



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/08836/2015

THE IMMIGRATION ACTS

Heard at Field House
On 19 June 2018

Decision & Reasons Promulgated
On 16 July 2018

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

JAGDEEP [S]

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Collins, Counsel

For the Respondent: Mr Mandalia, Counsel

DECISION AND REASONS

1. In a decision dated 30 August 2017 Upper Tribunal Judge Hanson found that the First-Tier Tribunal ('FTT') erred in law in allowing the appellant's appeal. Judge Hanson concluded, inter alia, that the FTT failed to give adequate reasons for finding that the appellant provided an 'innocent explanation' for the events in 2012 wherein he relied upon an Educational Testing Service ('ETS') / Test of English for International Communication ('TOEIC') certificate ('the 2012 certificate'). Judge Hanson issued directions regarding the relevant evidence. Both parties have

complied with these directions and as a consequence, the issues before me have narrowed as set out below.

Immigration and procedural history

2. The appellant is a citizen of India. He entered the UK lawfully as a student in 2009 and his leave as such was extended to expire on 23 August 2014. However, on 11 June 2013 his sponsor college had its licence revoked. His leave was curtailed but he was given 60 days to find another college. Prior to the curtailment date of 11 August 2013, the appellant made an application to remain as a student with a different sponsor but the respondent refused this application on 20 August 2013. The appellant successfully appealed to the FTT. The representatives before me did not make reference to this decision, which appears to be of historic relevance only. After the promulgation of this FTT decision, the respondent alleged he had information to support an allegation that the appellant had employed deception when he relied on an invalid TOEIC certificate to support an application dated 13 December 2012, to extend his leave as a student. The 2012 certificate was issued to the appellant after he claimed to have sat the ETS TOEIC on 22 August 2012 at Synergy Business College of London ('SBC'). The decision that the appellant employed deception resulted in the respondent issuing a decision to remove the appellant dated 5 February 2015. This decision was not challenged and the appellant remained in the UK as an overstayer.
3. On 20 May 2015 the appellant submitted a human rights application in which he placed reliance upon a relationship with a British citizen, M and her two British citizen A (born in 2004, and now aged 14) and B (born in 2006, and now aged 12). The application form asserted that they commenced living as a family unit in March 2012, i.e. at a time when the appellant was in the UK lawfully as a student. This application was refused in a decision dated 20 August 2015, in which the respondent alleged that the 2012 certificate was fraudulently obtained and the appellant used deception in placing reliance upon it. The respondent was satisfied that the appellant's presence was not conducive to the public good because his conduct made it undesirable to permit him to remain in the UK. The application was therefore refused for the following reasons: (i) the appellant did not meet the 'suitability' requirements under paragraph S-LTR 1.6 of the Immigration Rules; (ii) the appellant did not meet the requirements of 276ADE; (iii) the appellant's relationship with M and her children did not constitute 'exceptional circumstances' for the purposes of Article 8.
4. In a decision promulgated on 30 November 2017, the FTT acknowledged a concession on the part of the respondent that the appellant enjoyed a long standing and genuine relationship with M and her children. Having considered the appellant's oral evidence, the FTT accepted that the appellant was a credible witness and did not employ deception as alleged. The FTT concluded that the appellant was able to meet EX1(b) and EX2 of the Immigration Rules, given his relationship with M and her children. It is also noteworthy that the FTT accepted

that it was clear from the evidence that the financial and English language requirements were met: M's business income was way in excess of £18600 per annum.

5. As set above, Judge Hanson set aside the FTT decision but expressly preserved the findings made pursuant to the respondent's concession.
6. The matter now comes before me to re-make the decision.

