**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: HU/12018/2015

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
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| **On 12 December 2017** | **On 15 January 2018** |

**Before**

**UPPER TRIBUNAL JUDGE WARR**

**Between**

**MOHAMMOD EMADUR RAHMAN**
**(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr D Balroop of Counsel instructed by Kalam Solicitors
For the Respondent: Ms A Fijiwala, Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant appeals the decision of a First-tier Judge following a hearing on 17 February 2017 to dismiss his appeal against the decision of the Secretary of State on 16 November 2015 to refuse his application for

indefinite leave to remain as the husband of Mrs Runa Begum, a British citizen.

2. The appellant had entered this country on 28 April 2013 on a spouse visa. The application was refused on the basis that the appellant had submitted a Test of English for International Communication (TOEIC) certificate dated 21 February 2012 which had been fraudulently obtained by the appellant through the use of a proxy test taker. The application had been refused under paragraph 289 of the Immigration Rules with reference to paragraph 287(a)(vii) and paragraph 322(5) – the refusal was on the basis that the appellant's presence in the UK was not conducive to the public good. The Presenting Officer accepted that because the appellant's application for leave to remain had been made on the back of a previous grant of leave to enter as a spouse under paragraph 281 of the Rules, the old Immigration Rules prior to the changes made by Appendix FM continued to apply to the appellant. The only matter in issue was the validity of the TOEIC certificate. If the judge found there had been no deception in the TOEIC exam then the appellant would satisfy paragraph 287 of the Rules and the appeal should be allowed. If the judge were not satisfied that there was no deception then the appeal fell to be considered under Article 8 outside the Rules. The judge noted that the appellant had stated that he did not wish to use an interpreter and he gave evidence initially in English but she records that he struggled to do so "and fairly quickly moved to giving evidence using an interpreter the language being Bengali". His wife also gave evidence with the assistance of the interpreter.

3. The judge refers to the submissions made on behalf of the respondent. It was noted that the TOEIC test had been marked as questionable and as a result the appellant had been called to an interview to give him an opportunity to address whether or not a proxy had been used to take the test and it was to be noted that he had requested an interpreter during that interview. The appellant had struggled at interview and at the hearing to answer questions in English. He could not remember where he had taken the test or what the test comprised of. The appellant did not meet the suitability requirements of the Rules and there were no exceptional circumstances. It was in the best interests of the children to be with both their parents. The appellant's family life in the UK had been developed at a time when the appellant's immigration status was precarious.

4. Counsel then acting for the appellant pointed out that the appellant's test had been found to be questionable but not invalid. He accepted that the evidential burden on the respondent had been satisfied but submitted that there was no evidence before the judge to show that the appellant had used a proxy. The generic evidence was not sufficient to discharge the legal burden. In relation to Article 8 the appellant's wife and two young children were British citizens and reference was made to the respondent's guidance on family life as a partner or parent and the guidance on whether it would be unreasonable to expect a British citizen child to leave

the UK. He submitted that it was in the children's best interest to be with both their parents and it would not be reasonable to expect the appellant's children to leave the UK. He pointed out that the appellant's family life had been developed at a time when his immigration status was lawful although precarious.

5. Having heard the submissions the judge gave the reasons for her decision on the issue of the evidential burden (which, as I have said, had been conceded by Counsel) as follows:

