Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/06466/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 February 2018	**On 20 March 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR DHANRAJSINH PARMAR
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr E Tufan, Senior Presenting Officer
For the Respondent: Ms E Aryee, Solicitor of Visa and Migration Limited

DECISION AND REASONS

1. In this decision the Appellant is referred to as the Secretary of State and the Respondent is referred to as the Claimant.

2. The Claimant, a national of India, date of birth 19 December 1990, appealed against the Secretary of State's decision, dated 2 March 2016, to refuse leave to remain. His appeal against that decision came before First-tier Tribunal Judge Maciel (the Judge) who in a decision promulgated

on 8 November 2017 allowed the appeal with reference to Article 8 ECHR. Permission to appeal that decision was given on 21 November 2017 by First-tier Tribunal Judge Andrew.

3. The gravamen of the complaint by the Secretary of State against the Judge's decision is that the Judge failed to properly address the fact that the Claimant had been involved with the use of deception in taking a TOEIC test in that he had used a proxy test taker and as a result had obtained a pass. It is accepted on behalf of the Claimant that the Judge took into account those matters and concluded that the certificate had been fraudulently obtained. There was no cross appeal against that decision.

4. In considering the Article 8 issues the Judge referred simply to the fact that so far as the Claimant was concerned he was "... not at risk of committing any further deception." The Judge said that she "... considered the public interest in assuring the system (of Immigration controls) is not abused." That is only part of the issue, particularly as to whether there is a real risk of repetition. There is also the relevant public interest element of deterring people from coming to the UK and committing offences in order to obtain status to remain here and there is also it is not a victimless crime, in the sense that the use of such deception is against the general public interest and in the public interest in discouraging criminality. It is therefore a serious matter and although it is of some history the fact is that it should not have occurred.

5. Past criminality is a relevant part of the assessment of the claim either in relation to the reasonableness of return in terms of the impact on the children but it is also, but to a lesser extent, when that is resolved in the public interest, a part of a proportionality exercise. The position, as has been clarified in two decisions of the Court of Appeal, MA (Pakistan) [2016] EWCA Civ617 and AM Pakistan [2017] EWCA Civ 180. Fortunately in both cases Lord Justice Elias expressed his views on the relevance of past criminality, not least in the light of the other cases of MM (Uganda)[2016]

EWCA Civ 450 and Zoumbas ([2013]1 WLR 3690. The position is that Lord Justice Elias has indicated that in the light of EV (Philippines) [2014EWCA Civ874 and Zoumbas the criminality of an applicant is a relevant consideration in assessing the reasonableness of removal on the impact on the qualifying children, in this case for which there are three, with reference to Section 117B(6) but that once that reasonableness issue has been resolved in favour of the children then quite simply that is the end of the point, because if is not reasonable to remove the children it cannot be reasonable or proportionate to go further by reference to the balance of Article 8 considerations.

6. It is clear that the Judge did not do the required exercise, plainly considered the best interests of the children, made appropriate findings on the relationship between the Claimant and those children as well as making clear that in respect of two of the children, respectively aged about 9 and 11, they have weekly contact with their biological father and that the Judge took the view that the best interests of the children were to remain in the UK with their mother a British national. I find that the Judge did not carry out the required exercise, having regard to the relevant considerations and it is most unfortunate when the Judge properly dealt with the claim as a whole failed to follow the steps that have now been identified under the case law originally through MM and MA (Pakistan), which shows how the matter should be considered, both in terms of finding facts, making conclusions on the best interests of the children, considering whether the Immigration Rules have applicability before moving into the consideration of Article 8 ECHR and properly applying Section 117A and Section 117B of the Nationality, Immigration and Asylum Act 2002 as amended.

7. I therefore conclude that the Original Tribunal made a material error of law and therefore the original Tribunal's decision cannot stand. The parties helpfully made brief representations as to how the case might be remade and I do so now because it seems to me the interests of the children, in terms of the impact upon the Claimant's partner and to some degree,

suggests for the British nationals, clearly and almost unarguably, in favour of the Claimant remaining in the UK with the family.

8. I reach the view that the deception and misconduct of the Claimant is a significant factor contrary to the public interest. Looking at all the Judge's findings in relation to the family life and the relationships and the evidence contained within the bundle before the Judge, I find that for the two elder children, are qualifying children under Section 117B(6) and 117D (1) NIAA 2002 as amended, this is a case where it is not reasonable to expect the latter two children, given the circumstances of their schooling and presence and friends in the UK, to leave the UK or be separated from their natural father with whom they have contact. In those circumstances it is clear in the light of AM that if it is not reasonable for them to be removed then that is a full answer to the issue of proportionality. I conclude, taking full account of the Claimant's criminality in assessing the reasonableness of expecting the children to leave, that expecting them to leave is not reasonable and therefore disproportionate to separate the Claimant from the children. The following decision is substituted.

NOTICE OF DECISION

The immigration appeal is dismissed. The appeal on Article 8 ECHR grounds is allowed.

No anonymity order was requested nor is one required.

Signed Date 6 March 2018

Deputy Upper Tribunal Judge Davey

TO THE RESPONDENT

FEE AWARD

No fee award is appropriate because it appears no fee has been paid. If a fee has been paid the appeal has succeeded on basis of the Judge's findings of fact and so I conclude no fee award is appropriate. The Secretary of State decision was properly made on the material available.

Signed Date 6 March 2018

Deputy Upper Tribunal Judge Davey