraud”. This included successful criminal prosecutions of people involved in fraudulent activities at UTC and one of the other test centres. The UT said that evidence showing fraudulent activity in a number of ETS centres was overwhelming and whilst this did not show that any individual certificate was obtained by fraud, it provided important context (para 67). Without this context, allegations of fraud in an individual case would be met with scepticism, but in these circumstances, the individual allegation became more plausible (paras 68 - 69). Although an individual case could never be proved by the evidence of generality alone, it changed the starting point (para 70). In summary, the assessment of whether the burden of proof is discharged in an individual case falls to be determined against the background that there were many thousands of results obtained fraudulently (para 75).

28. The UT then considered the nature of the individual evidence that fraud had been committed in a particular case. The UT observed that the chain of custody evidence needed to be assessed as part of the evidence as a whole: merely suggesting or even showing that one part of the evidence was not demonstrably unassailable “does not begin to show that an individual conclusion on all the evidence taken as a whole would be unsafe or unmerited” (para 77). The UT then discussed the evidence it had heard in relation to the Look Up Tool and the chain of custody. At para 86, the UT said:

“Professor Sommer’s oral evidence explored and emphasised, but did not add very much to what he had said previously in writing. He again went through the possibilities of error in the “chain of custody”, but accepted that these were merely his suggestions about what could conceivably go wrong, rather than evidence that anything had gone wrong. He did make two points which we regard as of some significance. The first is that he was quite clear that candidates would not remain in ignorance that tests were being taken on their behalf: if they were not displaced from their seat, they would in any event see the cursor on the screen moving other than in accordance with their own entries. Secondly, Professor Sommer’s considered conclusion

was that it was very unlikely that there were accidental errors in the production or transmission of results. If there were errors, they were very probably deliberate. He hypothesised that a test centre might want to improve its own record of results by substituting false entries for those actually put in by the candidate.”

29. In an earlier decision promulgated in December 2020, *DK and RK (Parliamentary privilege; evidence)* [2021] UKUT 00061 (IAC), the UT held that the APPG’s report on the TOEIC tests was not admissible for the purposes of the appeal. However, the UT would admit as a factual record, what was said by three experts, including Professor Sommer and Dr Harrison at the APPG hearing. In the main *DK and RK* decision, the UT commented on the difference between the caution employed by Professor Sommer in the evidence he had given to the tribunal, in comparison to what he had said in the APPG session (para 89). The UT noted that Professor Sommer had accepted that he was not able to “identify specific points at which things had gone wrong” (para 89).
30. The UT set out its analysis from paras 103 – 125. I will only attempt to summarise it to the extent that is necessary to do so to understand and to resolve the contentions raised in the present applications. The UT said the voice recognition results showed that many test entries were in a voice recognisable as having provided test entries for different candidates and “there was no reason to suppose that the voice recognition process was substantially defective” (para 103). There was “no proper basis” for saying that the false positive rate was higher than, at most, three per cent. ETS would have no reason to exaggerate the level of fraud involved and the voice recognition process was “clearly and overwhelmingly reliable in pointing to an individual test entry as the product of a repeated voice” (para 103).
31. The UT considered that Professor Sommer’s criticisms in relation to chain of custody issues did not mean that there had been errors, simply that he could not rule out such errors occurring (para 104). It was clear that certain test centres were providing a fraudulent service to fraudulent candidates and there was no reason to suppose they would be other than extremely careful to ensure that the fraudulent entries were credited to the fraudulent candidates (para 105). Given ETS’ role as the largest private not-for-profit educational testing and assessment centre in the world, there was every reason to suppose that its evidence linking a test entry to a particular candidate was likely to be accurate, although this was not determinative and there could be room for error (paras 106 – 107). Possible corroboration could be found in the individual’s own account of the test, the evidence (if any) of fraud during the session at which the individual’s test was taken and evidence of that individual’s incompetence in English (para 108). That there were errors in the chain of custody remained “only a theoretical possibility not supported by any detailed evidence, and rendered less likely by some of the general evidence” (para 114).
32. The UT concluded that “the evidence the respondent relies on in these cases is not shown to be unreliable in any general sense. On the contrary, the very limited concerns that have been raised tend to show that as a class, the evidence is highly reliable, although not necessarily wholly free from error” (para 117). In relation to test centres that were properly described as “fraud factories” it was overwhelmingly likely that those to whom the proxy results were now attributed are those who took their test by that method and the combined effect of two parallel strands was “wholly compelling” (para 119). The first strand was that there was no good reason to think there had been

errors in the chain of custody. ETS were an organisation with an international portfolio of well-regarded tests and it was inconceivable they would retain this work if it was thought that their administration was unreliable (paras 120 - 121). The second strand was that there was no reason to consider that anybody other than the candidates and the test centres in collusion would have wanted to falsify results (paras 122 - 123). A test centre had no particular interest in getting candidates through a test (para 124). There was no perceptible way in which proxy test entries could have been inserted into the system after the candidates had taken honest tests; it was highly unlikely that any candidate present when proxies were being used was unaware of this and even more unlikely that such a system would then attribute proxy entries to anybody who had not taken part in the dishonest scheme (para 125).

33. The UT set out its general conclusions as follows:

“126. The two strands, therefore, amount, respectively, to the virtual exclusion of suspicion of relevant error by ETS, and the virtual exclusion of motive or opportunity for anybody to arrange for proxy entries to be submitted except the test centres and the candidates working in collusion.

127. Where the evidence derived from ETS points to a particular test result having been obtained by the input of a person who had undertaken other tests, and if that evidence is uncontradicted by credible evidence, unexplained, and not the subject of any material undermining its effect in the individual case, it is in our judgment amply sufficient to prove that fact on the balance of probabilities.

128. In using the phrase ‘amply sufficient’ we differ from the conclusion of this Tribunal on different evidence, explored in a less detailed way, in [*SM and Qadir*]. We do not consider that the evidential burden on the respondent in these cases was discharged by only a narrow margin. It is clear beyond peradventure that the appellants had a case to answer.

129. In these circumstances the real position is that the mere assertions of ignorance or honesty by those whose results are identified as obtained by a proxy are very unlikely to prevent the Secretary of State from showing that, on the balance of probabilities, the story shown by the document is the true one. It will be and remain not merely the probable fact, but the highly probable fact. Any determination of an appeal of this sort must take that into account in assessing whether the respondent has provide the dishonesty on the balance of probabilities.”

34. The UT went on to find that the SSHD had discharged the burden of proof in both cases (para 137).

Varkey

35. The decision of the Presidential Panel (Dove J, President (as he then was) and UT Judge Mandalia) in *Varkey* was promulgated on 11 March 2024. The UT declined to address all of the generic issues it was invited to address, commenting that it “would be wholly inappropriate for us to provide prescriptive guidance setting out, for example, the evidence that must be provided by the SSHD in respect of what was actually happening in the college in question, before an allegation of fraud requiring an answer will be raised” (para 22). The UT observed that the evidence would vary from college to college; in some cases evidence of a fraud would be “perfectly obvious and the individual will be complicit”, whereas in others the fraud may be more discrete and “in some cases, as is claimed by the appellants here, unknown to the individual”. The UT stressed that a fact sensitive analysis of the evidence was required in each case (para 23).
36. The UT were asked to re-visit the conclusions reached in *DK and RK* in light of additional disclosure from the SSHD, witness evidence from Richard Shury, a Security and Compliance Specialist with ETS and additional expert evidence, particularly that of Christopher Stanbury, who gave oral evidence. The focus of the evidence and argument before the UT in *Varkey* was on the methods employed where a “hidden room” was used (rather than a proxy simply taking the test instead of the candidate).
37. The UT held that whilst there may have been weaknesses in the security systems employed, there was a “wealth of evidence that on the whole, test centres and candidates were working in tandem and implicit in the fraud together” (para 90). The UT cited extensively from *DK and RK* and concluded that the general conclusions reached by the UT in that case were not undermined by the evidence of Mr Shury or Mr Stanbury (para 108).
38. The UT noted that Mr Stanbury had acknowledged that in terms of the potential types of fraud, much was speculation (para 96). The UT accepted his evidence that there was good evidence of direct replacement of the candidate by a proxy in the test room and of the use of remote control software (para 96). The UT said it also accepted there was evidence of “hidden rooms” being used at some test centres, but considered this told very little about the way that a fraud was operated at a particular test centre at a particular time (para 97). Depending on the method used, it was possible that a candidate’s voice files could have been swapped or falsified without their knowledge, “but that is not the question...The fact that something is possible is not to say that is what happened. Beyond saying what is possible on a general level, as Mr Stanbury was bound to acknowledge, it is impossible for him to say in a particular case what method was adopted by a test centre and whether a particular candidate knowingly participated” (para 100). Whilst there was, at least in theory, a range of ways in which the fraud and cheating was capable of being perpetrated and the theoretical possibility of any method could not be ruled out, “there is a wealth of evidence of the less sophisticated methods adopted in which the candidate is complicit in the fraud, the evidence regarding the more sophisticated methods is sparse and borders on simple speculation” (para 102). The UT considered Mr Stanbury’s evidence as to whether genuine candidates would know about test results from hidden rooms being uploaded (as opposed to their own results) was “nothing more than speculation” (para 107).
39. The UT expressed its conclusion as follows:

“108....We are left in no doubt that in general, there was widespread cheating and test centres adopted less sophisticated methods available of manipulating test rests, working in collusion with the candidates. It is possible that another method was adopted by a test centre but an appeal is not determined on what is possible. That something is possible is not to say it is probable. The question for a Tribunal is whether it is more likely than not, that the particular appellant they are considering in the case before them cheated.

.....

113. A judge has to start somewhere. The evidence before us simply serves to re-enforce [sic] the fact that there was widespread fraud and cheating at ETS test centres. As the Tribunal said in *DK and RK*, it is clear beyond peradventure that where there is evidence from ETS that points to the test relied upon by the individual as having been taken by someone other than that person, that is strong evidence that will weigh against the individual and calls for a credible explanation.

114. The parties agree that a Tribunal must consider the evidence before it as a whole and the decision will be fact sensitive...”

The Court of Appeal’s decisions

40. In *Secretary of State for the Home Department v Akter* [2022] EWCA Civ 741 (“*Akter*”), the Court of Appeal rejected a submission that *DK and RK* had no precedential authority in establishing that the generic evidence relied upon by the SSHD in “fraud factory” cases is sufficient to satisfy the initial evidential burden. Giving the leading judgment, Macur LJ said that as the UT in *DK and RK* had demonstrably undertaken a forensic examination and reached definitive conclusions, “There would need to be good reason, which would inevitably mean substantial fresh evidence, for another UT to revisit and overturn the determination”. This was not a situation in which different tribunals could reasonably reach different conclusions upon the same factual matrix (para 29). Accordingly, the Court allowed the SSHD’s appeal, holding that the evidence relied upon by the SSHD was sufficient to discharge the evidential burden, so that there was a case to answer (para 32).
41. In *Ram v Secretary of State for the Home Department* [2023] EWCA Civ 1323, Underhill LJ said the correct approach for a tribunal which had to determine whether an applicant for leave to remain used a proxy in the spoken English part of the ETS test was that set out by the UT in *DK and RK* (para 5).
42. In *Chowdhury v Secretary of State for the Home Department* [2025] EWCA Civ 36 (“*Chowdhury*”) the Court of Appeal held that the UT was correct to conclude that the FTT had erred in law in failing to engage with the reasoning of the UT in *DK and RK*. In this instance, the reasoning of the FTT was on its face inconsistent with that of *DK and RK*, for example as to the sufficiency of the generic evidence adduced by the SSHD and in relation to whether the appellant may have acted dishonestly even though his English was of sufficient quality that he did not need to have a proxy attend for him

(para 58). Whilst there may be good reasons on the particular facts of the case why the appellant is nevertheless to be believed, the FTT had to grapple with the implications of *DK and RK*, rather than simply ignoring it (para 58).

43. In the course of giving the leading judgment, Singh LJ said:

“The doctrine of precedent in the strict sense applies to questions of law, and indeed the notion of a factual precedent has been described as ‘exotic’: see *S and Others v Secretary of State for the Home Department* [2002] EWCA Civ 539, [2002] INLR 416, at paras 28-29 (Laws LJ). The concept of a factual precedent had nevertheless come to be regarded as having some utility, in particular in the immigration context: see *S and Others* itself, and the above decision of this Court in *Akter*, which is of particular importance in the present appeal, because it was directly concerned with the status of the UT’s decision in *DK and RK*.”

The Claimants’ circumstances

C2: Mosaraf Hossain

44. C2 is a national of Bangladesh who arrived in the UK on 22 January 2010 with leave to enter as a student. On 9 September 2014, he was told by his university sponsor, Glyndwr University, that he was being withdrawn from his degree course due to an allegation made by the Defendant that he had cheated in the Speaking and Writing module of a TOEIC test taken on 19 June 2012 at Colwell College. C2 had never submitted the test in support of an application for leave to remain, as his university used their own English tests. C2 unsuccessfully applied to judicially review the university’s decision, the Court holding that the university had acted reasonably in relying upon the information provided by the Defendant. On 6 July 2025, the Defendant curtailed C2’s leave to remain on the basis he had ceased studying with his sponsor. His 4 September 2015 application for leave to remain was refused on 4 December 2015.
45. On 19 December 2016, C2 applied for leave to remain outside the immigration rules, relying on Article 8 ECHR. On 6 December 2017, his application was refused and certified as “clearly unfounded” on the basis he had cheated in his TOEIC test. On 31 January 2018, the Defendant agreed to reconsider the decision. On 19 July 2018, the Defendant made a new decision to refuse C2’s application, but with a right of in-country appeal. The application was refused on suitability grounds; that C2’s presence in the UK was not conducive to the public good because he had cheated in the TOEIC test.
46. On 11 April 2019, the FTT dismissed C2’s appeal against this decision. In a decision promulgated on 18 June 2019, the UT allowed the appeal from the FTT’s decision and remitted the case to the FTT for a further fact-finding hearing. The Deputy UT Judge noted that “a significant part of the evidence is favourable to the Appellant”.
47. On 23 July 2019, the then Home Secretary made a written statement to Parliament on various immigration matters, including the accusations of cheating in the TOEIC tests (“the Parliamentary Statement”). The key paragraph of the statement was as follows:

“I have therefore asked officials to review our guidance to ensure that we are taking the right decisions on these cases to ensure we are properly balancing a belief that deception was committed some years ago against other factors that would normally lead to leave being granted, especially where children are involved. We will update operation guidance to ensure no further action is taken in cases where there is no evidence an ETS certificate was used in an immigration application.”