Issues in dispute

7. At the beginning of the hearing both representatives agreed that the issues had been narrowed. In particular, the parties agreed with the following matters set out below.
 - (a) There were three stages to be followed when determining whether deception was employed - see Majumder & Qadir v SSHD [2016] EWCA Civ 1167: (i) has the respondent met the burden of identifying evidence that the 2012 certificate was obtained by deception?; (ii) has the appellant satisfied the evidential burden of raising an innocent explanation?; (iii) if so, has the respondent met the legal burden of showing that deception in fact took place?
 - (b) In this particular case the respondent displaced the burden of establishing prima facie deception on the part of the appellant in relation to the 2012 certificate. On the face of it, this gave the appellant a very high speaking score following a test taken on 22 August 2012. I have been provided with both generic and specific evidence to support the clear view that the certificate was invalid. I need not rehearse that evidence because the appellant expressly accepted that having received the relevant ETS voice recording in compliance with Judge Hanson's directions, the voice linked to the 2012 certificate is not his.
 - (c) The consideration of the appellant's explanation is intrinsically fact-sensitive (see MA (EIS - TOEIC testing) [2016] UKUT 00450 (IAC)) and for me to determine having considered all the relevant evidence in the round.
 - (d) The 2012 certificate is invalid because it relies upon a voice recording that is not the appellant's. This can be explained in one of two ways: use of a proxy or deliberate manipulation by a third party.
 - (e) If I am satisfied that the appellant did not exercise deception then his appeal under Article 8 falls to be allowed for the reasons explained by the FTT. In short, he is able to meet the Immigration Rules and the children's best interests strongly support the continuation of the family unit in the UK, such that his removal would constitute a disproportionate breach of Article 8.

- (f) If I am satisfied that the appellant used deception, then he is unable to meet the Immigration Rules because he cannot meet the relevant 'suitability' requirements or the requirements of 276ADE, but Article 8 must be considered.
8. In addressing Article 8, the parties agreed that the concession at [11] of the FTT decision together with all the relevant evidence, was such that it is agreed that:
- (a) The appellant and M are in a long-standing genuine and subsisting relationship akin to marriage;
 - (b) The appellant has been playing a genuine and significant role in the upbringing of A and B, M's British citizen children, and has the requisite parental relationship with them as a step-father;
 - (c) A and B continue to have a close and significant relationship with their biological father and paternal grandparents, based in the UK.
 - (d) As British citizens, A and B are not expected to leave the UK.

Oral evidence

9. I heard evidence from the appellant and M. They each relied upon two witness statements, and were both closely cross-examined by Mr Mandalia. I refer to this evidence in more detail, when making my findings below.

Submissions

10. Mr Mandalia invited me to find that the appellant provided wholly unreliable oral evidence in material respects and failed to discharge the evidential burden of providing an innocent explanation for the 2012 certificate. Mr Mandalia submitted that the evidence developed and changed over time and was in any event vague. He asked me to note the conclusions in the Kroll report dated 26 July 2016 that there was no evidence to support a claim that the process leading to the 2012 certificate was subject to deliberate manipulation, and as such can only be explained by the use of a proxy. He reminded me of the evidence of Rebecca Collins to the effect that this could well involve the appellant attending the test centre as a registered candidate but allowing another, a 'fake sitter', to take the test on his behalf.
11. Mr Mandalia submitted that a finding of deception in these circumstances is of such seriousness and significance that the appellant's removal would not be disproportionate for the purposes of Article 8, even when balanced against the family life with M and her children, and their best interests. Mr Mandalia made it clear that he accepted that the appellant has a genuine and subsisting relationship with A and B, qualifying children by virtue of being British citizens. He also acknowledged that there was no expectation that A and B or their mother M to leave the UK. He however submitted that the public interest clearly requires the appellant's removal should I find that he has employed deception in the manner alleged.

