Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/00690/2015
HU/00692/2015
HU/00693/2015
HU/00694/2015
HU/00696/2015

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice	**Decision & Reasons Promulgated**
On 4 May 2017	**On 13 June 2017**

Before

THE HONOURABLE MR JUSTICE COLLINS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

CHINTA MANI BHANDARI
KALIKA DEVI SAPKOTA BHANDARI
ASIM BHANDARI
[S B]
[A B]
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:

For the Appellant: Mr N Bramble, a Senior Home Office Presenting Officer of the Specialist Appeals Team
For the Respondents: Mr E Wilford of Counsel, instructed by Advisa Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of First-tier Tribunal Judge Ross given on 2 November 2016 whereby he allowed the appeal of the respondent, as he now is, against the refusal of the Secretary of State to permit him to remain, he having been served with an IS151A notice because his leave, together with that of his family, had been cancelled on 21 January 2015. The reason for that cancellation was because it was said that he had been guilty of obtaining the necessary English proficiency with ETS in December 2012, that is when he underwent the necessary testing and as is well-known there have been a large number of cases in which it has been said that there has been fraud practised in that the English language test has been taken by proxy.

2. The evidence relied on by the Secretary of State in this case is limited to the witnesses who had been held not to be entirely satisfactory in the Tribunal case of **SM and Qadir [2016] UKUT 229**. However the Court of Appeal has accepted that the evidential burden has been discharged in furnishing proof of deception and the evidence is that there is only a 2% error rate in identifying cheating. Of course this does not mean necessarily that an individual, and this respondent in particular, was not one of the 2% but the judge dealt with the matter by referring to the situation in **SM and Qadir** and then saying that the appellant's evidence was in his view acceptable. He was able to remember how many people were in the room with him, he could remember which tests he did on which days and how the room was arranged. Since it was all of four years ago it was not surprising that he was not able to remember the detail other than that. He gave his evidence in English, he had a Masters degree from a British university which tended to indicate proficiency. Whether or not he was guilty, the reality is surely that it would have been strange if he had not known the manner in which the tests were undertaken and was able to give the evidence that was accepted by Judge Ross.

3. However, if that were the only point it might be that this decision could not overturned; unfortunately it is not because the claim on which reliance was placed was an Article 8 claim and that did not depend upon the deception finding. True, the reason why his leave was curtailed was because of the deception and that necessitated reliance on Article 8. On the other hand, he had limited leave and that would have expired last year so he would in any event have to make an application for leave to remain. The question that arises is whether that should prevail, that is to say his Article 8 rights should prevail whether or not he was guilty of deception on the assumption that he was not. The difficulty is that all Judge Ross did was to state in paragraph 19 that he had first to consider whether the removal amounted to an interference with the exercise of his right to respect for his private or family life. He decided that it did not interfere with family life because the whole family would be returned together and there was no reason on the face of it why they should not go back to Nepal. The second step he said was to consider whether it would have

consequences of such gravity as potentially to engage the operation of Article 8 and since he considered that it did involve sending the appellants back to Nepal it did potentially engage the Convention. That may well be correct, but that does not go nearly far enough to justify the decision that Article 8 entitled him to remain. He clearly, as is accepted, did not qualify under the Rules and so had to show that he could remain under Article 8 outside the Rules, and it must be recalled that the judge does not refer to this anywhere and that since his and his family's presence here was precarious Section 117B(5) of the 2002 Act applied and weakened his private life claim. Indeed, all that the judge did was to assert, paragraph 24, that his appeal should be allowed under Article 8 outside the Rules. Nowhere did he go into any of the relevant matters which should have been taken into account in considering whether in the circumstances since he did not qualify under the Rules it was appropriate to allow the appeal outside the Rules. The grounds of appeal do not themselves directly refer to Article 8, they concentrate on the deception point and they start badly by referring to a non-existent paragraph in the decision. It looks as if whoever was responsible was looking at the wrong judgment when drafting the grounds. However, be that as it may the First-tier Tribunal Judge who granted permission picked up the point that I have raised in relation to Article 8 and it is clearly what is sometimes described as a **Robinson** point, that is an obvious point which even if not directly spotted means that an error of law existed.

4. In those circumstances I must allow this appeal and obviously since the outcome will depend upon a re-assessment of evidential material remit it for a rehearing preferably at Taylor House, or alternatively Hatton Cross.

No anonymity direction is made.

Signed Date: 7 June 2017

Mr Justice Collins