48. C2’s remitted appeal had been listed for 7 November 2019 before the FTT. On 18 October 2019, the Defendant wrote to C2’s solicitors indicating that the refusal decision had been withdrawn and a recommendation made to the team who decided the earlier application to issue the relevant documentation. The Claimant was asked to withdraw his appeal on this basis. On 23 October 2019, the FTT directed that the appeal would be treated as ended and the forthcoming hearing vacated, unless C2 could provide good reasons to the contrary.
49. On 28 October 2019, C2’s solicitors wrote to the FTT requesting that the appeal proceed because the Defendant had not confirmed that the allegation he cheated on the TOEIC test was withdrawn and C2 was very anxious to have the opportunity to clear his name. The FTT then decided to proceed with the hearing. However, the day before the hearing, C2 was served with a decision letter dated 4 November 2019 granting him 2.5 years’ leave to remain. In these circumstances, the FTT no longer had jurisdiction to determine the appeal. Nonetheless, C2 and his counsel attended at the appointed hearing time in the hope that the FTT could be persuaded to hear the evidence and make a positive finding as to his innocence. The FTT did not proceed to hear evidence, but counsel representing C2, Mr Ó Ceallaigh KC, spoke with counsel for the Home Office. The events were described in Mr Ó Ceallaigh KC’s subsequent attendance note to his instructing solicitors as follows:
- “3. Having taken instructions Mr Wilcox informed me that whether or not the allegation was formally withdrawn the grant of leave to remain was a reflection of the fact that the Respondent now accepted that the suitability requirements of the Rules were met.
4. In court Mr Wilcox informed the Tribunal that the Respondent accepted that the Appellant met the suitability requirements of the Rules, albeit that leave to remain had been granted outside the Rules.”
50. On 24 August 2020, C2 was granted indefinite leave to remain.
51. Ms Middleton says in her witness statement that C2 suffered financial losses as a result of having no right to work or rent for a number of years. His wife was in Bangladesh throughout the events described and he was only able to visit her after the grant of the 2.5 years’ leave to remain in November 2019. Tragically, she subsequently died from Covid in Bangladesh in August 2021. A report prepared by Dr Bell, consultant psychiatrist, and served in these proceedings indicated that C2 has suffered severe and lasting psychiatric damage, namely a Severe Depressive Disorder and Post-Traumatic Stress Disorder (“PTSD”). Ms Middleton says that C2 feels that the allegation of

cheating, which the Defendant prevented him from fighting, destroyed his life. She says that C2 has made some slow progress towards recovery and is very upset to now be facing the renewed allegation of cheating made in these proceedings; she is concerned that this will lead to a deterioration in his mental health.

52. The witness statement made by Adam Sewell on behalf of the Defendant indicates the TOEIC test data provided by ETS in relation to C2. C2's Speaking and Writing test was subject to voice analysis by ETS and of the 18 candidates who took the test in the same session at Colwell College, 14 of the tests, including C2's, were assessed as "invalid". I understand that C2 accepts that the disclosed recording is not of his voice. Mr Sewell also provides some broader figures for Colwell College; it was deemed by ETS to have the seventh highest number of invalid tests of the TOEIC centres in the UK.

C6: Naveed Khan

53. C6 is a national of Pakistan who entered the UK on 2 May 2007 with leave to enter as a student. On 3 December 2014, the Defendant refused C6's application for leave to remain as a Tier 1 (Entrepreneur) migrant, on the basis that the TOEIC certificate used by C6 in his previous application for leave to remain was fraudulent. The tests in question were taken at Darwin College in November 2011. On 23 March 2015, the Defendant decided to remove him from the UK. On 10 April 2015, C6 issued judicial review proceedings against the Defendant in which he denied having used deception and/or a proxy test-taker. On 20 January 2016, the UT refused permission to apply for judicial review on the basis that C6 had an out-of-country appeal available to him. On 24 June 2017, C6 travelled to Pakistan, from where he filed an appeal to the FTT against the refusal of his application for leave to remain.
54. On 27 June 2019, C6's appeal was heard by FTT Judge Neville. C6 gave evidence via video-link from Pakistan. In a decision promulgated on 25 July 2019, Judge Neville allowed C6's appeal. The SSHD's case was that the Speaking part of C6's test had been taken by a proxy. At para 12, the Judge summarised the evidence adduced by the Home Office. This included two reports prepared via the Look Up Tool (para 15 above), indicating that C6 had attained 200 out of 200 for the Speaking element and 170 out of 200 for the Writing element of the test taken at Darwin College on 15 November 2011; and that ETS had categorised his results as "invalid" (para 14 above). 79% of the tests taken at Darwin College that day were also categorised as "invalid". The SSHD also relied upon the generic witness statements of Rebecca Collings and Peter Millington (para 15 above) and a report by Prof. Peter French in relation to the voice recognition aspect. C6 admitted that he was not the person speaking in the recording supplied by ETS.
55. The Judge considered that the recording strengthened the Home Office's case and undermined C6's case "but not to any conclusive or determinative degree" (para 16). He found that the initial evidential burden on the SSHD had been discharged (para 22). The Judge referred to the expert evidence regarding the "chain of custody" that was before the UT in *MA* and cited the UT's observation at para 47 (para 21 above). The Judge noted that no Project Façade police report had been provided in relation to the particular venue (para 20).
56. The Judge next considered whether C6 had provided a plausible explanation. Between paras 23 – 52 he undertook a detailed analysis of C6's evidence, including the points

raised against him when he had been cross-examined. The Judge considered that these points had not undermined C6's reliability as a witness (para 29). He noted that the SSHD had relied upon C6's tests scores at an earlier attempt in 2011, which had also been cancelled, thus, potentially giving him a greater motivation for using deception on a subsequent occasion (paras 21 and 31). The Judge accepted this was an adverse factor for him to take into account (para 31). He noted the "very high quality" of C6's English whilst giving his evidence, but recognised, as the UT had done in *MA*, that there were a number of reasons why someone who was fluent in English might still choose to use a proxy (para 47). Overall, the Judge said he attached "some very minor weight" to C6's very high level of English (paras 50 – 51). The Judge concluded that C6 had provided an account which satisfied the minimum level of plausibility (para 52). He summarised the position as follows:

"The appellant's evidence has remained consistent, both internally and with the wider documentation. He was an impressive witness, anxious and able to provide answers to questions and provide explanations for concerns that arose from the documents. Taking the appellant's evidence, in light of the factors discussed above, the appellant easily satisfies the burden that rest [sic] upon him at this stage."

57. The Judge then considered whether the SSHD had discharged the legal burden of establishing on a balance of probabilities that C6 had procured his TOEIC certificate by deceit (para 53). He acknowledged that there were factors on each side (para 54). He considered the details provided by C6 were largely consistent and carried greater weight than such inconsistencies as had been pointed out (para 54). He noted that even colleges engaged in widespread fraudulent practices might not turn genuine candidates away, who simply wanted to take the tests properly (para 57). The "hidden room" method of cheating provided a basis upon which C6's account "*could* be true, notwithstanding that a large number of the tests taken on the day were fraudulent. It would be consistent with the unrealistic number of tests conducted on that day" (para 57; emphasis in original). The Judge expressed his conclusion in para 58 as follows:

"When all the evidence in the present appeal is considered and weighed as already explained, I cannot find the use of deception by the appellant to be more probable than not. I believe the appellant's account. I therefore find as a fact that the appellant took his own test, did not fraudulently obtain his TOEIC certificate and, did not utilise deception by relying upon it when seeking leave to remain in the United Kingdom."

58. The SSHD did not appeal this decision. C6 was advised that the Home Office would issue a 30-day single entry vignette to allow him to return to the UK and make an in-country application for leave to remain. C6 duly returned to the UK and on 2 July 2020, his application for indefinite leave to remain was granted. In March 2022, the Defendant approved C6's application to naturalise as a British citizen.
59. Ms Middleton describes the impact on C6. He spent 4.5 years without any leave to remain and thus no right to work or rent during this time. He was forced to leave the UK and in Pakistan his family shunned him because he had been accused of cheating. He had to borrow substantial sums of money to survive, which he has not been able to

repay. His marriage broke down as a result of these allegations. A report by Dr Galappathie, consultant psychiatrist, indicates that C6 has been diagnosed with severe depression, anxiety and severe PTSD, from which he had not recovered. Ms Middleton says that C6 is shocked, anxious and frustrated that the Defendant had sought to renew the allegations of cheating in these proceedings.

60. I do not summarise the contents of Mr Sewell's statement, in so far as it covers material that was before the FTT when C6's appeal was heard. However, Mr Sewell also refers to additional material which is relied upon by the Defendant in these proceedings as new evidence capable of defeating the issue estoppel (para 8 above). C6 was recorded as having attended an ETS Global test centre on 5 November 2011 to sit the TOEIC test. This was a test centre directly administered by ETS, in relation to which no evidence of fraud has been uncovered. The records indicate that C6 attained 315/495 for the Listening element and 255/495 for the Reading element on this occasion, which was below the standard he was required to achieve in order to pass. C6 made no mention of these lower scores, achieved only a few days before the TOEIC test in issue, in the evidence he gave for his FTT appeal. The Defendant says this was a highly pertinent omission as this gave C6 a clear motive for cheating in his subsequent tests at Darwin College. It is also noted that these score results were much lower than those obtained at Darwin College a short time later.

C11: Ashiqur Rahman

61. C11 is a national of Bangladesh who arrived in the UK on 28 October 2009 with a Tier 4 entry clearance valid until 27 December 2012. On 13 August 2014, C11 was informed by his Tier 4 sponsor, Blake Hall College, that he was being withdrawn from the course due to an allegation that he had cheated in a TOEIC test sat on 17 October 2012 at Colwell College. On 24 September 2014, a decision was made under section 10 Immigration and Asylum Act 1999 to curtail his leave to remain. However, this was returned undelivered to the Defendant. The Defendant subsequently issued a new decision in January 2015. As he did not have an in-country right of appeal against this decision, C11 challenged it by way of judicial review, in which he denied that he had cheated. The UT refused his application for permission to apply for judicial review on the basis that he could appeal the decision from outside the UK. C11 appealed this decision to the Court of Appeal. On 5 December 2017, the Court of Appeal gave judgment in *Ahsan*, holding that an out-of-country appeal was not an effective alternative remedy in relation to an allegation of TOEIC fraud. Thereafter, C11's appeal to the Court of Appeal was allowed by consent, the terms including that he was entitled to a substantive hearing before the UT. In due course, the judicial review proceedings were settled with agreement that the TOEIC fraud allegation would be determined by an appeal to the FTT instead.
62. On 16 August 2019, C11 issued an appeal to the FTT in respect of the TOEIC allegation. His appeal was heard on 11 November 2019 before FTT Judge Taylor and on 20 November 2019 his appeal was allowed.
63. The Judge summarised C11's evidence between paras 7 – 12. C11 accepted that the voice recordings provided were not his voice, although he said the clips provided were much shorter than the test he had taken. The Judge referred to the SSHD's Look Up Tool evidence. This indicated that 56% of the submitted results for Colwell College for 17 October 2012 were questionable and 44% were invalid. The Judge said that applying

the approach in *SM and Qadir*, the Look Up Tool evidence taken with the generic evidence was sufficient to satisfy the initial evidential burden on the SSHD by “a narrow margin” (para 14). The Judge then referred to the findings of the APPG report (para 29 above), which post-dated *SM and Qadir*. The Judge said that given “these very powerful findings and recommendations of the APPG” he concluded that the initial burden “has been met by an even narrower margin that that suggested by *SM and Qadir*, indeed if at all” (para 15). The Judge went on to say that C11 had given a plausible account and that the SSHD had provided no good reason as to why C11 would want to take part in a fraudulent test (para 17). He had passed an earlier International English Language Testing System (“IELTS”) test before coming to the UK and he had submitted examples of his work, which showed his proficiency in English (para 17).

64. In a relatively short decision, the Judge concluded that C11 had established to above the minimum level of plausibility that he had no reason to pay a proxy to take the TOEIC test for him and to do so would pose a significant risk to his and his family’s reputation. He found that C11 had discharged the evidential burden upon him and that the SSHD had not established on a balance of probabilities that his account should be rejected (para 18).
65. The SSHD did not appeal against this decision. On 9 January 2020, the Defendant granted C11 30 months’ leave to remain and on 11 February 2020 he was granted indefinite leave to remain.
66. Ms Middleton says that C11 spent over five years in the UK without any leave to remain and thus unable to work or rent and that during this period he became destitute and had to borrow substantial sums of money to survive, which he has not been able to repay. The cheating allegation brought him shame amongst his family and friends. He was unable to visit family members in Bangladesh and his marriage plans broke down as a result. Ms Middleton refers to the report of Dr Lord, consultant psychiatrist, who has diagnosed C11 as suffering from depression, an adjustment disorder and a dissociative disorder. He has struggled to maintain employment because of his mental health problems. He has told Ms Middleton that his mental health has declined further since learning of the Defendant’s intention to renew the allegation that he cheated in the TOEIC test.
67. I do not summarise the contents of Mr Sewell’s statement so far as C11’s case is concerned, as it is accepted that it covers evidence that was before the FTT when C11’s appeal was heard and does not contain new material.

These proceedings

The Particulars of Claim

68. The Particulars of Claim for each Claimant follows a similar structure and content. I will take C6’s pleadings as an example. Para 4 says that C6 challenges his unlawful treatment by the Defendant “in consequence of the Defendant having identified him as a person who may have cheated in a TOEIC test”. The same paragraph alleges that the Defendant acted in breach of the Data Protection Act 1998 and/or the Data Protection Act 2018 and the GDPR / UK GDPR (“the data protection claim”) and/or unlawfully interfered with his Article 8 ECHR rights in breach of section 6 of the Human Rights Act 1998 (“HRA”).

69. A rather selective generic account of the TOEIC issues and litigation then follows between paras 6 – 44 of the Particulars of Claim. Facts specific to C6 are pleaded between paras 45 – 113. This narrative includes that C6 sat the Speaking and Writing components of the TOEIC test on 15 November 2011, achieving scores of 200/200 and 170/200 respectively and sat the Listening and Reading components on 18 November 2011, achieving scores of 495/495 and 425/495 respectively (paras 64 and 65). Para 110 pleads reliance upon Judge Neville’s findings in the FTT appeal that C6 took his own test and did not fraudulently obtain his TOEIC certificate.
70. The data protection claim is pleaded between paras 120 -126. It alleges that information including personal details and exam data provided by C6 to ETS, and then disclosed by ETS to the Defendant, were his personal data and the Defendant was at all material times a data controller processing his personal data, within the meaning of the legislation. Para 125 alleges that the Defendant’s processing of the personal data was unlawful on a number of grounds, including that the Defendant relied upon the personal data obtained from ETS “despite having no information from which it could confirm that such data was accurate and/or having taken no, or no adequate steps, to verify such data” and the Defendant “was or should have been aware that data provided by ETS was unreliable from the outset”. The text also alleges that the Defendant continued to rely on C6’s personal data “despite a growing corpus of evidence which undermined the accuracy of such data, and which ought to have prompted its erasure or rectification”. The evidence in question is listed as: representations made by C6’s solicitors in his application for judicial review; specific concerns with the data identified by the joint expert report in *MA*, as vindicated by the APPG report and the further disclosure in *Varkey*; representations made in C6’s witness evidence in the FTT proceedings; and Judge Neville’s criticisms of the SSHD’s evidence in his 25 July 2019 decision.
71. Para 126 pleads that the Defendant used this inaccurate data in arriving at the various adverse decisions that were made in relation to C6’s immigration status and continued to use this data in resisting C6’s legal claims, until he was successful in his appeal to the FTT.
72. The Article 8 claim is pleaded at paras 127 – 130, where it is said that C6 had a private and family life in the UK and that the manner in which his application for further leave to remain was considered and refused and the manner in which he was treated thereafter was an unnecessary and disproportionate interference with his right to private and family, that was not in accordance with law. Aspects relied upon in support, include that the Defendant failed to provide C6 with an adequate opportunity to comment on the allegations before bringing his leave to remain to an end, and deprived him of an effective remedy for almost five years until his appeal was granted by the FTT.
73. C6 seeks general damages for pain and suffering, loss of amenity, upset and distress; special damages including loss of earnings and legal costs; just satisfaction in relation to the HRA claim; and aggravated and exemplary damages. The report from Dr Galappathie (para 59 above) is appended to the claim. The Schedule of Loss claims damages in the sum of £633,049.87.
74. The Claimants did not plead the issue estoppel / abuse of process points in their respective Particulars of Claim.