> "25. The burden is on the Respondent to bear the initial burden of furnishing proof of deception – SSHD v Shehzad and Chowdhury [2016] EWCA Civ 615 ('Shehzad'). I have considered the documentary evidence in the Respondent's supplementary bundle. Document 1 of the Respondent's supplementary bundle is a witness statement from senior caseworker, Raana Afzal, relating to the process by which the Appellant was identified as a person who had sought to obtain leave by deception through the use of a fraudulently obtained TOEIC certificate provided by Educational Testing Services (ETS). Document 2 is the ETS SELT source data relating to the Appellant which shows that the Appellant's test has been categorised as questionable. Document 3 is the ETS TOEIC test centre lookup tool for Elizabeth College showing the MIDA matched data. Document 4 is the project facade criminal enquiry into abuse of the TOEIC relating to Elizabeth College, London. The ongoing criminal enquiry relating to Elizabeth College has revealed that between 18/10/2011 and 26/09/2012 Elizabeth College undertook 3919 TOEIC tests of which ETS identified 2074 as invalid and 1845 as questionable. There were no tests where there was no evidence of invalidity i.e. no tests where the TOEIC were not withdrawn. This shows that there was an organised and widespread abuse of the TOEIC exam at Elizabeth College. Document 5 is the witness statement of Rebecca Collings. Document 6 is the witness statement of Peter Millington and document 7 is the report by Prof Peter French dated 20 April 2016 relating to forensic speaker comparison tests undertaken by ETS.
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> 26. In addition there is also a copy in the Respondent supplementary bundle of the Appellant's temporary migration credibility interview which took place on 7 October 2015. In that interview the Appellant is asked when he took the ETS TOEIC English language test. He responds that he is taken two tests and indicates he has taken one that was at level B1. He is asked when he undertook the test and states that he took the test at the end of January (specifying 28 January 2015) and that he took the test at Harrow International Business School. He is asked whether he has ever taken a test at Elizabeth College and responds he cannot remember that test. He states that he completed a test in 2011 that being the A1 test. It is then put to the Appellant that the Home Office records show that he sat a test at Elizabeth College in December 2012 and the Appellant then appears to recall the test and states that it was an A1 test. He states that the test was for the purpose of an application in Bangladesh on the grounds of a spouse visa. The Appellant is expressly asked why he could not remember taking the test Elizabeth College until advised about the

record of the test and his explanation is that he cannot remember due to the time has passed. It is a matter of note that he cannot remember taking the test.

27. The Appellant is also asked whether he completed a course before taking the English test and responds that 'he did some classes with them'. He has however unable to recall where the classes took place other than a vague reference to the Whitechapel area. According to the Appellant's evidence in the interview his test was booked by the people that he did the class with. The Appellant is asked to tell the interviewer what the test involved and is able to give very little detail simply referring to there being 3 or 4 answers and he marked the right answer and that it was the same for every question. The Appellant had the assistance of an interpreter for the first 17 questions but answered questions 18 to 21 without the assistance of the interpreter. The interviewer notes that in relation to the questions where the interpreter was not used he had to speak slowly and repeat almost all of the questions asked.

28. I find that the information which specifically relates to the Appellant and the evidence in the temporary migration interview, including the fact that the Appellant could not recall having taken the test at Elizabeth College until prompted and could provide very little detail about the test, when taken with the statements provided by Peter Millington, Rebecca Collins and Raana Afsal, discharges the evidential burden on the Respondent".

6. The judge then noted that the burden shifted to the appellant to provide a plausible or innocent explanation. She reminded herself that on the authorities such questions would invariably be intrinsically fact- sensitive.

7. The judge noted that the appellant had given contradictory evidence about whether the appellant had personally booked his test and how long it had lasted. The inconsistencies undermined his evidence that he had taken the test. No detail had been provided about the content of the test. The appellant had successfully passed other English language tests in 2015 but the judge was not satisfied that at the time of the TOEIC certificate the appellant had passed a similar test to show that his standard of English in 2012 was such that he would have had no motivation to cheat in the TOEIC exam. In relation to the oral evidence of the appellant the judge noted that the appellant had struggled significantly to give evidence in English and his answers "were not particularly detailed and rather garbled". The judge observed:

> "While I appreciate that the hearing is a significantly more stressful experience than for example if the appellant was engaged in general conversation with other people I find that the appellant's English language ability during the hearing was not impressive".

She noted that the appellant had confirmed that he communicated with his wife in Bengali. The judge in paragraph 35 of her decision commented that it was odd that the appellant had been able to remember details

about registering for the exam in 2012 and the exact location of the exam but could remember almost nothing about the exam itself.

8. The judge also heard from Mrs Begum who had not accompanied her husband on the day of the test at Elizabeth College. When she visited her GP she did not require an interpreter unless she was not accompanied by her husband. In relation to her desire to remain in the UK with her two young children and husband rather than returning to Bangladesh she stated that she had no family in Bangladesh and she wished to stay in the UK because prospects were not good in Bangladesh. She had visited Bangladesh in 2012 staying for just over a month and for approximately five to six weeks in 2013. Her passport showed she had been in Bangladesh on 3 February 2013 until 27 April 2013. She had stayed with her mother-in-law on both occasions.