12. Mr Collins relied upon his skeleton argument. He highlighted photographs placing the appellant at the test centre and asked me to take into account the passage of time that may have adversely impacted upon his memory of events in 2012 as well as the unanswered questions and uncertainties relating to TOEIC procedures as summarised at [47] of MA (ETS).
13. Mr Collins submitted that even if I found that deception on the appellant's part established, I must still go on to address Article 8 and was obliged to determine this in the appellant's favour in order to properly give effect to section 117B(6) of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act') and MA (Pakistan) v SSHD [2017] Imm AR 53; [2016] EWCA Civ 705.
14. I invited both representatives to explain the role of deception, if I found this to be established, when applying section 117B(6). They agreed that deception was a relevant factor to take into account. Mr Collins invited me to find that it was outweighed by the family life and the children's best interests, and Mr Mandalia submitted that it was not outweighed in this case.
15. At the end of submissions, I reserved my decision, which I now provide with reasons. I first address the deception issue before turning to an assessment of Article 8.

Deception

16. I do not accept the appellant provided a credible account of the circumstances surrounding his TOEIC test at SBC. I have taken all the evidence into account and considered it in the round before reaching the conclusion that I do not accept that the appellant has provided an innocent explanation. There are a number of factors that tell in the appellant's favour, but I only attach limited weight to these for the reasons I set out below.
17. First, the appellant provided photographs and copies of google maps that placed him very near the SBC test centre. These were not dated. The appellant was unable to clearly explain why he was unable to link the photographs to a specific date. He claimed that the 'Iphone' and computer used to transfer the photographs from the phone that was used, were unable to do this, but provided no evidence to support this surprising assertion. The appellant provided these photographs for the hearing before me but was unable to explain, when pressed by Mr Mandalia, why he did not rely on these before the FTT.
18. The appellant highlighted that the photograph on the 2012 certificate was consistent with his appearance in the photographs he produced: similar shirt collar, no beard or turban (when the appellant appeared before me he had a beard and turban). I acknowledge these consistencies in appearance however if the appellant wished to provide evidence to support a false claim that he was present at the test centre, he would have taken the necessary steps to make the photographs appear

persuasive. In any event, the appellant's 'innocent explanation' needs to go further than mere presence at the test centre on 22 August 2018, given the evidence I have summarised above from Rebecca Collins.

19. Second, M provided credible, reliable evidence but the support she was able to provide in relation to the appellant's TOEIC test was inherently limited. The most she was able to say is that she was shown photographs on the appellant's phone but could not recall when. To her credit, M did not exaggerate. She understood that the appellant had to complete a test but was unable to offer any more detail because at the time they were not living together. I pause here to note that the more recent statements suggest that they started living together in Christmas 2013 when it was actually Christmas 2012. I accept this was a genuine error.
20. Third, I acknowledge that the appellant studied in English from his arrival in 2009. This does not give any reliable indicator that his English-speaking ability met the requisite requirements or that he believed it would do. In any event, as pointed out in MA (ETS) at [57] there is a range of reasons why those proficient in English may engage in TOEIC fraud.
21. Fourth, the appellant's English ability when giving evidence before me was very good. However, this offers very limited assistance as to the quality of his English nearly six years ago.
22. Fifth, I acknowledge that the FTT regarded the appellant to be a credible witness able to recall in great detail the setting and format of the English test. That finding has not been preserved. In any event it was made in the absence of significant evidence: the voice on the relevant voice recording is accepted not to be the appellant's voice. In addition, I heard lengthy and extensive oral evidence during the course of probing cross-examination from Counsel. The extent of the cross-examination conducted by the presenting officer before the FTT is unclear.
23. On the other hand, I have significant concerns regarding the vagueness of the appellant's evidence when pressed by Mr Mandalia on why he chose the particular test centre he did and the arrangements that were made to sit the test. I was also struck by the appellant's vague description of events on the day itself. I acknowledge that the FTT formed a different view on this but as I have already observed, it may well be that the FTT did not have the benefit of the careful and probing cross-examination conducted by Mr Mandalia. I acknowledge that the appellant was being questioned about events that took place six years ago but he has revisited these events in two witness statements since and taken the opportunity to reflect upon what happened over a sustained period.
24. The SBC test-centre is located in Canary Wharf. At the relevant time the appellant resided in Coventry. In his second witness statement he explained that he travelled by car at 5.30am from Coventry. The journey took some three hours. The appellant was unable to clearly or cogently explain why he chose a test centre so far away