The Defences

75. The Defendant's Defences do not follow a common structure or content but, for present purposes, the gist of its response in the respective Defences / Amended Defences / Part 18 Responses is analogous. I will again use the pleadings in C6's case as an example. In his case, the Defence dated 9 April 2025 was followed by an Amended Defence. However, the only difference between the two that I am aware of is a correction to para 55.
76. Para 1 of the Defence states that voice analysis of the Speaking and Writing test that C6 claimed to have sat at Darwin College resulted in the identification of a multiple proxy test taker, leading to the refusal of his application for leave to remain. The Defendant responds to the generic account in the Particulars of Claim at paras 8 – 42. Para 10 avers that on the day when C6 claimed to have taken the TOEIC test at Darwin College, 103 tests were taken, 79% of which were found to have been "invalid". Figures are also given for the number of invalid tests that Darwin College was found to have conducted across the 24 June 2011 – 5 February 2014 period. Para 40 lists what is said to be widespread evidence of cheating at Darwin College and evidence linking C6 to the fraud. The material includes: that ETS subjected all of the 1,047 Speaking and Writing tests that Darwin College claimed to have conducted in the period June 2011 – February 2014 to voice analysis, deeming 805 to be "invalid" and 242 to be "questionable"; the test session relating to C6 had a total of 45 candidates and 31 of these tests were assessed as "invalid" and the remainder as "questionable"; and in the Listening and Reading test session relating to the Claimant, 62 of the 100 candidates achieved the maximum score of 495.
77. The Defence responds to the Particulars of Claim narrative about C6 at paras 43 – 97. Para 53 avers that the Speaking and Writing test modules completed at Darwin College in C6's name and with his location-specific unique registration number "were conducted by a multiple, proxy test taker on [C6's] behalf". Para 55 contrasts the marks obtained by C6 in the 18 November 2011 Listening and Reading test at Darwin College of 495/495 and 425/495, with the marks he obtained 13 days earlier on 5 November 2011 (para 60 above). The Defendant averred "this corroborates the finding of the Claimant having used a proxy to sit his subsequent tests."
78. The Defence addresses C6's data protection claim at paras 98 – 102. The Defendant says it relied upon "the strength of the evidence available that [C6's] test was taken by someone other than him"; and also contends that the FTT's judgment predated "and is rendered unreliable" by the UT's subsequent decisions in *DK and RK* and in *Varkey*.
79. The Article 8 claim is addressed at paras 103 – 105. In addition to the matters raised in defending the data protection claim, it is said that the evidence of fraud perpetrated by C6 "on which the Defendant acted, renders those actions proportionate to any interference" with his right to private and family life. The Defendant also relies on the claim having been brought outside of the one-year period of limitation under section 7(5) HRA.
80. In C2's case, the Claimant made a Part 18 Request for Further Information in order to clarify the way the Defendant put its case. The Defendant responded that it averred that C2 had cheated in the Listening and Reading Components of his TOEIC test, as well as in the Speaking and Writing Components, by using a proxy text taker. Reference was

made to anomalous score patterns at Colwell College and to discrepancies between these TOEIC scores and other tests undertaken by C2.

The Replies

81. The Replies filed by the Claimants are similar, although not identical, in structure and content. It is denied that the Article 8 claims were brought outside of the applicable limitation period and alleged, in the alternative, that the claim has been brought within a period the Court should treat as equitable under section 7(5)(b) HRA. Under the heading “Res Judicata / Issue Estoppel” the text in C6’s Amended Reply says:

“The Defendant is estopped from attempting to re-argue the determination of the allegation of fraud by the First-tier Tribunal (in the determination dated 25 July 2019) by the principles of res judicata and issue estoppel. There is a binding decision from the expert Tribunal in respect of the Defendant’s failed fraud allegation which the Defendant did not appeal and/or failed to appeal. The Defendant’s attempt to remake that allegation now in these proceedings is a collateral attack on a final decision of the Tribunal and an abuse of process.”

The litigation and the orders

82. Bindmans LLP act or have acted for the claimants in 23 claims which arise from the same generic facts and rely on the same causes of action; 13 of these 23 claims have now settled. The strike out applications were only made in six of the claims (three of which have since settled, as I explained in the Introduction).
83. Following a case management conference before Master Armstrong (the assigned Master) on 21 November 2025, the Master gave directions that were sealed on 12 December 2025, listing a further case management conference for 19 May 2026 (which has since been adjourned to a later date). By a second order sealed on the same date, the Master gave directions in relation to the six strike out applications covering the serving of evidence, skeleton arguments and the provision of hearing bundles. Individual strike out applications in relation to the six cases had been filed on 8 October 2025, along with generic Grounds of Application. Draft orders have been provided in each of the claims, listing the paragraphs in the Defendant’s pleadings which it is said should be struck out.

Additional information

84. As a result of questions I asked during the hearing, the parties helpfully supplied the following additional information. Bindmans LLP indicated they were aware of County Claims brought by another firm of solicitors which were based on the same generic facts and raised similar allegations. At a case management conference last summer, the indication given was that six such claims had been issued, with three more in preparation. They were to be stayed pending the outcome of these strike out applications. The Defendant confirmed that it has not received any further claims arising from the same generic facts (although the letter of 13 May 2026 indicates “a small number of claims with a TOEIC element” have been received).

85. The Defendant indicated it was unable to ascertain the current number of tribunal appeals which concerned challenges to invalidated TOEIC certificates. The Defendant said records indicate that between 25 January 2012 and 31 December 2020 there were 16,663 appeals by individuals who were recorded as having sat an ETS TOEIC case. However, it was not possible to ascertain the number of appeals within this cohort that related to allegedly fraudulent certificates, as a number of the appeals would have been based on or included other grounds.

The legal framework

Issue estoppel

General principles

86. The leading authority on issue estoppel is *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly Contour Aerospace Ltd)* [2013] UKSC 46, [2014] AC 160 (“*Virgin Atlantic*”). The general principles were set out by Lord Sumption JSC, who gave the leading judgment. At para 17, Lord Sumption observed that *res judicata* was a portmanteau term used to describe a number of different legal principles with different juridical origins. His summary of these principles included the following:

“Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties: *Duchess of Kingston’s Case* (1776) 20 State Tr 355. ‘Issue estoppel’ was the expression devised to describe this principle by Higgins J in *Hoysted v Federal Commissioner of Taxation* (1921) 29 CLR 537, 561 and adopted by Diplock LJ in *Thoday v Thoday* [1964] P 181, 197—198. Fifth, there is the principle first formulated by Wigram V-C in *Henderson v Henderson* (1843) 3 Hare 100, 115, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones. Finally, there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger.”

87. After referring to *Arnold*, which I will summarise shortly, Lord Sumption identified the propositions he derived from Lord Keith’s speech in that case:

“22.... (1) Cause of action estoppel is absolute in relation to all points which had to be and were decided in order to establish the existence or non-existence of a cause of action. (2) Cause of action estoppel also bars the raising in subsequent proceedings of points essential to the existence or non-existence of a cause of action which were not decided because they were not raised in the earlier proceedings, if they could with reasonable diligence and should in all the circumstances have been raised. (3) Except in special circumstances where this would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which (i) were not raised in the earlier proceedings or (ii) were raised but unsuccessfully. If the relevant point was not raised, the bar

will usually be absolute if it could with reasonable diligence and should in all the circumstances have been raised.”

88. Earlier, Lord Sumption had described “the real issue” in *Arnold* as whether the flexibility in the doctrine of res judicata “extended to an attempt to reopen the very same point in materially altered circumstances” (para 20).
89. Lord Sumption explained that res judicata and abuse of process are juridically very different. Res judicata is a rule of substantive law, whilst abuse of process is a concept which informs the exercise of the court’s procedural powers. He said that they were “distinct although overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation”. This purpose made it necessary to qualify the absolute character of both cause of action estoppel and issue estoppel where the conduct is not abusive (para 25).
90. It is necessary to consider *Arnold* in some detail in light of the central role it played in Mr Sachdeva KC’s submissions. Under a lease between the defendant landlords and the plaintiff tenants, there was provision for rent reviews every five years. The reviews were to be carried out partly by reference to a hypothetical lease for the unexpired residue of the term. On the first review an issue arose as to whether this hypothetical lease was to be construed as itself containing rent review provisions. Walton J held, on an appeal from an arbitrator, that it was not to be so construed. He refused a certificate under section 1(7)(b) Arbitration Act 1979, which meant his decision could not be appealed to the Court of Appeal. The arbitrator’s decision indicated that the rent would be about 20% higher if the hypothetical lease contained no provision for rent reviews. Subsequent cases, including two in the Court of Appeal, decided that Walton J had been wrong on the construction issue. Before the second rent review, the tenants brought an action seeking a determination of the basis on which it was to be conducted. The defendants applied to strike out this claim on the basis that the plaintiffs were barred by issue estoppel from relitigating the point decided by Walton J. Sir Nicolas Browne-Wilkinson VC held that the plaintiffs were not barred and both the Court of Appeal and the House of Lords agreed with this conclusion.
91. Lord Keith gave the leading speech. He proceeded on the basis that the subsequent cases indicated that Walton J had been “wholly incorrect” on the point of construction (103C). Lord Keith referred to Sir James Wigram V-C’s recognition in *Henderson v Henderson* that there may be “special circumstances” where an estoppel does not operate (104G-105A). Lord Keith said that although *Henderson v Henderson* was a case of cause of action estoppel, the “special circumstances” observation had since been held to be applicable to issue estoppel. The instant case was concerned with “the nature of such special circumstances” (107C-D).
92. Lord Keith addressed whether an exception to issue estoppel could arise where a party sought to rely on further material relating to a point that had been raised in the earlier proceedings. He concluded at 108H – 109B that:

“...it is hard to perceive any logical distinction between a point which was previously raised and decided and one which might have been but was not. Given that the further material which would have put an entirely different complexion on the point was at the earlier stage unknown to

the party and could not by reasonable diligence have been discovered by him, it is hard to see why there should be a different result according to whether he decided not to take the point, thinking it hopeless, or argue it faintly without any real hope of success. In my opinion your Lordships should affirm it to be the law that there may be an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings. One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result...”

93. Lord Keith next considered whether the further relevant material which a party may be permitted to bring forward in the later proceedings is confined to matters of fact or whether “what may not entirely inappositely be described as a change in the law may result in, or be an element in special circumstances enabling an issue to be re-opened” (109C). Lord Keith considered the question should be approached as a matter of principle:

“If a judge has made a mistake, perhaps a very egregious mistake, as is said of Walton J’s judgment here, and a later judgment of a higher court overrules his decision in another case, do considerations of justice require that the party who suffered from the mistake should be shut out, when the same issue arising in later proceedings with a different subject matter, from reopening the issue?”

94. Lord Keith went on to consider the circumstances of the instant case. He noted that there was no right of appeal against the judgment of Walton J because he wrongly refused to grant a certificate, as the later decisions had showed (110D). Lord Keith considered that anyone “not possessed of a strictly legalistic turn of mind would think it most unjust that a tenant should be faced with a succession of rent reviews over a period of over 20 years all proceeding upon a construction of his lease which is highly unfavourable to him and is generally regarded as erroneous” (110E). Lord Keith said that *res judicata* was concerned with “preventing abuse of process” and in the present case an abuse of process would be favoured, rather than prevented, by refusing the plaintiffs permission to reopen the issue (110G). Lord Keith expressed his agreement with the following passage from the judgment of Sir Nicolas Browne-Wilkinson V-C below:

“In my judgment a change in the law subsequent to the first decision is capable of bringing the case within the exception to issue estoppel. If, as I think, the yardstick of whether issue estoppel should be held to apply is the justice to the parties, injustice can flow as much from a subsequent change in the law as from the subsequent discovery of new facts. In both cases the injustice lies in a successful party to the first action being held to have rights which in fact he does not possess. I can therefore see no reason for holding that a subsequent change in the law can

never be sufficient to bring the case within the exception. Whether or not such a change does or does not bring the case within the exception must depend on the exact circumstances of each case.” (Emphasis in original.)

95. Lord Lowry, expressing his agreement with Lord Keith, said that once the possibility of relying on special circumstances is established as a legal proposition, he had no hesitation in agreeing that the circumstances of the instant case “are special and indeed exceptional” (113E).
96. In *Virgin Atlantic*, Lord Neuberger of Abbotsbury PSC cautioned that it could be dangerous to invoke Lord Keith’s observation in *Arnold* that estoppel is intended “to work justice between the parties” because “it is only too easy to fall back on it, as an excuse for an unprincipled departure from, or an unprincipled exception to, the rule...” (para 62).
97. In the earlier Scottish case, *Phosphate Sewage*, Earl Cairns LC said at p.814:

“As I understand the law with regard to res judicata, it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in a litigation can be allowed to re-open the litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up to the same relief which I asked for before, but, it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. My Lords, the only way in which that could possibly be admitted would be if the litigant was prepared to say, I will shew you a fact which entirely changes the aspect of the case, and I will shew you further that it was not, and could not by reasonable diligence have been, ascertained by me before.”
98. It is well-established and common ground in these proceedings that the doctrine of res judicata is not confined to private law and can apply in relation to adjudications in areas of public law: *Thrasylvoulou v Secretary of State for the Environment* [1990] 2 AC 273 (“*Thrasylvoulou*”).

Subsequent caselaw that has considered *Arnold*

99. *Watt (formerly Carter) and others v Ahsan* [2007] UKHL 51, [2008] 1 AC 696 (“*Watt*”) concerned a claim brought by a Labour Party councillor who was not selected to stand for the Party in forthcoming local elections. He claimed the Labour Party had unlawfully discriminated against him on racial grounds. The Employment Tribunal (“ET”) decided as a preliminary issue that the Labour Party was acting as a “qualifying body” for the purposes of his claim under section 12 Race Relations Act 1976 and this decision was upheld by the Employment Appeal Tribunal. The Labour Party did not appeal that decision and so the claimant’s claims, which now included a second and a third claim against the Labour Party, were heard on their merits by the ET. Before the ET promulgated its decision, the Court of Appeal decided in a different case that the

Labour Party was not acting as a “qualifying body” for the purposes of section 12 when selecting candidates for public office. The ET, nonetheless, upheld the claimant’s three claims. Subsequently, the House of Lords held that the ET was right to do so, as the Labour Party was estopped from challenging the ruling that it was a “qualifying body” for the purposes of the second and third claims.

100. Lord Hoffman gave the leading speech. He agreed with the Court of Appeal that the Labour Party was not acting as a “qualifying body” at the material time, but the crux of his reasoning was as follows:

“33. In my opinion, therefore, the decision that the Labour Party was a qualifying body for the purposes of section 12 was made by a competent court and is therefore binding upon the parties. It does not matter that a later decision now approved by this House has shown that it was erroneous in law...The whole point of an issue estoppel on a question of law is that the parties remain bound by an erroneous decision.

34....the issue estoppel is in principle binding between the parties in subsequent litigation raising the same issue, as in the second and third applications by Mr Ahsan...It is true that the severity of this rule is tempered by a discretion to allow the issue to be reopened in subsequent proceedings when there are special circumstances in which it would cause injustice not to do so: see [*Arnold*]...In the present case, however, I think it would be unjust if the issue estoppel did not apply to the second and third applications. Although the Labour Party knew that it had given notice of appeal in [the other proceedings] it made no attempt to obtain an extension of time for appealing in this case. Instead, it involved Mr Ahsan in a length and expensive hearing over the summer of 2001, during which the merits of all three applications were examined. It would be quite unfair for Mr Ahsan now to be told that he must start again in the county court.”