9. The determination continues:

> "37. Considering the evidence in the round I do not find the Appellant to be a credible witness. I accept that the score of which is recorded for the Appellant in the TOEIC test is not particularly high being 110. Nevertheless, the very fact he could not remember taking the test, his inconsistencies regarding the booking of the test and when he took the particular parts of the test undermine his credibility significantly. In addition, the contrast in his fairly detailed evidence about the formalities which were carried out before he sat the test when compared with his very vague recollection of what he actually had to do in the TOEIC test again undermine his credibility. This taken with the fact that the Appellant exhibited a fairly poor grasp of the English language during the hearing which took place nearly 5 years after the TOEIC test leads me to conclude that the Appellant has not provided an innocent explanation which would show that he did not use a proxy to take the TOEIC test.
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> 38. I find that the Secretary of State has established on the balance of probabilities that the Appellant's prima facie innocent explanations are to be rejected. The Secretary of State has discharged the legal burden of proof. I find that the Appellant did submit a TOEIC certificate which had been obtained through the use of a proxy test taker with his application dated 30 March 2012.
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> 39. Paragraph 322 of the Immigration Rules makes provision for refusal of leave including refusal of leave to remain, variation of leave to enter or remain or curtailment of leave. Paragraph 322 (5) is a ground on which leave to remain should normally be refused. The Respondent has exercised discretion to refuse the Appellant's application under paragraph 322 (5). I require to consider whether there are any special circumstances which would point to the Appellant's conduct in submitting the fraudulently obtained TOEIC certificate meaning that while the conduct of this type should normally lead to refusal under paragraph 322 (5) it should not do so in the Appellant's case. I do not consider there to be any such factors in the Appellant's case. The Appellant has engaged in deceitful conduct in submitting a TOEIC certificate which was fraudulently obtained. The requirement for those

> seeking entry to the UK as a spouse having passed an English-language test has important policy objectives and a fraudulent TOEIC test such as the one submitted by the Appellant undermines the system of immigration control in the UK. I find that the Respondent was entitled to exercise discretion under paragraph 322 (5) of the Immigration Rules. I find that it is undesirable to permit the Appellant to remain in the UK in the light of his conduct in submitting a fraudulently obtained TOEIC certificate and that there are no special circumstances in this case which mean that the Appellant's application should not be refused with reference to paragraph 322 (5). The appeal is dismissed under the Immigration Rules".

10. In relation to Article 8 the judge noted that the appellant and his wife had a genuine and subsisting marriage and had two daughters. One had been born on 6 February 2014 and the other on 10 September 2015. They and their mother were British citizens. The judge referred to what the Court of Appeal had said at paragraph 35 of **EV (Philippines) v Secretary of State [2014] EWCA Civ 874**:

> "A decision as to what was in the best interests of children will depend on a number of factors such as (a) their age; (b) the length of time that they have been here; (c) how long they have been in education; (d) what stage their education has reached; (e) to what extent they have become distanced from the country to which it is proposed that they return; (f) how renewable their connection with it may be; (g) to what extent they will have linguistic, medical or other difficulties in adapting to life in the country; and (h) the extent to which the course proposed will interfere with their family life or their rights (if they have any) as British citizens".

11. The judge in paragraph 44 noted that the importance of British citizenship could not be downplayed and the children could not be forced to leave the UK. However they were very young. They had resided in the UK all their lives but neither of the children was yet in education. The older child might have been attending nursery but there was no evidence provided to the judge on this issue. While the children had not lived in Bangladesh both of their parents were of Bangladeshi origin. The appellant had family who lived in Bangladesh including his mother with whom his wife had previously stayed when visiting. The appellant and his wife would be in a position to assist the children in integrating into Bangladesh and if the children returned to Bangladesh they would be able to get to know their paternal grandmother and other extended family. The appellant said he had a family of four brothers and two sisters. The children could maintain contact with their maternal grandparents in the UK using modern methods of communication. The grandparents could visit the children in Bangladesh. Both the appellant and his wife spoke Bengali which was the language spoken in the home and accordingly the children had been exposed to the Bengali language. The judge found that it was not likely that there would be any significant linguistic difficulties for the children should they return to Bangladesh, neither of the children had any medical conditions. As the children were young they would be focused on their parents rather than their peers and they would be adaptable – the judge

referred to **Azimi-Moayed v Secretary of State [2013] UKUT 00197 (IAC)**.

12. If the parents relocated outside the UK then it would be in the best interests of the children to go with them and in such circumstances it would be reasonable to expect the children to leave the UK with their parents and the judge found that it would be in the best interests of the children for them to return to Bangladesh with their mother and father as part of a family unit.