from his home, and which would have been time-consuming and expensive. The appellant claimed that a friend recommended SBC because of another friend's positive experience when sitting the TOEIC there. I do not accept this explanation. It is vague and unconvincing. The appellant was unable to explain why he carried out no independent enquiries regarding test centres closer to his home and why he considered no other college than SBC. I also regard it to be incredible that the appellant simply took the advice without asking any questions of his friend. When pressed by Mr Mandalia as to whether he asked basic questions about the experience of taking the test at SBC he said that he could not recall and then said maybe he did, before then saying maybe his friend just mentioned that the test was done there, implying that this was sufficient.

25. The appellant also provided no independent supporting evidence to corroborate his claim that he made the decision to use the SBC upon the advice of a friend. The appellant explained that he was unable to contact the friend because he lost contact with him when he moved from Coventry to Leamington. There was also a degree of confusion on the appellant's part as to when he moved from Coventry to Leamington, in order to reside there with M and her children. Having heard credible evidence from M, I accept this took place in Christmas 2012. However, the appellant's human rights application form clearly states at A16 that they started living together in March 2012. The appellant accepted that the form was inaccurate in this respect. This reflects poorly on the appellant's general credibility. He was clearly prepared to misrepresent the date he started living with M in the application form in order to attempt to show a longer period of living together. The appellant also stated in the application form at A29 that he had no contact with his immediate family in India, since leaving India in 2009. Yet, when cross-examined by Mr Mandalia, he said that he spoke to his family after he met M. In addition, when giving evidence regarding the children's relationship with their father, the appellant sought to minimise that relationship, with a view to bolstering the importance of his relationship with the children. The appellant claimed that the children "very often" complained about seeing their father on the weekend in accordance with the agreed arrangements. He went further to say that the children wished to stay with him and sometimes say "they want nothing to do with" their father. M, whose evidence I accept, indicated that there were no real difficulties and the children had a good relationship with their father, who is a teacher. These are three examples of the appellant providing misleading evidence in an attempt to improve his position, and reflect adversely upon his general credibility and the reliability of the evidence he has provided.
26. The appellant's explanation for not being able to provide any supporting evidence to support his claim that he paid for the test in advance by credit card or the expenses associated with travelling to London, was not credible. He claimed that he was unable to obtain bank statements going back that far due to changes to his banking arrangements, yet provided no supporting evidence from the relevant banks to support this. The appellant also accepted in cross-examination that his

first witness statement was inaccurate in stating that he paid the fee when he attended reception on the day of the test.

27. In his second witness statement, prepared as recently as 30 May 2018, the appellant also claimed that he showed reception an email confirmation on the day of the test. When questioned by Mr Mandalia, the appellant stated that he showed reception 'something' but could not recall what it was. When pressed further during cross-examination he said he showed a driver's licence and nothing else.
28. The appellant also provided vague and inconsistent evidence regarding the physical features of the SBC building. When pressed by Mr Mandalia he was unable to describe anything other than it being a tall building with a tennis court nearby. When asked how many floors it had, the appellant said he did not count. This is clearly inconsistent with his second witness statement in which he said that the building had 7-8 floors.
29. I bear in mind that the evidence summarised in MA (ETS) regarding weaknesses and inadequacies in ETS systems and processes. I however accept the specific evidence regarding the operation of ETS at SBC, as outlined in the Kroll report. The appellant has not sought to rebut this evidence. I therefore accept the following conclusions: (i) test centre staff and test candidates at SBC were unable to replace audio recordings within the ETS / TOEIC user interface; (ii) the possibility that the recording was deliberately replaced by a person with nefarious intent or accrued as a result of systemic fault is not supported by evidence and purely speculative; (iii) without a highly computer literate person being involved it is unlikely the TOEIC system would attribute a genuine test taker's recording to a different candidate or that a genuine test taker's recording would be submitted by multiple candidates. Mr Collins maintained that it was possible that there was simply a systemic error, but there is insufficient evidence to support this. The only evidence in support is very general and speculative. In any event, the appellant has been unable to clearly and credibly account for matters material to the 2012 certificate for the reasons I have already explained.
30. Having considered all the relevant evidence, I do not accept the appellant has provided reliable evidence to support the claim that he played no role whatsoever in obtaining what is now accepted to be an invalid TOEIC certificate. I am satisfied that a proxy was used in order to complete the speaking test, and the appellant knew about this and participated in this fraud, either by being present but using a 'fake sitter' or by not attending at all. Where it is accepted that the relevant voice attributed to the TOEIC certificate is not that of the appellant, the respondent has displaced the burden of establishing prima facie deception. It falls upon the appellant to provide an innocent explanation. This involves an assessment of all the relevant circumstances surrounding the test itself and the appellant's particular circumstances. This includes an explanation as to the likely nature and extent of the manipulation at the particular test centre. As set out above, in the absence of