101. In *Curling and others v Securicor Limited & Group 4 Total Security Limited* [2001] EWCA Civ 358 (“*Curling*”) the Court of Appeal rejected the submission that there had been a change in the relevant law. However, Peter Gibson LJ (who gave the leading judgment) went on to say that even if a change in the law had occurred, he would not have thought it right to allow an exception to the issue estoppel that would otherwise apply. He considered that “*Arnold* was a case on its own very special facts” (para 34). He emphasised that Walton J’s refusal of a certificate had prevented any appeal and had meant that the parties were stuck with a decision which, on the ordinary application of issue estoppel, would have prevented any arguments to the contrary on the four subsequent rent reviews, with considerable financial implications (para 34). Peter Gibson LJ did not regard the facts of the current case as nearly so compelling (para 35).
102. Henderson J reviewed the *Arnold* line of authority in *Littlewoods Retail Ltd and others v Revenue and Customs Commissioners* [2014] EWHC 868 (Ch) (“*Littlewoods Retail*”). He described the facts of *Arnold* as “striking” (para 164) and characterised *Watt* and *Curling* as having taken a strict approach to recognising cases that might fall within the *Arnold* exception (para 167). Henderson J held that the circumstances in the

case before him did not come within measurable distance of the kind of change in the law which could, exceptionally, prevent an issue estoppel from operating (para 168). Whilst it was not conclusive, the fact that HMRC had not sought leave to appeal from the earlier decision that it now sought to depart from “tells strongly against permitting the issued decision in that case to be re-opened” (para 168).

103. The authors of *Spencer Bower and Handley: Res Judicata* (6th ed, 2024) describe the absence of a right of appeal as critical to the House of Lords’ decision in *Arnold* (para 8.32). They note that since *Arnold*, there “have been very few cases where special circumstances have been established” (para 8.33).

Factual precedents and issue estoppel in immigration appeals

104. In light of the parties’ submissions, it is necessary to summarise the position that applies in immigration appeals in relation to factual findings reached in earlier appeals and in relation to issue estoppel.
105. The guidelines identified in *Devaseelan v Secretary of State for the Home Department* [2003] Imm AR 1 concern the effect of factual findings made in an appellant’s earlier immigration appeal when they subsequently appeal a further decision of the SSHD. In broad summary, the guidelines indicate that the facts found in the first decision should always be the starting point and that facts personal to the appellant that were not raised in the first appeal should be treated with the greatest circumspection, unless there is some very good reason for the appellant’s failure to adduce the relevant evidence in the first appeal.
106. In *Ocampo v Secretary of State for the Home Department* [2006] EWCA Civ 1276 (“*Ocampo*”), Auld LJ held that the *Devaseelan* guidelines were also relevant to cases where the parties were not the same as in the earlier appeal, but there was a material overlap of evidence (para 25). In *AA (Somalia) v Secretary of State for the Home Department* [2007] EWCA Civ 1040, Carnwath LJ (as he then was) observed that exceptions to the ordinary principle that factual decisions do not set precedents should be closely defined and should not extend to cases where there was no more than an “overlap of evidence”. However, he noted that in all the cases in which the principle had been applied so far, the claims had not merely involved overlapping evidence “but have arisen out of the same factual matrix, such as the same relationship or the same event or series of events”. He considered the principle should be limited to such cases (para 69).
107. Singh LJ referred to this concept of a “factual precedent” in immigration cases in *Chowdhury*, when considering the effect of *DK and RK* (para 42 above).
108. In a number of earlier immigration appeals, doubts were expressed as to whether the res judicata doctrine applied with full force in this area. In *R (Tomlinson) v Secretary of State for the Home Department* [2025] EWCA Civ 253, [2025] KB 547 (“*Tomlinson*”) the Court of Appeal held that it did. Giving the leading judgment, Falk LJ summarised her conclusions, at para 66, which included the following. Lord Bridge’s statement of principle in *Thrasyvoulou* (para 98 above) is of general application; there is no reason why it should not apply to decisions of statutory tribunals in immigration cases. Issue estoppel requires an identity of issue, which will very commonly not be the case in an immigration context because a relevant matter is being

assessed at a different time in light of the then prevailing circumstances. In those circumstances the *Devaseelan* guidance will apply to the facts and evidence considered in the earlier decision. Even where issues are not identical, to the extent that facts are relied on that are “not materially different” from those put before the first tribunal, they should be regarded as already settled under the *Devaseelan* guidance for reasons of fairness. Where a judicial review challenge is made on the basis of a failure by the Secretary of State to follow an earlier determination of an issue by the FTT, principles of issue estoppel can and should be applied by analogy, recognising that the complaint is about administrative actions following earlier tribunal proceedings, rather than successive proceedings.

109. The *Upper Tribunal (Immigration and Asylum Chamber) Guidance Note 2011 No. 2* issued by Lane J (then President), pursuant to section 107 of the Nationality Immigration and Asylum Act 2002, includes the following: decisions in which a panel of judges has sat may be considered more authoritative than decisions of a single judge of the Chamber (para 6); FTT judges are expected to follow the law as set out in reported cases, unless persuaded that the decision failed to take into account an applicable legislative provision or a binding decision of a superior court (para 10); and special arrangements are made for the reporting of Country Guidance cases, which are to be treated as authoritative findings on the country guidance issue identified in the determination, unless it has been expressly superseded or replaced by any later CG determination or is inconsistent with other authority that is binding on the tribunal (para 11).

Setting aside judgments on the basis of fraud

110. It is necessary to consider *Takhar* in some detail, given Mr Sachdeva KC’s reliance upon this case. The claimant brought an action alleging that various properties she owned had been transferred to the first defendant company as a result of undue influence or other unconscionable conduct by the second and third defendants. Judgment was given for the defendants at trial. Several years later, the claimant brought a further claim seeking to have the earlier judgment set aside on the ground it had been obtained by fraud. She relied on evidence that the second and third defendants had forged her signature on a document. She had not made this allegation at the earlier trial and had not been in possession of this evidence at the time. The defendants applied to strike out the second action as an abuse of process on the basis that the claimant could, with reasonable diligence, have obtained the new evidence before the first trial. The Supreme Court allowed the claimant’s appeal.
111. Giving the leading judgment, Lord Kerr of Tonaghmore JSC emphasised that this was not a case where the claimant was challenging a finding made in the earlier proceedings; the question of her signature having been forged had not been raised or decided in the earlier trial (paras 30 and 32). He said that *Arnold* and *Virgin Atlantic* contained no “unequivocal judicial statement that seeking to set aside a judgment on the basis that it was obtained by fraud constitutes an abuse of process, if evidence of the fraud could, with reasonable diligence, have been obtained and produced at the earlier trial” (para 32). Lord Kerr also emphasised the contrast with Earl Cairns LC’s observations in *Phosphate Sewage*; this was not an instance of a claimant seeking to adduce evidence of facts “going in the same direction” as facts previously stated (paras 34 – 35). Lord Kerr said that Earl Cairns’ identification of the need for a fact “which entirely changes the aspect of the case” and which “could not by reasonable diligence have been

ascertained” before was said in a context where precisely the same relief as had previously been claimed is sought again. Lord Kerr concluded that it was not appropriate to import the requirement of reasonable diligence from this context into a different scenario “where a changed basis for success for the claimant is advanced” (para 36). Lord Kerr considered that *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 (“*Hunter*”) (para 119 below) was also concerned with a very different context, namely collateral challenge to a criminal conviction (para 39).

112. After reviewing various authorities concerned with setting aside judgments obtained through fraud, Lord Kerr observed that the policy arguments for permitting a litigant to apply to have a judgment set aside where it can be shown that it has been obtained by fraud are overwhelming (para 53). He then set out his conclusions as follows:

“54....In my view, it ought now to be recognised that where it can be shown that a judgment has been obtained by fraud, and where no allegation of fraud had been raised at the trial which led to that judgment, a requirement of reasonable diligence should not be imposed on the party seeking to set aside the judgment.

55. Two qualifications to that general conclusion should be made. Where fraud has been raised at the original trial and new evidence as to the existence of the fraud is prayed in aid to advance a case for setting aside the judgment, it seems to me that it can be argued that the court having to deal with that application should have a discretion as to whether to entertain the application. Since that question does not arise in the present appeal, I do not express any final view on it. The second relates to the possibility that, in some circumstances, a deliberate decision may have been taken not to investigate the possibility of fraud in advance of the first trial, even if that had been suspected. If that could be established, again, I believe that a discretion whether to allow an application to set aside the judgment would be appropriate but, once more, I express no final view on the question. In Mrs Takhar’s case, she did suspect that there may have been fraud but it is clear that she did not make a conscious decision not to investigate it...”

113. Lord Kerr said (at paras 56 – 57) that the relevant principles governing applications to set aside judgments for fraud had been summarised by Aikens LJ in *Royal Bank of Scotland plc v Highland Financial Partners Ip* [2013] 1CLC 596 at para 106. Lord Kerr summarised these requirements as including that “it must be shown that the fresh evidence would have entirely changed the way in which the first court approached and came to its decision”.
114. Lord Sumption said that subject to the observations he would make, he agreed with Lord Kerr’s judgment. Lord Sumption said that a cause of action to set aside a judgment in earlier proceedings for fraud is independent of the cause of action asserted in the earlier proceedings; it relates to the conduct of the earlier proceedings and not to the underlying dispute. Similarly, there could be no question of issue estoppel because the basis of the action is that the decision in issue in the earlier proceedings is vitiated by

fraud and cannot bind the parties (para 61). He also addressed the questions left open by Lord Kerr at para 55 (para 112 above), saying:

“66. I would leave open the question whether the position as I have summarised it is any different where the fraud was raised in the earlier proceedings but unsuccessfully. My provisional view is that the position is the same, for the same reasons. If decisive new evidence is deployed to establish the fraud, an action to set aside the judgment will lie irrespective of whether it could reasonably have been deployed on the earlier occasion unless a deliberate decision was then taken not to investigate or rely on the material.

67. I recognise the risk of frivolous or extravagant litigation to set aside judgments on the ground of fraud, but like other members of the court, I think that the stringent conditions set out by Aikens LJ in *Royal Bank of Scotland plc v Highland Financial Partners Ip* [2013] 1CLC 596, para 106, combined with the professional duties of counsel, are enough keep it within acceptable limits. I do not think that the imposition of further conditions would be consistent with the long-standing policy of equity of reversing transactions procured by fraud.”

115. ***Bhandal v Her Majesty’s Revenue & Customs and another*** [2023] EWHC 1498 (Ch) (“***Bhandal***”) involved a claim to set aside previous judgments on the basis they were obtained by fraud. The defendants applied to strike the action out as an abuse of process on the basis it involved an impermissible collateral attack on the earlier decisions. In the course of his reasoning, Sir Anthony Mann observed:

“69....it is no answer to an action to set aside a judgment said to have been procured by fraud that it is a collateral attack on a previous decision. In one sense it is not, because the action is not an attempt to re-litigate issues which have already been decided as such because the causes of action are different, as pointed out by Lord Sumption in *Takhar* at paragraph 61, in which he pointed out that estoppels arising from the previous action are of no relevance to the action to set aside. However, insofar as it might otherwise be viewed as a collateral attack, it is one which the law allows because of the significance of the fraud and the policy reasons which should prevent a party from using deceit together with court proceedings to procure an advantage.”

116. Sir Anthony Mann went on to say that it was necessary to distinguish between two types of action, one seeking the same relief as was sought before on fresh material and the other seeking to set aside the decision made in the earlier action for fraud (para 77). Having cited from Lord Kerr’s judgment in ***Takhar*** he continued:

“Since they are not equivalent legal situations, it does not follow that the concepts and operation of any doctrines of election necessarily apply straight from one to the other...*Takhar* makes it clear that an absence of due diligence in discovering or raising

fraud is not a defence in an action to set aside a decision for fraud. So due diligence is applied to one type of attempt to re-run an issue but not to another. One has to consider carefully whether principles applicable to one type of action or procedure should be transferred in the same form to set aside actions.”

117. In *Finzi v Jamaican Redevelopment Foundation Inc and others* [2023] UKPC 29, [2024] 1 WLR 541 (“*Finzi*”) the Privy Council held that where a claimant brought an action to set aside an earlier judgment or settlement on the ground it had been procured by fraud, the burden was on the claimant to establish: (i) the evidence of fraud was new in the sense it had been obtained since the earlier judgment or settlement; or (ii) if the evidence was not new in this sense, any matters relied on to explain why the evidence had not been deployed in the earlier action; and the claim was likely to be regarded as abusive unless it was shown that there was a good reason which had prevented or significantly impeded the use of the evidence in the original action.

Abuse of process

118. The leading exposition of what will constitute an abuse of process was given by Lord Bingham of Cornhill in *Johnson v Gore Wood & Co* [2002] 2 AC 1 (“*Johnson*”) at p.31:

“But *Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have

been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not... While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice.”

119. The abuse of process identified in *Hunter* was the initiation of civil proceedings for the purposes of mounting a collateral attack on a final decision made by a criminal court of competent jurisdiction. At 545A-E, Lord Diplock held that in these circumstances the existence of new evidence obtained since the criminal trial only justified an exception being made to the general rule of public policy against the use of such collateral attacks where the fresh evidence met the *Phosphate Sewage* requirement that the new evidence must be such as “entirely changes the aspect of the case” (para 97 above), rather than the *Ladd v Marshall* [1954] 1 WLR 1489, at p. 1491 requirement, that the fresh evidence “would probably have an important influence on the result of the case, though it need not be decisive”.
120. In *Allsop v Banner Jones Ltd (trading as Banner Jones Solicitors) and another* [2021] EWCA Civ 7, [2022] Ch 55 Marcus Smith J (giving the leading judgment) reviewed a number of cases concerned with alleged abuses of process arising from determinations made in earlier civil claims. His summary of the principles (at para 44) included the following:
- “(i) The jurisdiction to strike out proceedings as an abuse of process is one that should not be tightly circumscribed by rules or formal categorisation. It is an exceptional jurisdiction, enabling a court to protect its procedures from misuse. Thus, a court is able to indeed, has a duty to control proceedings which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right thinking people: *Hunter* [1982] AC 529, 536....
 - (ii) Any further attempt to define the circumstances in which this power should be exercised is subject to this overriding formulation of the principle, and can only be helpful if seen in this light. Thus, there can be identified a class of abuse which involves the relitigation of issues which have already once been determined by a court of competent jurisdiction in earlier proceedings....
 - (iii) However, the cases make clear that to regard relitigation as even prima facie amounting to an abuse of process would be to adopt too rigid an approach and to disregard the importance of

individual circumstance and the need to consider each case on its own facts...” (Emphasis in original.)