13. The judge concludes her determination as follows:

> "46. Mrs Begum is a British citizen and cannot be forced to leave the UK. Should she choose not to return to Bangladesh with the Appellant I do not find that the welfare of the children would be significantly compromised. They are both very young and would be residing in the UK with their mother who is their primary caregiver.
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> 47. While Mrs Begum is a British citizen she is of Bangladeshi origin. She has visited Bangladesh in 2012 and 2013 and in particular 2013 stayed for a relatively lengthy period. She speaks Bengali and is aware of the culture and traditions in Bangladesh. On her holidays to Bangladesh he stayed with the Appellant's mother and there is nothing before me to suggest that the Appellant's mother would not be disposed to assist the family should they return to Bangladesh.
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> 48. It was not suggested by Mr Hasan that the Appellant could meet the requirements of the Immigration Rules for leave to remain as a partner or a parent and I find that he does not meet the requirements of the Immigration Rules.
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> 49. The Respondent considered the Appellant's application under the provisions of Appendix FM and leave to remain as a partner. The Appellant does not meet the suitability requirements for leave to remain as a partner or parent. As I have found that he submitted a fraudulent TOEIC certificate and his presence in the UK is not conducive to the public good due to his conduct he cannot meet the suitability requirements with reference to S-LTR paragraph 1.6. The Appellant has a British spouse but there are no insurmountable obstacles to family life with Mrs Begum continuing in Bangladesh.
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> 50. While the Appellant has 2 British citizen children for the reasons already given I have found that it would be reasonable for the Appellant's children to return to Bangladesh with the Appellant as part of a family unit. The Appellant cannot meet the requirements in the Immigration Rules for leave to remain as a parent.
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> 51. I do not find that there is a significant gap in the Immigration Rules which is not covered in this case which would mean that I should go on and consider the Appellant's case under Article 8 outwith the rules. Nevertheless in case I should be wrong in this conclusion I go on to consider the Appellant's case under Article 8 of the ECHR. In

considering Article 8 of the ECHR I require to consider the rights of the Appellant, Mrs Begum and the Appellant's 2 children.

52. In a case where removal is resisted in reliance on Article 8 of the ECHR, Razgar v SSHD [2004] UKHL 27 (Razgar) sets out a number of questions which require to be determined. I do not find that the Respondent's decision interferes with the Appellant's family life as the Appellant, Mrs Begum and their two children could return to Bangladesh and continue to enjoy their family life there. There was no particular evidence before me in relation to any private life that the Appellant had developed in the UK. I accept however that his relationship with Mrs Begum and his children in addition to falling within family life the purposes of Article 8 may also fall within the Appellant's private life on the basis of his ability to develop relationships with his wife and children. On that basis I accept that if the Appellant was to be removed to Bangladesh on the may be an interference in his private life developed in the UK.

53. The Appellant has only been away from Bangladesh since 2012 a period of 5 years. He has family members residing in Bangladesh including his mother and siblings. The Appellant would be able to re-establish his private life in Bangladesh with little difficulty. He could keep in touch with any friends in the UK using modern methods of communication.

54. I now turn to the weight that must be given to immigration control within the proportionality exercise. The importance of and weight to be given to immigration control has been emphasised by Parliament through the provisions in section 19 of the Immigration Act 2014, which introduces part 5A of the Nationality Immigration and Asylum Act 2002. This contains section 117A to D which must be applied when considering the public interest question as applied to the proportionality assessment which is the fifth test in Razgar.

55. In this case I am required to have regard under section 117B to the statutory requirement that the maintenance of effective immigration controls is in the public interest.

56. The Appellant can speak English. There is documentary evidence of this in the City and Guilds certificate submitted with the Appellant's appeal.

57. There was no evidence before me as to the Appellant's financial situation or which shows that he is financially independent. Section 117B (3) does not therefore assist the Appellant.

58. Section 117B (5) provides that little weight should be given to a private life established by a person at a time when the person's immigration status is precarious. While the Appellant has been lawfully in the UK having been granted leave to enter as the spouse of Mrs Begum his immigration status has always been precarious given that he was here on a visa which was valid to 6 June 2015. The precariousness of a person's immigration status is also relevant to any family life developed in the UK.

59. Section 117B (6) provides that in a 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. The Appellant's two daughters are qualifying children as they are British citizens. However for the reasons given I have found that it would be reasonable to expect the Appellant's children to leave the UK with him and his wife as part of a family unit. Section 117B (6) is not applicable in the Appellant's case.