any specific evidence to undermine the Kroll report, the appellant has not provided an innocent explanation by reference to deliberate or reckless manipulation at SBC.

31. Having found that the appellant did not provide an innocent explanation to rebut the respondent's prima facie case of deception, I need not proceed to the third stage, as summarised above.

Article 8

Immigration Rules

32. I begin with consideration of the appellant's family and private life application within the Rules. Having found that the appellant has not established an innocent explanation, it follows with the agreement of the parties that the appellant is unable to meet the requirements of the Immigration Rules. I conclude that the appellant cannot meet the Rules on suitability grounds, in particular S-LTR.1.6:

"S-LTR.1.6. The presence of the applicant in the UK is not conducive to the public good because their conduct (including convictions which do not fall within paragraphs S-LR.1.3. to 1.5.), character, associations, or other reasons, make it undesirable to allow them to remain in the UK."

33. I have found the appellant to have exercised deception and to have been party to fraud. I appreciate that he was not the organiser of the fraud, that this was a widespread fraud and that many others took advantage of the fraudulent enterprise. In my view the deception is nonetheless serious as it was perpetrated with a view to circumventing the requirements of the Rules and therefore undermining the system of immigration control. Furthermore, the appellant has continued to lie about the 2012 certificate both before the FTT and before the Upper Tribunal.
34. Since the appellant is unable to meet the suitability requirements, it follows that he is unable to benefit from paragraph EX.1. of Appendix FM. Mr Collins acknowledged this and that the appellant did not meet the requirements of paragraph 276ADE.

Best interests

35. I have applied the relevant general principles when considering the best interests of A and B, in the context of an Article 8 evaluation. These have recently been summarised by Kitchin LJ in TA (Sri Lanka) v SSHD [2018] EWCA Civ 260 at [22] as follows:

"In particular, the respondent has an overriding obligation to have regard to the welfare of a child in the exercise of her various statutory functions. The best interests of a child are therefore an integral part of the proportionality assessment under Article 8. In carrying out that assessment it is important to have a clear idea of a child's circumstances and of what is in a child's best interests before determining whether those interests are outweighed by the force of other considerations. In carrying out

that evaluation, the best interests of the child must be a primary consideration although not necessarily the only primary consideration. It necessarily follows that the best interests of a child can be outweighed by the cumulative effect of other considerations; but no consideration can be treated as inherently more significant than the child's best interests. Ultimately the decision maker must carry out a careful examination and evaluation of all relevant factors with these principles in mind. The question is whether, having regard to the foregoing, there are compelling circumstances which justify the grant of leave to remain outside the immigration rules."