121. Marcus Smith J went on to identify the different considerations that applied to collateral challenges to anterior criminal decisions and earlier decisions made in civil proceedings. He concluded that the *Phosphate Sewage* test did not apply in the latter circumstances (para 44(iv) – (v)).
122. In *Orji & Orji v Nagra & Nagra* [2023] EWCA Civ 1289 (“*Orji*”) the Court of Appeal considered whether the rule in *Henderson v Henderson* applied to what had been said by a party at an earlier hearing. In summary, the claimants had begun proceedings against the defendants for trespass. Subsequently, they successfully appealed against convictions arising out of the same events and then indicated by a pre-action protocol letter that they intended to bring a claim for malicious prosecution. At a hearing before the District Judge in the trespass claim, the claimants were granted permission to amend that claim. This permission did not extend to adding a malicious prosecution claim. Subsequently, the claimants issued a malicious prosecution claim, which the defendants applied to strike out on the basis of what the claimants had said (and not said) to the District Judge at the earlier hearing as to whether they intended to further change their claim if their amendment application was granted.
123. Giving the leading judgment, Coulson LJ explained that the rule in *Henderson v Henderson* had no application to the instant case as there had been no relevant determination by the District Judge which could legitimately prevent the claimants’ subsequent pursuit of their malicious prosecution claim (para 48). Coulson LJ explained the basis for this conclusion as follows:

“46. There can be no doubt, therefore, that both *Henderson v Henderson* and *Johnson v Gore-Wood* are primarily concerned with a party seeking to raise in subsequent proceeding an issue which had either already been decided in earlier proceedings, or which could and should have been raised in those earlier proceedings. However, it is not necessary for there to be two different sets of proceedings for the rule to apply...

47. It follows that the rule in *Henderson v Henderson* can apply, not only to one set of proceedings, but to earlier interlocutory decisions in those proceedings...But it is crucial to remember that, whenever it arises, the rule in *Henderson v Henderson* requires a previous determination by the court. As Lord Hobhouse put it in *In Re Norris* [2001] UKHL 34 at paragraph 26: ‘It will be a rare case where the litigation of an issue which has not *previously been decided* between the same parties or their privies will amount to an abuse of process’ (emphasis supplied). More recently, Nugee LJ reiterated in *Wilson and Another v McNamara and Others* [2022] EWHC 243 (Ch) at [57], by reference to *Henderson v Henderson* itself, that ‘the principle does not arise if there has not been a previous adjudication’ by the court.”

124. Coulson LJ went on to indicate that the power to strike out a statement of case as an abuse of process pursuant to CPR 3.4(2)(b) was not limited to applications of the rule in *Henderson v Henderson* and that a flexible approach must always be adopted (para 55). However, he also emphasised that a party seeking a conclusion that there has been an abuse of process faces a high hurdle. It needed to be shown that the conduct of the party in question is so objectionable that they should forfeit their right to take part in the trial (para 56). No abuse had been shown in the instant case (para 77).
125. After indicating his agreement with Coulson LJ's judgment, Nugee LJ added some observations about the operation of the *Henderson v Henderson* principle, which included the following:

“84. But what all the cases have in common is that the second claim is an attempt to reopen something that has already been decided. That is where the abuse lies. That does not mean that there must have been a trial of the first claim. The principle is capable of applying if the previous proceedings have been settled by agreement. A settlement by the parties is just as much a final resolution of a claim as a judgment by a court, and it can be just as abusive to seek to circumvent it by putting forward a second claim...But if there has not been any previous decision, there is nothing for the principle to bite on. It cannot be said that a litigant is being abusive in seeking to have a second bite at the cherry if they have not yet had their first.”

126. CPR 38.7 provides that a claimant who discontinues a claim needs the permission of the court to make another claim against the same defendant if the claim was discontinued after a defence was filed and the other claim arises out of facts which are the same or substantially the same as those relating to the discontinued claim. In *King and others v Kings Solutions Group Limited and others* [2020] EWHC 2861 (Ch) (“*Kings Solutions*”) Tom Leech QC (as he then was), sitting as a Judge of the Chancery Division, considered both the operation of CPR 38.7 and the *Henderson v Henderson* form of abuse of process. This case pre-dated the Court of Appeal's decision in *Orji*. The Judge decided that it was open to a party to rely upon *Henderson v Henderson* abuse of process where the first claim had been discontinued, as well as where there had been a judgment or compromise of the earlier proceedings (para 113). In arriving at this conclusion he disagreed with the view of HHJ Matthews in *Ward v Hutt* [2018] 1 WLR 1789 that *Henderson v Henderson* abuse of process could not apply where a claimant had discontinued the earlier claim, as there had been no decision on the first claim (paras 110 – 111). It is not clear that the authorities referred to by Coulson LJ in *Orji* were cited to the court in *Kings Solutions*.

The rule in *Hollington v Hewthorn*

127. The rule in *Hollington v Hewthorn* was explained in the joint judgment given by Lord Sales JSC, Lord Leggatt JSC and Lady Rose JSC in *Evans v Barclays Bank plc and others* [2025] UKSC 48, [2026] Bus LR 328 as follows:

“144. It is a general rule of the common law that findings made by another decision-maker are not admissible as evidence of the facts found. This rule is often referred to as ‘the rule in

Hollington v Hewthorn’...As explained by the Court of Appeal in *Rogers v Hoyle* [2015] QB 265, 305, paras 39-40, the rule is founded on a principle of fairness. That principle requires that a tribunal responsible for finding facts should base its findings on its own evaluation of the evidence and not on the evaluation of someone else who is not the relevant decision-maker...

145. It would be particularly unfair to treat findings made by an earlier decision-maker as admissible against a person who was not a party to the earlier proceedings and who therefore had no opportunity to influence the findings made in those proceedings by adducing evidence or advancing arguments. This fundamental objection does not apply to someone who was a party to the earlier proceedings. In some cases, such a party may be bound by findings, for example where they give rise to an issue estoppel; or it may be an abuse of process for the party to contest them...

146....where the follow-on jurisdiction is not in issue and there is no question of issue estoppel or abuse of process, the defendants are entitled to challenge the correctness of the findings and the principle of fairness considered in *Rogers v Hoyle* remains relevant. The court or tribunal which has to decide whether the findings of the earlier decision-maker were correct can only properly do so by making its own evaluation of the evidence on which they were based and any additional evidence...”

128. Lord Sales, Lord Leggatt and Lady Rose also confirmed that even where the rule in *Hollington v Hewthorn* would apply at a trial of the proceedings, it does not preclude reliance on findings made by another decision-maker for the purposes of defeating a strike out or summary judgment application or otherwise demonstrating the strength of claims at an interlocutory stage (paras 158 – 159). In the present case, no objection is raised to my having regard to the UT’s decisions in *DK and RK* and in *Varkey* for the purposes of deciding the strike out applications.

Submissions

129. The Claimants’ skeleton argument, including an annex addressing each of the individual Claimants, ran to 44 pages. The Defendant’s skeleton argument, including a similar annex, comprised 70 pages. The Claimants subsequently filed a 19-page submission in reply and the Defendant responded with a further 22-page document. Over the course of these written articulations of their respective cases, the parties’ arguments evolved to a substantial degree and, indeed, their positions continued to develop during the course of the hearing. A number of the points raised in the skeleton arguments were no longer relied upon or had been relegated to very subsidiary supporting arguments. For this reason and in order to avoid unnecessarily lengthening what is in any event a long judgment, I intend to focus my summary of the parties’ submissions upon the main points which they advanced orally. I have read each of the written submissions in full and I bear in mind all the points made in these documents insofar as they relate to issues that remain live.

The Claimants' submissions

Issue estoppel

130. Mr de la Mare KC contended that the Defendant had failed to show any recognised exception to the issue estoppel that would otherwise apply, which would permit this court to go behind the findings made by the FTT in the appeals brought by the IE Claimants. He emphasised the public interest in the finality of litigation.
131. Mr de la Mare KC submitted that the decisions in *DK and RK* and in *Varkey* did not involve any change in the law in the *Arnold* sense; in these cases, the UT simply gave non-binding, non-conclusive generic guidance as to how tribunals were to assess the generic evidence in future TOEIC cases and did so at a relatively high level of abstraction. Adopting the Defendant's very broad approach to developments that could constitute an exception to issue estoppel would collapse the distinction between changes in the law and fresh evidence cases where the *Phosphate Sewage* requirements still applied.
132. Mr de la Mare KC argued that *Arnold* had no application to the present circumstances, as the Defendant could not rely upon the UT's assessment of the Defendant's generic TOEIC evidence in *DK and RK* and in *Varkey* at the trial of the present claims, as to do so would offend the rule in *Hollington v Hewthorn*. There was no reason why the rule in *Hollington v Hewthorn* should not apply in its full rigour; the factual precedent system was peculiar to the Tribunal. It would be unfair for the IE Claimants to be faced with the UT's assessment of the evidence in *DK and RK* and in *Varkey* when they had not been parties to those proceedings.
133. Furthermore, there were no "special circumstances" in the present cases. The situation was very different from the striking circumstances in *Arnold*; the Defendant had been able to appeal the FTT's decisions in the IE Claimants' cases, as had been done in various other cases, but in these instances it had chosen not to. Moreover, the Defendant has provided no evidence in these proceedings to explain why such appeals were not brought. Whilst the Defendant could not appeal once it had taken the subsequent decisions to grant leave to remain, these were voluntary decisions that had been made knowing this would have the effect of removing appeal rights. The SSHD had proceeded to make immigration decisions on the basis of the FTT's findings, without any attempt to resuscitate the allegations of cheating in respect of the TOEIC tests. Mr de la Mare KC also emphasised the adverse impact upon the Claimants of the Defendant resurrecting these fraud allegations.
134. In terms of the Defendant's secondary argument based on fresh evidence, Mr de la Mare KC said the Defendant had made a crucial concession in accepting that Mr Sewell's witness statements did not contain new evidence (save for the one allegedly new aspect relating to C6). This meant that even if the strictures of the *Phosphate Sewage* test did not apply (contrary to the Claimants' primary position), the Defendant could not meet the requirement of showing that it relied upon new evidence that could not with reasonable diligence have been obtained for the claimants' FTT appeals. It was striking that the only material relied on as new evidence was a few answers obtained in cross-examination of the experts who gave evidence in *DK and RK* and in *Varkey*; these were matters that could have been explored at an earlier stage of the TOEIC litigation and the Defendant was not able to say this would have led to a different outcome in the IE

Claimants' appeals. Whilst the Defendant relied upon *Takhar* for the proposition that it did not have to meet the reasonable diligence test, the decision in *Takhar* is irrelevant as it was solely concerned with the different situation of an action to set aside a judgment on the grounds of fraud in circumstances where the allegation of fraud had not been raised in the original proceedings.

135. Mr Ó Ceallaigh KC argued that none of the new evidence that had been relied upon in *DK and RK* had been adduced by the Defendant in these proceedings and, in any event, none of that evidence was directly material to the present claims. He emphasised that, as *DK and RK* and *Varkey* made clear, each TOEIC appeal before the FTT is fact-sensitive and falls to be considered on its own facts. An FTT hearing a future appeal was not bound to reach the same conclusions on the facts as the UT had done in those cases. So far as C6's case was concerned, the Defendant's alleged new evidence could not meet either the *Phosphate Sewage* or the *Ladd v Marshall* test and C6 had not misled the FTT in his written or oral evidence.

Abuse of process

136. Mr de la Mare KC argued that the SSHD's decision to grant C2 leave to remain, with the effect that his FTT appeal came to an end, was "functionally equivalent" to the settlement of a claim. The SSHD could have contested the FTT appeal and maintained the allegation of TOEIC fraud against C2 but chose not to do so, thereby depriving C2 of his day in court. The concession recorded by Mr Ó Ceallaigh KC (para 49 above) was a concession that C2 had not cheated. In any event, the categories of abuse of process were not closed and there was no case that had so far considered the factors that arose in this case.
137. Mr de la Mare KC said there was a combination of features which, taken together, meant that it would be manifestly unfair for the Defendant to be permitted to resurrect the allegation that C2 cheated in his TOEIC test, specifically: (i) by initially using C2's educational establishment as a proxy for its decision-making, it had unfairly deprived C2 of a merits-based appeal, confining him to the more limited remedy of judicial review in a manner that was held to be unfair and unreasonable in *Mohibullah v Secretary of State for the Home Department (TOEIC – ETS – judicial review principles)* [2016] UKUT 00561 (IAC) at paras 72 – 73; (ii) C2 had to litigate in order to establish his entitlement to an in-country appeal; (iii) the Parliamentary Statement (para 47 above) recognised the unfairness of the Defendant's previous approach on people, such as C2, who had not relied on their TOEIC certificate for any immigration application; (iv) the Parliamentary Statement also acknowledged that fraud would not be alleged on the part of those coming within this category; (v) C2 had been involved in litigation from 2014 – 2019 trying to clear his name; (vi) the Defendant alone controlled this process and could have let the FTT determine the fraud allegation, rather than pulling the rug from under him just before the hearing; (vii) the SSHD granted leave to remain to C2 in order to avoid the FTT hearing; and (viii) there was no attempt to re-open the fraud allegations in any of the immigration decisions that were subsequently taken in relation to C2. Mr de la Mare KC said there was a "vanishingly small" difference between C2's case and the cases of the IE Claimants.

The Defendant's submissions

Issue estoppel

138. Mr Sachdeva KC's central argument was that it would be unjust for the court to prevent the Defendant from defending these claims by proving that the Claimants had cheated in their TOEIC tests, which it now had a strong prospect of doing. He submitted that ***DK and RK*** represented a sea change that was properly regarded as a change in the law in the ***Arnold*** sense. It was not a "factual precedent" but a case where the UT prescribed the proper method of analysing the reliability and cogency of the SSHD's evidence in cases involving allegations of TOEIC fraud. It is a requirement of law that the FTT follows the ***DK and RK*** approach, as shown by language used by the UT itself and by the subsequent Court of Appeal decisions (paras 40 – 43 above). If ***DK and RK*** had been decided when the FTT considered the appeals of the IE Claimants, it would have made a substantial difference to their outcome.
139. When asked why the SSHD had not appealed the FTT's decisions in relation to the IE Claimants, Mr Sachdeva KC said there were hundreds of TOEIC-related cases at the time. If in-time appeals had been brought, the SSHD would have likely lost: the SSHD would have been stuck with the evidence given before the FTT and the UT guidance as it stood then was not particularly helpful to the SSHD. Challenging the UT's approach in ***SM and Qadir*** and/or in ***MA*** would have involved bringing appeals in a substantial number of FTT decisions and overcoming the high hurdle of persuading the UT to stay the majority of those appeals whilst the UT ruled on the correct approach to be taken. ***DK and RK*** did not come to the UT by this route; they were appeals brought by claimants who sought to rely on the APPG report, which then backfired for them. By the time ***DK and RK*** was decided, the IE Claimants had been granted immigration status, so it would not have been possible to bring out of time appeals. Seeking to revoke their immigration status at that stage would have been a much more severe action to take.
140. Mr Sachdeva KC did not accept that the absence of an appeal was an important factor in ***Arnold***. He said that whilst Lord Keith was not prescriptive about what could amount to "special circumstances", the key factors for the House of Lords were that Walton J's approach to the rent review was plainly wrong and the substantial financial impact on the tenants in light of the ongoing lease and further rent reviews. He suggested this was analogous to the instant case. He also referred to passages in the speeches of Lord Upjohn and Lord Reed in ***Carl Zeiss Stiftung v Rayner & Keeler Ltd (No. 2)*** [1967] 1 AC 853 ("***Carl Zeiss***") (which were cited in ***Arnold***) indicating that where the initial case was trifling, so that the losing party did not appeal the adverse ruling, it may be unjust to hold them bound by an issue estoppel in subsequent, more substantial proceedings. Mr Sachdeva KC said that "trifling" was a relative concept; whilst obtaining the correct decisions on immigration status was important to the Defendant, it now faced High Court claims for damages, with each Claimant seeking several hundred thousand pounds and it had received no intimation of these claims at the time of the FTT's decisions. He said I could infer that the Defendant would have taken a different approach to the FTT's decisions if it had been aware of the potential civil claims at that time.
141. Responding to Mr de la Mare KC's ***Hollington v Hewthorn*** point, Mr Sachdeva KC said it would be highly undesirable for the High Court to decide claims relating to

TOEIC fraud allegations in a different way from how they would now be decided in the Tribunal and comity considerations applied. Furthermore, the Defendant was seeking to rely on the legal approach identified in *DK and RK*, not on factual findings that were made by the Upper Tribunal and, accordingly, the rule in *Hollington v Hewthorn* was not engaged.