60. I also take account of the fact that I have found that the Appellant submitted a TOEIC certificate which was fraudulently obtained. This is a weighty factor against the Appellant in the balancing exercise which requires to be carried out under Article 8 in assessing the proportionality of the Respondent's decision. The Appellant does not meet the requirements of the Immigration Rules. Weighing the competing interests and having regard to the need to maintain effective immigration controls, I am satisfied that it would not be disproportionate to remove the Appellant to Bangladesh. I find that there are no compelling circumstances such that the Appellant's appeal should succeed outside the Immigration Rules under Article 8 of the ECHR".

14. The judge accordingly dismissed the appeal under the Rules and on human rights grounds. There was an application for permission to appeal. There were three grounds. The first ground concerned the credibility findings of the judge. It was said that she had failed to take into account material matters and given weight to immaterial matters. In ground 2 it was claimed that the judge had materially erred in law while considering paragraph 322(5) of the Rules and paragraph S-LTR.1.6. of Appendix FM. The threshold of falling foul of paragraph 322(5) was very high as it was concerned primarily with criminality, a threat to national security, war crimes or travel bans. Paragraph S-LTR.1.6. could be surmounted even where there was some low-level criminality. Reliance was placed on the Secretary of State's guidance published on 1 March 2017. I note that this was in fact after the promulgation of the judge's decision. The part relied on reads:

> "The main types of cases you need to consider for refusal under paragraph 322(5) or referral to other teams are those that involve criminality, a threat to national security, war crimes or travel bans.
>
> A person does not need to have been convicted of a criminal offence for this provision to apply. When deciding whether to refuse under this category, the key thing to consider is if there is reliable evidence to support a decision that the person's behaviour calls into question their character and/or conduct and/or their associations to the extent that it is undesirable to allow them to enter or remain in the UK. This may include cases where a migrant has entered, attempted to enter

> or facilitated a sham marriage to evade immigration control. If you are not sure the evidence to support your decision is reliable then speak to your line manager or senior caseworker".

In relation to the Immigration Directorate Instruction of August 2015 on the ten year routes reference was made to paragraph 5.1:

> "The decision maker must consider whether criminality which does not fall within paragraphs S-LTR1.2. to S-LTR.1.4 may fall for refusal within paragraphs S-LTR.1.5. to S-LTR.1.6.
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> In doing so, decision makers should look at whether their conduct (including any convictions which do not fall within paragraphs S-LTR.1.3. to S-LTR.1.4.) mean the applicant's presence in the UK is undesirable or non-conducive to the public good under conduct, character, associations or other reasons. It is possible for an applicant to meet the suitability requirements even where there is some low-level criminality".

In ground 3 it was said that the judge had materially erred when considering the test of reasonableness. Reference was made to paragraphs 48 and 49 of **MA (Pakistan) [2016] EWCA Civ 705**. The judge had approached the test too strictly. Reference was made to paragraph 11.23 of the respondent's guidance – referred to by the judge in paragraph 22 of her decision – a decision maker should not take a decision which would force the British child to leave the EU to reflect the principles in **Zambrano**. A case must always be assessed on the basis that it would be unreasonable to expect a British citizen child to leave the EU in circumstances where the parent or primary carer would be required to return to a country outside the EU. It would be necessary to consider quite apart from the **Zambrano** principle whether it was reasonable to expect a child to leave the UK. it had been accepted by Counsel in the case of **MA (Pakistan)** that it would be relatively rare for it to be reasonable to expect a child who is a British citizen to leave the UK. The judge had wrongly treated the children as an appendage of their parents contrary to **EV (Philippines)**.

15. In granting permission to appeal the First-tier Judge stated that she could see nothing in ground 1 and while the judge's decision was clear and careful, grounds 2 and 3 were considered to be arguable. Reference was made to the case of **SF and Others (Albania) (Guidance, post–2014 Act) [2017] UKUT 120** which had been promulgated very shortly before the judge's decision.

16. In a response on 31 October 2017 the respondent submitted that the grounds had no merit and merely expressed disagreement with the decision although it had not been possible to produce a full response to the grounds. Counsel referred to the guidance and to the case of **SF** which had in fact been published after the decision on 22 March 2017. **SF**

established that the Tribunal ought to take guidance into account if it pointed clearly to a particular outcome in the instant case. Reference was made to the policy at paragraph 7 of the Tribunal's decision.