36. Having considered all the relevant circumstances, I find that the children's best interests are served by remaining in the UK, by a very wide margin. There are five dominant factors:

- (i) The children are British citizens - see the importance of British citizenship as underlined in the speech of Lady Hale in ZH (Tanzania) v SSHD [2011] UKSC 4 at [32] to [34]. Like the instant case, ZH was a case of removal where the parents were estranged and the child would therefore be separated from one parent if the other were removed.
- (ii) The children who were born in the UK and have spent the entirety of their lives (12 and 14), and perhaps the most formative time of their lives here.
- (iii) The children have become accustomed to and enjoy a particular family arrangement in the UK that enables them to have a significant relationship with their biological British citizen father on both days of most weekends, whilst living with their British citizen mother. If they leave the UK to settle with their mother and step-father this will inevitably significantly disrupt their family life with their father.
- (iv) The children must have some ties to India given the background of their parents (particularly their mother, who was born in India) and step-father but given their ages and the time spent in the UK must see themselves with an identity based firmly on British multi-cultural society.
- (v) The children will find it very difficult to leave the UK at this particular stage of their education and childhood.

Section 117B

37. Proportionality is the "public interest question" within the meaning of Part 5A of the 2002 Act. By section 117A(2) I am obliged to have regard to the considerations listed in section 117B, and do so below.

38. The public interest in the maintenance of effective immigration controls is directly engaged in this case. I have found that the appellant has sought to deliberately avoid lawfully sitting the English language test, a mandatory part of the Immigration Rules. He has demonstrated a blatant disregard for the Immigration Rules. The appellant was in the UK in a temporary capacity when commenced a

relationship with M. He then overstayed in 2015 but after a matter of months sought to regularize his status.

39. There is no infringement of the "English speaking" public interest as the appellant speaks fluent English. The economic interest is not engaged given the income of the family unit. I attach limited weight to the appellant's private life given his precarious status throughout. In any event, the focus of the appellant's claim to remain rests firmly upon his family relationship with M and her children. I now turn to section 117B(6) in this regard. This states:

"In the case of a person who is not liable to deportation, **the public interest does not require the person's removal** where -

- (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
- (b) it would not be reasonable to expect the child to leave the United Kingdom."

40. The appellant is not liable to deportation. He has a genuine and subsisting relationship with two qualifying children. The only issue in dispute is whether it would be reasonable to expect them to leave the UK. In determining this issue I am obliged to apply the approach laid down in MA (Pakistan) (supra). Although it is a conclusion which the Court of Appeal reached with some reticence, it was accepted in MA (Pakistan) that the question whether it is "reasonable to expect" a child to leave the UK incorporates consideration of other public interest factors.

"28. ...The focus is not simply on the child but must embrace all aspects of the public interest. She submits that in substance the approach envisaged in section 117B (6) is not materially different to that which a court will adopt in any other article 8 exercise. The decision maker must ask whether, paying proper regard to the best interests of the child and all other relevant considerations bearing upon the public interest, including the conduct and immigration history of the applicant parent or parents, it is not reasonable to expect the child to leave. The fact that the child has been resident for seven years will be a factor which must be given significant weight in the balancing exercise, but it does not otherwise modify or distort the usual article 8 proportionality assessment. That test requires that where the parents have no right to be in the UK that is the basis on which the article 8 proportionality assessment must be made...

29. Ms Giovannetti submits that essentially the same approach should be adopted when applying the reasonableness test; in essence, it is the usual proportionality test save that the fact that the child has resided in the UK for seven years will be a significant factor weighing in favour of the conclusion that it would not be reasonable to require the child to leave."

41. I am mindful that the best interests assessment is not determinative. As Elias LJ noted in MA (Pakistan) at [47] even where the child's best interests are to stay, for the purposes of section 117B(6) of the 2002 Act it may still be not unreasonable to require the child to leave. That will depend upon a careful analysis of the nature and extent of the links in the UK and in this case, India, as well as any other relevant wider considerations - see [45] of MA (Pakistan).