142. In the alternative, Mr Sachdeva KC argued that the concessions which the experts had made in their evidence to the UT in *DK and RK* and in *Varkey* constituted new evidence that could not have been foreseen, nor obtained with reasonable diligence, at the time of the IE Claimants' FTT appeals. Equivalent concessions had not been made by the experts in the evidence given in *MA*. He did not accept that the more rigorous *Phosphate Sewage* tests applied; the law had moved on from this. In the further alternative, Mr Sachdeva KC relied on *Takhar* as establishing that he did not have to satisfy a reasonable diligence requirement since the allegations in question concerned fraud. He said that whilst *Takhar* itself concerned an application to set aside a judgment on grounds of fraud, there was no reason of principle or policy why a different approach should apply in the present circumstances and it was open to this court to decide that the same approach should be taken. Insofar as *Bhandal* indicated to the contrary, it should not be followed; and *Finzi* was not binding upon this court.
143. Mr Thomann KC took me through the evidence that C6 had provided to the FTT in support of his appeal, including a list of certificates he produced and his witness statement, neither of which referred to the low score he had achieved in a Listening and Reading test a few days before the disputed tests (para 60 above). He submitted this earlier test was highly relevant to the question of whether C6 had a motive to cheat at the time of the Darwin College tests and his failure to mention this in his appeal evidence indicated he had systematically misled the FTT. In answer to my questions, Mr Thomann KC accepted that the Defendant would have been able to access the earlier test scores at the time of the FTT appeal but he argued that it would be unjust to prevent the Defendant from relying on this powerful evidence.

Abuse of process

144. Relying on *Orji*, Mr Sachdeva KC argued there had been no determination in this case capable of engaging the *Henderson v Henderson* principle; a unilateral discontinuance was insufficient.
145. He also emphasised that the caselaw showed that a broad, merits-based assessment was required, which in this case favoured the Defendant's position. He said the facts were nowhere near those required for the Claimant to establish an abuse of process. In addition to points he had already made in relation to the IE Claimants, it was noteworthy that it was C2 who was bringing the claim, rather than the party who had "discontinued" the FTT appeal. Mr Thomann KC also addressed me on C2's position. He said the terms of the Parliamentary Statement made it clear that the SSHD did not resile from the belief that there had been systematic cheating in the TOEIC tests; and, given the terms of this statement, the withdrawal of the appeal was not inconsistent with maintaining that allegation in C2's case. Mr Thomann KC also highlighted a number of points which he said showed the strength of the evidence of fraud in C2's case.

Analysis and conclusions: Issue Estoppel

146. As I explained in the Introduction, in light of the FTT's decisions on the earlier appeals, the parties agree that the Defendant is precluded by issue estoppel from asserting that the IE Claimants' TOEIC test results were obtained by fraud, unless it can show that a relevant exception applies. I summarised the exceptions relied upon by the Defendant at paras 7 – 8 above.

A change in the law

147. I begin by considering whether the UT's decisions in ***DK and RK*** and in ***Varkey*** constitute a change in the law capable of bringing the circumstances within the exception recognised in ***Arnold*** (paras 90 – 95 above). I will focus, in particular, on ***DK and RK*** for these purposes, as it is this case that the Defendant says represented the crucial sea change in the law, whereas ***Varkey*** endorsed ***DK and RK***. Addressing this question involves considering the nature and status of what was decided by ***DK and RK***, the impact of this decision on subsequent appeals to the FTT in cases of alleged TOEIC fraud, the significance of ***DK and RK*** beyond the Tribunal system, and what may amount to a change in the law in the ***Arnold*** sense.

The impact of *DK and RK* within the Tribunal system

148. I do not accept Mr de la Mare KC's submission that in ***DK and RK***, the UT did no more than give non-binding generic guidance. This is apparent both from the terms of the decision in ***DK and RK*** itself and from the subsequent Court of Appeal decisions which have addressed its effect. The impact of ***DK and RK*** needs to be understood in the particular context of the way that precedents operate within the immigration appeals system. I explained the concept of a "factual precedent" at paras 105 – 107 above. As I referred to, this is an exception to the ordinary principle that factual decisions do not set precedents. Mr Sachdeva KC suggested that Singh LJ was wrong to characterise ***DK and RK*** as a factual precedent case in ***Chowdhury*** (para 42 above), because the UT's decision prescribed an approach for future FTT appeals to follow. However, the two are not mutually exclusive. It appears to me that ***DK and RK*** was a case that *both* arrived at factual findings on the generic evidence relating to TOEIC fraud that had a precedent fact status within the Tribunal system and, *in light of those factual findings*, prescribed an approach that the FTT was to follow.

149. The UT considered that its decision provided "an opportunity for an *up-to-date evaluation of the evidence* produced by the Secretary of State in ETS/TOEIC cases"; and it described its decision as considering "the impact and *effect of that evidence as a whole*" (emphasis added; para 25 above). The UT's decision contains factual assessments of the generic evidence. Examples of this include: "there was no reason to suppose that the voice recognition process was substantially defective" (para 30 above); there was "no proper basis" for saying that the false positive rate was higher than three per cent (para 30 above); errors in the chain of custody remained "only a theoretical possibility not supported by any detailed evidence" (para 31 above); the evidence relied on by the SSHD "is not shown to be unreliable in any general sense" (para 32 above); and there was no perceptible way in which proxy test entries could have been inserted into the system after candidates had taken honest tests (para 32 above). The factual assessments reached by the UT, led it to arrive at the factual conclusions expressed at para 126 of its decision, that the evidence amounted to the virtual exclusion of relevant

error by the ETS and the virtual exclusion of motive or opportunity for proxy entries to be submitted other than by the test centres and candidates working in collusion (para 33 above).

150. In turn, it was these factual conclusions that formed the basis of the guidance for the FTT which the UT then provided at paras 127 – 129 of its decision. I have set this guidance out in full at para 33 above but, in summary, the UT said that in the circumstances it identified the effect of the SSHD’s generic evidence was that “it was clear beyond peradventure” that the appellant would have a case to answer and that mere protestations of innocence were “very unlikely to prevent the Secretary of State from showing that, on the balance of probabilities, the story shown by the document is the true one”. Further, that the FTT must proceed on the basis that this was “a highly probable fact” when assessing whether the SSHD had discharged the burden of proving dishonesty. The UT had provided additional guidance during the course of its reasoning, including that the assessment of whether the burden of proof had been discharged was to be determined against the starting point it had identified (para 27 above); and as to potential sources of corroboration in respect of evidence linking a test entry to a particular candidate (para 31 above). The UT had earlier explained at para 6 that it would “attempt to give some guidance on the approach to TOEIC/ETS appeals in general” (para 25 above). Whilst the UT emphasised on multiple occasions that each case fell to be determined on its own facts, this does not detract from the proposition that the UT was clearly identifying an approach to the three-stage assessment of the evidence that was intended to have legal force and which the FTT was expected to follow in subsequent cases.
151. The trio of decisions from the Court of Appeal I referred to at paras 40 – 43 above confirms this. Post ***DK and RK***, it was not open to the FTT to reach different factual conclusions on the same factual matrix; and the tribunal would err in law if its reasoning was inconsistent with that in ***DK and RK***, for example as to the sufficiency of the general evidence adduced by the SSHD. Accordingly, I agree that ***DK and RK*** entailed a change in the law so far as the FTT’s approach to appeals concerning TOEIC fraud was concerned.
152. It follows that if the IE Claimants’ appeals had been decided by the FTT after ***DK and RK***, the FTT would have been bound to follow that approach and the outcome of the appeals quite possibly would have been different. Certainly, the Claimants would have had more of an uphill struggle. Applying the UT’s guidance at paras 127 – 129 (para 33 above), the FTT would have been satisfied in each case that the generic evidence was “amply sufficient” to discharge the initial evidential burden on the SSHD. In light of the findings that were made in their earlier appeals, it seems probable that the FTT would then find that each appellant had provided a plausible explanation. The question would then be whether the SSHD had established the dishonesty on the balance of probabilities, bearing in mind the UT’s assessment of the generic evidence in ***DK and RK*** and its assessment that protestations of innocence were very unlikely to be sufficient in themselves.
153. Accordingly, I do not accept Mr Ó Ceallaigh KC’s contention that ***DK and RK*** would have had no discernible impact on the IE Claimants’ cases even if it had been decided before their appeals were heard by the FTT. However, I am unable to go so far to conclude that if it had been decided by that stage, it is likely that ***DK and RK*** would have led to a different outcome in either case. I go no further than the view I have

expressed in the preceding paragraph (that quite possibly the outcome would have been different) for the following reasons.

154. ***DK and RK*** does not prescribe what the outcome should be in any particular case. In both C6's and C11's cases, the FTT did find that the SSHD had satisfied the initial evidential burden. In C6's case, the Judge appreciated (as the UT later observed in ***DK and RK***) that the availability of the recording, which C6 accepted was not his voice, strengthened the SSHD's position (para 55 above). C11's case does strike a more discordant note with the guidance in ***DK and RK***, the Judge finding that the evidential burden had been met by a "narrower margin" than in ***SM and Qadir*** (para 74 above). Post ***DK and RK***, it would be expected that the FTT Judge would have little difficulty in concluding that the initial evidential burden had been met.
155. Turning to the next stages of the inquiry, in C6's case the FTT Judge proceeded to conduct a detailed evaluation of the credibility of his account, paying close regard to the points raised in cross-examination, accepting his answers and explaining why he did not find that the SSHD had established cheating on his part (paras 56 – 57 above). Without having had the benefit of hearing that oral evidence, whilst the prospects of a hypothetical post ***DK and RK*** tribunal reaching the opposite conclusion are significantly increased in light of the UT's fact-finding and guidance, I am unable to say it is more *likely* than not that this would have been the outcome. I return to the potential significance of this nuanced position when I consider ***Arnold*** at para 161 below. The position is also unclear in relation to C11, albeit for a somewhat different reason. Whilst the FTT was likely wrong to consider that the SSHD had only just met the initial evidential burden, the consequence was that the Judge only briefly addressed the credibility of C11's account, so there is little for a court to go on at this stage in terms of assessing whether the outcome would have been different if C11 had given his evidence in a post ***DK and RK*** scenario (para 64 above).

Wider impact of ***DK and RK***

156. Having examined the impact of ***DK and RK*** in the Tribunal context, I turn to consider its potential significance in the present proceedings.
157. Mr Sachdeva KC did not cite any authority establishing that the Tribunal's approach to factual precedents also applies to High Court proceedings involving an immigration context or element. He suggested this must be the case in the Country Guidance context; but even if that is so, such cases have a recognised status of their own (para 109 above). Insofar as he submitted that comity considerations required such an approach, it could equally well be said that comity considerations point to this court proceeding on the basis of the decisions made by the FTT in the IE Claimants' appeals, rather than the issues being relitigated.
158. Whilst Mr Sachdeva KC argued that ***DK and RK*** was concerned with providing binding *guidance* for future FTT appeals and, as such, was not a "factual precedent" sort of case; as I have just explained, the UT's guidance was based on its factual assessment of the generic evidence (paras 148 - 150 above). In short, ***DK and RK*** was a combination of factual precedent and linked guidance. There does not appear to me to be a legal basis for extending the application of a decision of this nature beyond the Tribunal system. Outside of the Tribunal system, the rule in ***Hollington v Hewthorn*** (paras 127 – 128 above) would therefore apply, as C6 and C11 were not parties to ***DK***

and RK (or *Varkey*). Whilst Mr Sachdeva KC made a number of points regarding the basis of the Supreme Court's decision in *Evans* that the rule in *Hollington v Hewthorn* applied in the Competition Appeal Tribunal, I am not aware of any ground for finding that this very well-established rule would not apply to High Court proceedings. Given the careful and detailed reasoning of the UT in *DK and RK* and its deep familiarity with the overall course of the TOEIC litigation, this might be thought to be an undesirable position, but no relevant exception to the rule in *Hollington v Hewthorn* was cited to me

159. This means that the findings of fact made by the UT in *DK and RK* as to the strength of the SSHD's generic evidence would not be admissible as evidence of the facts found for the purposes of trial in the present proceedings and I have already explained that the UT's guidance was predicated on those factual findings. As Mr de la Mare KC pointed out, it would then be a surprising position if the issue estoppels that would otherwise apply to the IE Claimants' cases could be defeated by subsequent caselaw that could not be applied in the High Court jurisdiction and which was itself grounded in factual findings that would be inadmissible at the trial in this jurisdiction.

A change in the law in the *Arnold* sense

160. Whilst I accept that Lord Keith in *Arnold* was not prescriptive in terms of the circumstances that could amount to a subsequent material change in the law capable of avoiding an issue estoppel, for the reasons I have just explained, the present situation appears to be some considerable way from the kind of situations that he had in mind.
161. Furthermore, even if I were wrong about the applicability of the rule in *Hollington v Hewthorn* (contrary to my primary conclusion above), it would still be the case that the application of *DK and RK* does not provide an unequivocally different answer to the question of whether the IE Claimants cheated in their TOEIC tests. As I have explained, if their appeals had been decided after *DK and RK*, the outcomes quite possibly would have been different, but I have put it no higher than this, as it would ultimately depend upon a fact-sensitive evaluation of, in particular, the quality of the evidence adduced by the appellants (paras 152 – 155 above). This is a long way from the binary situation in *Arnold*, where Walton J's construction of the lease was plainly wrong and the correct answer was clear (paras 90 - 91 above); or even from the situation in *Watt* (where issue estoppel nonetheless applied) where the Supreme Court was clear that the Labour Party was not a "qualifying body" within the statutory definition, with the consequence that the ET would not have had jurisdiction if this had been appreciated at the time (paras 99 - 100 above).
162. Accordingly, I do not consider that the UT's decision in *DK and RK* (or in *Varkey*, which endorsed *DK and RK*) amounts to a change in the law of the kind that could bring the present situation within the exception to issue estoppel that was recognised in *Arnold*.

Special circumstances in the *Arnold* sense

163. However, given the lack of prescription in *Arnold* as to what may amount to a change in the law for these purposes and given I have accepted that *DK and RK* brought about a change in the law in terms of the FTT's approach to TOEIC fraud appeals (para 151 above), an alternative way of assessing matters is to consider in the round whether this

amounts to “special circumstances” sufficient to enable the question of whether the IE Claimants cheated in their TOEIC tests to be relitigated in these proceedings. On this approach, the conclusions I have already reached as to extent to which *DK and RK* would have made a difference to the outcome of the IE Claimants’ appeals (if they were heard after the UT’s decision) and as to the impact of the rule in *Hollington v Hewthorn* are relevant as factors to be weighed in the overall evaluation of whether special circumstances have been established. Mr Sachdeva KC rightly accepted that showing a subsequent change in the law was not sufficient in itself for the *Arnold* exception to apply.