Article 8 balancing exercise

42. I begin the balancing exercise by considering the public interest. I have already provided my reasons for finding that the appellant exercised deception of a serious kind and continued to lie about it. He has demonstrated disregard for the Immigration Rules. The public interest factor weighing against the Appellant is that his continued presence is contrary to the maintenance of effective immigration control. That is both as a direct result of his deception and, indirectly, because that deception prevents him being able to satisfy the requirements in the Rules from which he is excluded on suitability grounds. I take into account in this regard that the appellant has not been convicted of any criminal offence arising from his deception. This is not a deportation case. I take into account also that the appellant is someone who, with many others, has taken advantage of a fraudulent enterprise organised by others and had no role in the organisation of the fraud, but has continued to lie about his role in the fraud.
43. I accept that there are no other public interest factors weighing against the appellant in this case. He now clearly speaks English well. The family appear to be financially independent. M has a good job and the family are not supported by benefits. Nonetheless, for the reasons I have set out, as a result of his deception, the public interest in the removal of the appellant is, in this case, a weighty factor.
44. Equally, there are no factors other than the appellant's relationship with M and her children which weigh strongly in favour of the appellant. I turn first to the appellant's relationship with M. There are insurmountable obstacles to the relationship continuing in India. The children, who live mostly with M, have a close relationship with their father and do not wish to leave. It is also unlikely that he will consent to their departure.
45. More significantly, the best interests of the children favour remaining in the UK by a wide margin. This is in effect the only country in which the status quo can be maintained and they can continue to enjoy a meaningful relationship with both their mother and father.
46. The question whether it is reasonable to expect the qualifying children to leave the UK therefore comes down to a balance between their best interests which are very strongly in favour of remaining in the UK and the strong public interest favouring the appellant's removal. In determining that balance, I have regard to the Guidance published by the respondent on family migration dated 22 February 2018, which states in unequivocal terms that it is not reasonable to expect a British Citizen child to leave the UK. As I have also recognised, the best interests of A and B very strongly favour remaining within the current extended family arrangements with both biological parents, as well as their step-father and grandparents in the UK.
47. I have regard to the fact that, in this case, the public interest factors weighing against the appellant are strong and, were it not for his parental relationship with

British Citizen children, would undoubtedly be sufficient to outweigh the relevant family and private life interests in the proportionality balance.

48. Having considered all the relevant factors and weighed the public interest in removing the appellant with the interference with family life this will entail, I am satisfied that, to use the wording of section 117B(6), the public interest does not require the appellant's removal because it would not be reasonable to expect the British citizen children to leave the UK. For this reason, I am satisfied that the interference with family life in this case is disproportionate and it follows that the appeal is allowed on Article 8 grounds.

Postscript

49. I acknowledge that this result may appear curious given my findings on the appellant's use of deception and the consequent strong public interest in his removal. However, as Sales LJ made clear in Rhuppiah v SSHD [2016] EWCA Civ 803, [2016] 1 WLR 4204 at [45], sections 117A-117D of the 2002 Act provide a structured approach to the application of Article 8 which produces in all cases a "final result" compatible with Article 8. Where Parliament has declared that the public interest does not require a person's removal in specified circumstances, and those circumstances are present, that is the end of the matter. In this case I have accepted that when all the circumstances are considered including the appellant's use of deception and immigration history, it would not be reasonable to expect the children to leave the UK.
50. If a deportation decision had been made against the appellant, an altogether different approach would apply. If not sentenced to four years or more imprisonment, the question would be whether or not Exception 2 as contained in section 117C(5) of the 2002 Act applies i.e. would the "effect of C's deportation" on M or the children be "unduly harsh". To use the language of paragraph 399 of the Immigration Rules, although it would be difficult, it might not be unduly harsh for M and the children to remain in the UK without the appellant. I need say no more about this because section 117C(5) and paragraph 399 are not relevant to this case.

Decision

I re-make the decision by allowing the appeal on Article 8 grounds.

Signed
Upper Tribunal Judge Plimmer

Dated: 12 July 2018