The significance of an opportunity to appeal

164. Mr Sachdeva KC argued that the fact the tenants were unable to appeal Walton J’s judgment did not play a key part in the House of Lords’ decision in *Arnold* (para 140 above). I reject that submission. The absence of a right of appeal was one of the factors highlighted by Lord Keith (para 94 above). Mr Sachdeva KC stressed that Lord Keith did not mention the absence of a right of appeal in the passage at 108H – 109B. However, this is a bad point. At this juncture, Lord Keith was addressing the circumstances in which a party could rely upon further evidence that had not been adduced in the earlier proceedings; it was immediately after this section of his speech, that his Lordship turned to consider whether and in what circumstances subsequent changes in the law could give rise to “special circumstances” (paras 92 - 93 above). It is quite evident that the inability to appeal was one of the central reasons why the tenants in *Arnold* would have suffered a considerable injustice if the court had decided the parties were bound by Walton J’s erroneous construction of the lease. The inability to appeal in *Arnold* was emphasised by Peter Gibson LJ in *Curling* (para 101 above) and by the authors of *Spencer Bower and Handley: Res Judicata*, the leading textbook in this area (para 103 above).
165. Equally, if the party who seeks to avoid the effect of an issue estoppel chose not to appeal the earlier decision when it was able to do so, this will point against the existence of special circumstances; albeit this element alone is not conclusive. In *Watt*, Lord Hoffman, regarded the fact the Labour Party had not tried to appeal the earlier decision of the EAT as highly significant (para 100 above). Similarly, in *Littlewoods Retail*, Henderson J concluded the fact HMRC had not tried to appeal the earlier decision it now sought to depart from told strongly against it (para 102).

The narrowness of the *Arnold* exception

166. More generally, the narrowness of the *Arnold* change in the law exception is underscored by the subsequent authorities (paras 99 – 103 above). Mr Sachdeva KC sought to diminish the significance of Lord Hoffman’s reasoning in *Watt* by suggesting that para 34 of his speech failed to recognise the exceptions to issue estoppel. However, it is quite clear that paras 34 and 35 of his Lordship’s speech are to be read together; and that in the latter paragraph he specifically considered the special circumstances exception (para 100 above). Mr Sachdeva KC also suggested that no weight should be accorded to Henderson J’s decision in *Littlewoods Retail*, because he failed to appreciate that Lord Keith had not regarded the absence of an appeal as significant in *Arnold*. However, I have just explained why this is an incorrect characterisation of Lord Keith’s reasoning.

The SSHD's decision not to appeal in these cases

167. It is accepted that the SSHD did not attempt to appeal the FTT's decisions in the IE Claimants' cases. It is also accepted that, in terms of in-time appeals, there was no legal barrier to the SSHD doing so. Mr Sachdeva KC advanced a number of related reasons why this course had not been taken. I have summarised these at paras 139 – 140 above. I will address each of these points. Before doing so, I emphasise that it is striking that the Defendant has provided no evidence at all as to the reason/s why no attempt was made to appeal the FTT's decisions. Instead, I am invited to draw inferences from what are said to be the known facts.
168. Firstly, I do not accept it is self-evident that in-time appeals would have been unsuccessful, as Mr Sachdeva KC contended. His position was that it was only after the sea-change brought about by ***DK and RK*** that the SSHD could have succeeded in appealing (if it had still been possible to bring an appeal at that juncture). However, I do not consider that the position is as binary as he suggests. There are two elements to this. Firstly, as to the alleged sea-change, I have already explained my assessment of the extent to which it would have made a difference if the FTT, or in this scenario the UT, had decided the IE Claimants' cases after ***DK and RK***, rather than beforehand (paras 152 - 155 above). Secondly, in terms of whether in-time appeals could have been brought, it appears to me that there was scope for timely appeals from the FTT's decisions, in part because of the FTT's reasoning - at least in C11's case and, more substantially in both cases, because the SSHD's arguments that prevailed in ***DK and RK*** could have been pursued at an earlier stage.
169. The FTT Judge's decision in C11's case was heavily informed by his conclusion that the SSHD had only discharged the initial evidential burden by "an even narrower margin" than that indicated by the UT in ***SM and Qadir*** (para 63 above). Arguably, this approach erred in failing to recognise that matters had moved on considerably since the UT's expression of concern over the accuracy of the ETS' voice recognition assessments in ***SM and Qadir***; given C11 accepted that the recording was not of his voice (para 18 and 63 above). A challenge could also have been raised to the reliance placed on the APPG report, a point the SSHD did take in a subsequent case (para 29 above). Further, the Judge's reliance on C11's apparent lack of motivation to cheat does not appear to reflect the analysis in ***MA*** (para 22 above). There do not appear to have been equivalent potential grounds of appeal in C6's case.
170. In terms of the more generic arguments the SSHD could have pursued at the time, it appears that much of the UT's reasoning in ***DK and RK*** was based on factors that also existed at the time of the FTT's decisions in the IE Claimants' cases. By way of illustration, this includes: that the chain of custody evidence needed to be placed in context (para 28 above); that whilst there was expert evidence as to what *could* go wrong, as had been summarised in ***MA***, there was no specific evidence that this had occurred in practice (paras 28 and 31 above); ETS's standing as an organisation with an international portfolio of well-regarded tests (para 32 above); and there was no reason to consider that anybody other than the candidate and the test centres would have wanted to falsify the results (para 32 above). During his oral submissions, Mr Sachdeva KC described the UT's reasoning in ***DK and RK*** as having brought "common sense to bear" on the TOEIC fraud issues. If that is right, then this is "common sense" which the SSHD could have urged upon the UT at an earlier stage; it was not dependant upon future developments that had yet to occur at the time of the IE Claimants' appeals in

2019. There was clearly opportunity for the SSHD (who had the benefit of an overview of the state of the TOEIC litigation) to seek fresh or further guidance from the UT by the time of the FTT's decisions in the IE Claimants' cases. The UT's reasoning in *SM and Qadir* had been superseded by the availability of the ETS' voice recordings and the UT had found it unnecessary to make specific findings about the chain of custody expert evidence it had heard in *MA* (para 21 above). A lead appeal or appeals could have been identified with a view to the UT hearing submissions and expert evidence on the generic issues, with stays sought for other appeals behind the lead cases.

171. I appreciate I have to be careful when looking back with the wisdom of hindsight, but I do not have to be satisfied that the SSHD would have been successful if timely appeals to the UT been pursued; rather, I am explaining why I do not accept Mr Sachdeva KC's submission that there was "literally no point" in bringing in-time appeals because the SSHD was at that stage stuck with unhelpful guidance from the UT and any appeals would have failed. In turn, as I do not accept this proposition, in the absence of any direct evidence as to the Defendant's reasons for not appealing, I am unable to infer – as I was invited to do - that this was the reason why the SSHD did not try to appeal the FTT's decisions in these cases. The IE Claimants' appeals were decided by the FTT on 25 July 2019 (C6) and 19 August 2020 (C11). In his oral reply to Mr Sachdeva KC's submissions, Mr de la Mare KC indicated that an internet search had revealed that between 28 September 2018 and 25 March 2022 (when *DK and RK* was promulgated) the SSHD had appealed FTT findings that TOEIC fraud had not been proven in as many as 76 cases. This reinforces the point that the SSHD could have appealed the FTT's decisions in the IE Claimants' cases.
172. I do not need to reach a specific conclusion as to why this step was not taken; for present purposes it is sufficient that I am satisfied that this was a course open to the SSHD which they chose not to take. However, insofar as I am asked to draw inferences, the most obvious explanation for the absence of any appeals is the simple one that the IE Claimants' accounts had been believed and, particularly in C6's case, the FTT Judges, who had the benefit of hearing his account tested in cross-examination, provided detailed reasons for reaching this conclusion.
173. It is accepted that the SSHD would not have been able to bring late appeals post *DK and RK*, as the IE Claimants had been granted leave to remain in the interim. However, these were steps the Defendant chose to take, after deciding not to appeal the FTT's decisions. For reasons I have explained, this is a powerful argument in favour of the usual position on finality applying to the FTT's decisions that the Claimants had not been shown to have cheated in their TOEIC tests.

Further relevant factors

174. In this context, I note that the TOEIC tests in question date back to 2011 in C6's case and to 2012 for C11. Thus, the Defendant seeks to resurrect allegations about events that occurred fourteen or more years ago. I accept, as Ms Middleton says, that this is likely to cause evidential difficulties for the Claimants, who reasonably believed from the Home Office's subsequent conduct, that the allegations they had cheated were at an end after their successful FTT appeals in 2019; a position which itself only came about after the lengthy litigation that I have described. For the avoidance of doubt, I attach less weight to Ms Middleton's concerns that having to contest the Defendant's allegations of fraud in these proceedings would cause additional psychiatric injury to

the IE Claimants. I say this, not because I reject that proposition, but simply because it is not something that I have any expert medical evidence on.

175. I am not persuaded that this is an instance where the decisions in these FTT appeals were “trifling” relative to the High Court damages claims the Defendant now faces, so as to render it unjust for issue estoppels to apply to the earlier conclusions reached by the FTT in relation to the allegations of TOEIC fraud (para 140 above). Even when examined from the Defendant’s perspective (as Mr Sachdeva KC submitted), I do not consider that decisions regarding the status of a person to remain in the UK, with all the implications this brings, can be characterised as “trifling” or anything close to this and, again, I have no evidence at all that this was what motivated the Defendant’s thinking at the time. The present cases appear to be far removed from the kind of circumstances that Lord Upjohn and Lord Reed had in mind in *Carl Zeiss*, where their Lordships were highlighting the injustice that could result if issue estoppel were thought to be an absolute rule.
176. In terms of the potential for injustice, I bear in mind that it is the Claimants who are seeking to rely on the issue estoppels in support of civil claims they have brought seeking substantial damages and that in doing so they seek to “stop the clock” in terms of the UT’s approach to the SHHD’s generic evidence of TOEIC fraud at a pre **DK and RK** point. However, this concern is tempered by my assessment of the impact that **DK and RK** would have had on these particular cases and also the inadmissibility of the UT’s generic findings of facts in the present case (paras 152 – 159 above).
177. I do not consider the sheer fact that the Defendant now faces High Court claims for substantial damages gives reason to find that an exception to the issue estoppel rule applies. If this were the case, it would be a significant inroad into the principle of finality, meaning that issue estoppels would be avoided in many instances. Further, whilst Mr Sachdeva KC referred to the Home Office facing damages claims for “millions and millions” of pounds, the evidence is rather more limited. It is only the cases where issue estoppel potentially applies that can be relevant for the purposes of this factor. In terms of the Bindmans LLP Claimants, there are only two live claims where issue estoppel is asserted (the Defendant having chosen to settle certain other claims) and I was not told how many of the potential nine claims I referred to at para 84 above involve issue estoppels. From the information I was given, there is nothing to indicate that the Home Office is facing a flood of analogous damages claims (para 84 above). Additionally, absent any direct evidence on this from the Defendant (which it could have chosen to adduce), I am not in a position to infer that the Defendant would have taken a different course had civil claims for damages been intimated immediately after the FTT’s decisions.
178. I do take account of the impact on this litigation of my reaching a conclusion that the Defendant is prevented from advancing the contention that the IE Claimants cheated in their TOEIC tests. I emphasise that I am only able to do this in a general sense. Neither party addressed the potential impact on the pleaded claims and defences in any detail; and any dispute about the effect of issue estoppel applying on the Defendant’s ability to pursue the defences that have been raised to the particular causes of action, will fall for resolution at a later stage. However, on any view, it is evident from the pleaded issues I have summarised at paras 68 – 81 above, that this will likely have a significant impact on the way that the Defendant is able to defend the claims and I bear this in mind. I do so with this qualification, it seems to me that there is likely to be a distinction

between allegations that the particular IE Claimants cheated in their tests (precluded by issue estoppel if it applies) and pleaded allegations and counter allegations about the state of the generic evidence and the Defendant's knowledge of it at particular times which, on the face of it, do not appear to be caught by the *res judicata* doctrine, albeit the dividing line between the two may be less than straightforward.

Conclusion

179. Looking at matters in the round and weighing up all the factors I have discussed, I am not persuaded that the Defendant has shown that this is a situation where special circumstances exist as a result of a subsequent change in the law such as to make it unjust for issue estoppel to apply to the FTT's rejection of the allegation that the IE Claimants' obtained their TOEIC results by fraudulent means. The issue estoppel rule is reflective of the strong public interest in achieving finality and, as I have explained, the *Arnold* exception is a narrow one. The change in the law relied upon in the present case is very different from the kind of clear-cut binary legal development that was relied upon in *Arnold*; the UT's decision in *DK and RK* does not in and of itself establish that the FTT was wrong to reach the conclusions that it reached in the IE Claimants' appeals and the factual findings made in *DK and RK* would not be admissible in the High Court trial of these claims. The Home Office could have appealed the FTT's decisions and has not provided any cogent explanation as to why it did not do so, let alone one capable of establishing sufficient injustice to displace the usual principles of finality, in circumstances where the Defendant seeks to resurrect allegations of TOEIC fraud by the IE Claimants many years after the events in question.

New expert evidence before the UT

180. It will be appreciated from what I have said earlier, that the Defendant's secondary argument is that the expert evidence given before the UT in *DK and RK* and in *Varkey* constitutes new evidence, such that it would be unjust if issue estoppel were to prevent the Defendant from arguing in these proceedings that the IE Claimants had obtained their TOEIC results by fraud.
181. Whether or not the Defendant must also show that the new evidence entirely changes the aspect of the case (para 97 above), it is agreed that subject to the *Takhar* submission that I will address below, it is incumbent on the party seeking to avoid the effect of an issue estoppel to show that the evidence in question could not with reasonable diligence have been obtained at the time of the previous hearing: *Virgin Atlantic* at para 22 (para 87 above), following *Arnold* at 108H – 109B (para 92 above). However, the Defendant has failed to do so in this instance.
182. Mr Sachdeva KC indicated the Defendant relied upon the following new evidence:
- i) Professor Sommer's acceptance in *DK and RK* that he was merely putting forward suggestions about things that could go wrong, rather than evidence that anything had gone wrong (para 28 above);
 - ii) Professor Sommer's acceptance in *DK and RK* that candidates would not remain in ignorance if tests were being taken on their behalf; and his conclusion that it was very unlikely that there were accidental errors in the production or transmission of results (para 28 above);

- iii) The greater caution Professor Sommer had displayed in his evidence in ***DK and RK*** in comparison to what he had said in the APPG session and his acceptance that he was not able to identify specific points at which things had gone wrong (para 29 above);
 - iv) Mr Stanbury's acceptance recorded at para 93 in ***Varkey***, that the possibility of voice files being wrongly attributed to a candidate was "remote" and that he had not seen any evidence to suggest how robust, or otherwise, the Look Up Tool was;
 - v) Mr Stanbury's acceptance in ***Varkey*** that much was speculation in relation to the various types of fraud (para 38 above); and
 - vi) Mr Stanbury's acceptance in ***Varkey*** that his theorising over whether genuine candidates would have been aware of test results being uploaded from hidden rooms was "nothing more than speculation" (para 38 above).
183. I am content to proceed on the basis that this was not evidence that had been given prior to the hearing of the IE Claimants' FTT appeals (although I do not, for example, have a transcript of the evidence that the experts gave to the UT in ***MA***). I also accept that the matters relied upon are, in the main, evidence rather than findings of fact as Mr de la Mare KC suggested (with the caveat that the material I have referred to at (iii) is partly the UT's own comment). Insofar as Mr Sachdeva KC also sought to rely on para 108 in ***Varkey*** (para 39 above), this did contain the UT's findings of fact and so I have disregarded it for these purposes.
184. I do not accept that any of this new evidence could not have been obtained using reasonable diligence by the time when the IE Claimants' FTT appeals were heard. Both Mr Stanbury and Professor Sommer gave evidence before the UT in the earlier ***MA*** case (para 20 above). These matters could have been put to them in cross-examination at that stage. It also appears that a significant number of these points would have been self-evident at that earlier stage, in particular that both experts relied upon a series of theoretical possibilities rather than things they knew had gone wrong in practice. The Defendant has not shown that any of the concessions made by the experts in ***DK and RK*** or in ***Varkey*** were based upon new material that could only have been brought to their attention after ***MA*** was heard by the UT.
185. There is an additional reason why the Defendant cannot succeed in its secondary argument. Even if the ***Phosphate Sewage*** requirement of showing that the new evidence entirely changes the aspect of the case (para 97) does not apply, which I will assume in the Defendant's favour without deciding, the Defendant still has to show that the evidence would "probably have had an important influence on the result of the case" (para 119 above) or some equivalent formulation; absent this, it is very hard to see how injustice can be found to flow from the application of the usual principles of finality.
186. However, the Defendant is a long way from being able to show this in the present cases. As my earlier summary of the reasoning in ***DK and RK*** and in ***Varkey*** shows, these pieces of evidence from the experts were but a small part of the overall reasoning and conclusions of the UT in those cases. I am quite unable to say that these limited concessions, largely concerning matters that were already self-evident, would have an

important influence on the question of whether the IE Claimants cheated in their TOEIC tests.

187. Accordingly, as it cannot meet either of the cumulative “reasonable diligence” and “important influence” requirements, the Defendant has failed to establish the new evidence exception to issue estoppel on the basis of the expert evidence subsequently given to the UT.

The *Takhar* submission

188. As I explained at para 181 above, the conclusion I have just expressed is subject to the Defendant’s reliance on *Takhar*, which I will now address. I do not accept Mr Sachdeva KC’s submission that the Supreme Court’s decision in *Takhar* can be applied to the present circumstances. In that case the reasonable diligence requirement was held not to apply to a situation where the claimant had brought an action to set aside an earlier judgment on the basis it was obtained by fraud in circumstances where fraud had not been alleged in the original proceedings (paras 110 - 112 above). Lord Kerr and Lord Sumption both specifically distinguished the situation from one where a party sought to re-litigate a judicial finding made in the earlier proceedings (paras 111 and 114 above) and it is evident that different policy considerations involving finality are engaged in such circumstances. There is nothing in the judgments in *Takhar* that suggests their Lordships’ reasoning should be applied beyond the context of an application to set aside an earlier judgment on grounds of fraud, to a situation where a subsequent claim seeks to re-litigate an issue that has already been decided between the parties. The caselaw that Lord Keith reviewed when analysing the policy arguments concerned setting aside judgments obtained through fraud. *Bhandal*, the only subsequent authority I was shown on this point, reinforces, rather than undermines this impression (paras 115 – 116 above).
189. I also note that if there was any force in Mr Sachdeva KC’s proposition that an analogous approach should be taken to that which applies to applications to set aside judgments obtained by fraud, the Defendant would have to show that the fresh evidence entirely changed the way the first court came to its decision (para 113 above). I have already explained that the Defendant is unable to establish this (paras 185 - 186 above).
190. In the context of applications to set aside judgments on grounds of fraud, there remains an unresolved question of whether the *Takhar* approach should be applied in a situation where fraud was unsuccessfully alleged in the earlier proceedings – compare Lord Sumption’s obiter dicta in *Takhar* with the Privy Council’s decision in *Finzi* (para 127 above). However, it is unnecessary for me to resolve that question; for reasons I have just explained, *Takhar* does not in any event assist the Home Office.

New evidence in C6’s case

191. I have explained the evidence the Defendant relies upon and its alleged significance at paras 77 and 143 above.
192. However, the Defendant cannot show that C6’s earlier test scores could not have been obtained with reasonable diligence at the time when C6’s FTT appeal was heard. Indeed, Mr Thomann KC fairly accepted that the Defendant would have been able to access these test results at that time (para 143 above).

193. On the face of it, this is a complete answer to the Defendant's contention. Whilst Mr Thomann KC referred to the injustice to the Home Office if it was not permitted to re-open the question of whether C6 cheated in light of this evidence, I do not understand the leading authorities to recognise a broader exception to issue estoppel permitting a party to re-open the issue that was previously litigated because that party overlooked potentially significant evidence that was available to it at the time. To the contrary, both *Virgin Atlantic* and *Arnold* identified the need to show that the new evidence could not have been obtained by reasonable diligence at the earlier stage (paras 87 and 92 above).
194. Even if there were a broader exception (contrary to the conclusion I have expressed in the preceding paragraph), the circumstances are not all one way in terms of injustice, as the Defendant suggests. On the one hand, I accept that evidence about the relatively poor scores C6 obtained on 5 November 2011 was relevant material that appears to assist the Home Office's position that C6 cheated a few days later. However, I also note that the FTT Judge, who had the benefit of hearing him cross-examined, found that C6 was an impressive witness (para 56 above) and that in arriving at his decision he only accorded "some very minor weight" to C6's apparently good standard of English (para 56 above), which this material is said to undermine. In terms of injustice, I also note that the Defendant seeks to raise for the first time evidence that it had all along about events that occurred as far back as 2011.
195. Furthermore, on the material before me, I am not in a position to find that C6 positively misled the FTT about the earlier tests he had taken. I do not have a transcript of his evidence and there is nothing in the material I do have, including his witness statement, to indicate that he falsely denied having taken an earlier TOEIC test unsuccessfully. Whilst there was some argument before me as to whether the disclosure duty identified in *R v The Secretary of State for the Home Department ex p. Kerrouche* [1997] Imm. A.R. 610 applies to parties other than the Secretary of State, I do not need to resolve this point as the obligation is not to knowingly mislead and I have concluded that there is no basis for me to find that C6 did knowingly mislead the FTT.
196. In short, this is simply an instance of the Defendant impermissibly seeking to have a second bite at the cherry when, for unexplained reasons, it failed to deploy evidence that was available to it at the time of C6's FTT appeal.

Analysis and conclusions: abuse of process

197. As I explained at para 4 above, the abuse of process argument is focused on the position of C2, it being accepted that no question of issue estoppel arises in his case as his FTT appeal did not proceed as he was granted leave to remain (para 49). It is unnecessary to consider an abuse of process argument in relation to C6 and C11, as I have already decided that issue estoppel prevents the Defendant from raising allegations that they obtained their TOEIC tests by fraudulent means. The parties agreed that the onus is on C2 to establish that the conduct in question is abusive.
198. It is clear from the authorities I cited earlier that the *Henderson v Henderson* form of abuse of process can only arise where there has been a previous determination in the proceedings in which it is said the point should have been raised, whether by way of a court judgment or an agreed settlement of the claim. This principle was recently affirmed and explained by both Coulson LJ and Nugee LJ in *Orji* (paras 123 and 125 above). No basis has been shown for me to depart from this approach, which is binding

upon me. As I noted earlier, it does not appear that the relevant authorities were cited to the High Court in *Kings Solutions*, as they are not referred to in the judgment (para 126 above). As Mr de la Mare KC fairly accepted, *Kings Solutions* cannot be reconciled with the Court of Appeal's later decision in *Orji*.

199. I do not accept Mr de la Mare KC's submission that the circumstances in which C2's appeal did not proceed was "functionally equivalent" to a settlement of a claim. In this instance, the FTT made no decision on C2's appeal and indeed a decision could not have been made as the FTT no longer had any jurisdiction to do so (para 49 above). Furthermore, the SSHD's grant of leave to remain, which brought the appeal to an end, was consequent upon the Parliamentary Statement, in which it was said that no further action would be taken in cases where the TOEIC certificate had not been used in an immigration application (para 47 above). Accordingly, in and of itself, the grant of leave to remain did not indicate any acceptance by the Home Office that C2 had not cheated in the TOEIC test. Following the Parliamentary Statement, the question of whether C2 had acted fraudulently in that regard was simply no longer relevant to his immigration status.
200. Even if the *Henderson v Henderson* form of abuse could *potentially* apply in these circumstances (contrary to my primary conclusion above), I would not have found on the facts that it was abusive for the Defendant to pursue the allegation that C2 obtained his TOEIC test results by fraudulent means. This is for the reasons I explain at paras 202 – 206 below.
201. As I explained at para 124 above, the court's power to strike out a statement of case or part of a pleading as abusive is not limited to situations where the rule in *Henderson v Henderson* applies. I accept the jurisdiction is a flexible one, able to accommodate new circumstances (paras 120 and 124 above). However, the authorities also emphasise that there is unlikely to be a finding of abuse unless the later proceedings involve "unjust harassment" of a party (para 118 above); and that the hurdle is a high one, it needing to be shown that the conduct of the party in question is so objectionable that they should forfeit their right to pursue this issue (para 124 above).
202. I turn to the points relied upon by Mr de la Mare KC (paras 136 – 137 above). The Parliamentary Statement in fact reiterated the SSHD's belief that deception had been committed, as well as explaining that no further action would be taken in certain cases for a reason that did not of itself indicate an acceptance that cheating had not occurred (rather, it was because the certificate had not been used for an immigration application). In these circumstances, it is difficult to see how the grant of leave to remain in C2's case was other than a reflection of the fact he had not used his TOEIC certificates in his immigration applications and, in particular, it did not convey an acceptance that he had not cheated. What was said by counsel at the FTT on 5 November 2019 did not alter this. Consistent with the Parliamentary Statement, counsel for the SSHD simply accepted that the suitability requirements under the Immigration Rules were now met (para 49 above), there was no concession made that C2 had not cheated. Furthermore, the Parliamentary Statement was concerned with a revised approach to immigration applications, it did not say of those who came within the ambit of this change in policy, that the Home Office would never raise allegations that they had committed TOEIC fraud in any context.

203. I can see no merit in the suggestion that despite the Parliamentary Statement, the SSHD should have continued to deny C2's application for leave to remain and permitted his FTT appeal to proceed to a hearing (which C2 may or may not have won) and, indeed, that it was unfair for the SSHD not to do have done so. To the contrary, it was the SSHD's public law duty to act in a manner consistent with the Parliamentary Statement; and this meant granting leave to remain in C2's case, with the consequence that the FTT no longer had jurisdiction to hear an appeal which challenged an earlier and now historic refusal to grant him leave to remain. The same applies to the subsequent decisions that were made in relation to C2's immigration status.
204. The suggestion that the SSHD acted in this way to "pull the rug" from under C2 and in order to avoid a hearing that the Home Office thought it would lose is groundless. No basis has been shown for me to draw this inference. Firstly, there was an alternative, perfectly sound reason for the SSHD to act as it did, as I have identified in the preceding two paragraphs. Secondly, whilst there is no need for me to predict the outcome of the FTT appeal and I acknowledge that there were also points to be made in C2's favour, this was not a case where the Home Office would have felt particularly pessimistic about the prospects of success. The SSHD had succeeded at the previous FTT hearing at which C2 had given evidence, albeit the decision was overturned on appeal (para 46 above). C2 accepted that the disclosed recording was not of his voice. Colwell College had a high rate of invalid tests overall and in relation to the session in which C2 said he took the test (para 52 above). Despite this, C2 claimed in his witness statement not to have seen anything to cause him suspicion when he took the test. His 2012 Colwell College certificates were arguably out of step with other tests C2 had taken. He had obtained poor results in language proficiency in 2010 and in tests taken in 2015 he had failed to achieve the B2 standard.
205. I accept that C2 had been involved in a lengthy legal battle and one in which he was initially unfairly restricted to a judicial review application against his educational establishment and where he had to litigate simply to establish his (then) entitlement to an in-country appeal (para 137 above). However, these background factors in themselves do not come close to rendering the Defendant's conduct abusive, given, as I have explained, there was good reason for granting C2 leave to remain which did not imply any acceptance that he had not cheated and which was not motivated by denying him a right of appeal. I also bear in mind that this is not a case where the Home Office has sought to take legal action against C2, rather it is a situation where the Claimant argues that the Defendant is unable to defend a claim for substantial damages by relying upon a line of defence that has not been the subject of an earlier judicial determination.
206. I am conscious that if I do not find that there is an abuse of process in C2's case, he will face allegations that he obtained his TOEIC certificate by fraudulent means, whereas I have found that the Defendant is precluded from raising the equivalent allegations in C6's and C11's cases. However, there is good reason for this distinction. Their appeals were heard by the FTT who decided the issue in their favour and the Defendant then chose not to appeal. There is nothing equivalent to this in C2's case and he has to meet the high hurdle of showing an abuse of process. Given that the circumstances in C2's case would otherwise be a long way from amounting to an abuse of process, I do not see how the situation can become abusive, so as to prevent the Defendant from pursuing the defence it would otherwise be able to pursue, simply because issue estoppels will apply in two of the other claims.

207. Overall, therefore, C2 has failed to establish that it is an abuse of process for the Defendant to assert by way of defending these proceedings that he obtained his TOEIC test results by fraudulent means. For the avoidance of doubt, in light of the conclusions I reached earlier regarding the inadmissibility of the UT's findings in ***DK and RK*** at a trial of the present proceedings (paras 157 - 159 above), I have not treated the ***DK and RK*** developments as a significant additional reason why abuse of process is not established.

Summary and outcome

208. I have concluded that the Defendant is prevented from relying on the assertions in its Defences / Amended Defences that C6 and/or C11 obtained their results in their TOEIC tests by fraudulent means. This is because of the principle of issue estoppel. Both C6 and C11 successfully appealed to the FTT against adverse immigration decisions made on the basis that they had cheated in these tests. The Defendant, who chose not to appeal those decisions, accepts that issue estoppel applies unless it can bring the circumstances within a relevant exception. For reasons I have explained at paras 147 – 179, I do not consider that the UT's subsequent decisions in ***DK and RK*** or in ***Varkey*** give rise to a relevant change in the law and/or to "special circumstances" bringing the situation within the narrow exception regarding injustice resulting from subsequent changes in the law that was recognised by the House of Lords in ***Arnold***.
209. I have also rejected the Defendant's secondary case that issue estoppel does not apply because of new evidence becoming available since the FTT's decisions; the Defendant has not shown that the new evidence, such as it is, could not have been obtained with reasonable diligence at the time of the FTT appeals or that it would have had an important influence on the question of whether the IE Claimants had cheated (paras 180 – 190 above). The Defendant has also failed to establish the new evidence exception in relation to the specific evidence it seeks to rely upon in C6's case (paras 191 – 196 above).
210. The position is different in C2's case where, for good reason, his appeal was not heard by the FTT and so no decision has previously been made on the allegation that he had cheated in his TOEIC test. For the reasons identified at paras 197 – 207 he has failed to show that it is an abuse of process for the Defendant to assert in these proceedings that he obtained his TOEIC test results by fraudulent means.
211. The parties will need to consider carefully which passages in the Defence / Amended Defence fall to be struck out in light of my ruling on issue estoppel. A number of passages are listed in the individual application notices, but I have not heard detailed argument as to the impact of a ruling to this effect. The parties will also want to consider the point I have raised at para 178 above. If the parties are unable to agree on the parts of the pleading that are to be struck out, I will consider written submissions from them on this topic. I will also give the parties an opportunity to provide written submissions on other consequential matters including costs.