17. In relation to the first ground although the judge when giving permission had seen nothing in it, it was to be noted that the appellant would not have had to sat a similar exam to that taken by students. They sat at the B1 level whereas the appellant as a spouse would have taken the test at the most basic level. Therefore it was not so remarkable that the appellant was not speaking fluent English some years after the exam. There was also a difference between the case where a test had been invalidated and where it was questionable. Although the appellant had taken a test more recently (in 2015) he would still be nervous in the Tribunal proceedings.

18. Ms Fijiwala submitted that there was no material error of law disclosed in ground 1 of the appeal. The issue of the evidential burden had been conceded by Counsel and the appellant's evidence had been considered in detail. The judge had referred to all the evidence in the round. She had gone on to consider the appellant's evidence and had found that no innocent explanation had been advanced and the Secretary of State had discharged the legal burden of proof. There was no material difference between the tests as set out in the Rules and what was said in Appendix FM and in relation to suitability. What was at issue in this appeal however was a serious matter as had been reflected on page 2 of the reasons for refusal decision. The judge had referred to the appellant's deceitful conduct and the undermining of immigration control in paragraph 39 of her decision. It was the appellant's deceitful conduct that was at issue, the conduct did not necessarily have to be criminal conduct. In relation to the final ground the policy statement only related to Section 117B (6), the appellant's wife and children would not be expected or forced to leave the United Kingdom. Reference was made to **VM (Jamaica) [2017] EWCA Civ 255**. She referred to paragraph 60 and the case of **FZ (China) v Secretary of State [2015] EWCA Civ 550** – the critical question was whether there was "an entire dependency of the relevant child on the person who is refused a residence permit or who is being deported". As in that case in the instant case there was no "entire dependency" on the appellant because they could remain in the UK with their mother who was a British citizen and had a right to be in this country. The guidance was consistent with the guidance given in **Agyarko v Secretary of State [2017] UKSC 11** at paragraphs 61–67. The approach was consistent with the findings of the First-tier Judge. The appellant had used deception which was relevant to the consideration as to whether he could be separated from his wife and children.

19. In reply it was submitted that deportation was under consideration in the case of **VM** which was accordingly not applicable in the instant appeal. The judge had not properly considered the policy.

20. At the conclusion of the submissions I reserved my decision. I remind myself that I can only interfere with the decision of the First-tier Judge if it was materially flawed in law. I would endorse the comments of the First-tier Judge who granted permission when stating that the decision was clear and careful. I would also agree with the comment that there was nothing in ground 1. Ground 1 is simply an expression of disagreement with the findings made by the judge which were open to her. The judge was entitled to take into account the appellant's difficulties with speaking in English both at the hearing and at the interview as one of a number of credibility issues that caused her to find as she did. The issue of language was by no means the only factor that the judge had in mind in a lengthy and carefully analysis of the evidence before her. Her conclusion that the appellant was not a credible witness was reached after meticulous examination of the oral and documentary evidence.

21. In relation to the arguments based on the guidance it is important to note that it is the conduct of the appellant that is relied on in this matter and the judge properly addressed this in paragraph 39 of her decision. The appellant had engaged in deceitful conduct in submitting a certificate which had been fraudulently obtained. The requirement to obtain an English language test had important policy objectives as the judge noted and a fraudulent test such as the one submitted by the appellant undermined the system of immigration control in the UK. It was open to the judge to find that the Secretary of State had been entitled to exercise discretion under paragraph 322(5) of the Rules. This is not a case of low-level criminality and I am not satisfied there is any material difference for the purposes of this appeal between the suitability requirements and what is said in paragraph 322(5). As the Secretary of State put it in the reasons for decision, the appellant's complicity in the fraud contributed to an extremely serious attack on the maintenance of effective immigration controls and the public interest more generally.

22. In relation to the **Zambrano** point the law has, as Ms Fijiwala put it, moved on and the Court of Appeal at paragraph 52 of **VM (Jamaica)** noted that the Tribunal appeared to have been misled by an "ill advised concession" made by the Secretary of State in **Sanade [2012] UKUT 48 (IAC)**. It had been conceded in effect that a British child's location in the UK was to be treated as a fixed point and the Article 8 analysis had to be moulded in that light. As was said in **VM (Jamaica)** and **FZ (China)** the possibility of the children relocating did not violate the fundamental precepts of EU law. The children could alternatively remain in the UK with their mother – there was no "entire dependency" of the children and the appellant. The children are not being forced to leave the EU and the circumstances are not the same as in the case of **SF (Albania)** where, of the three appellants, only one, the youngest child, was a British Citizen. The mother and elder child were citizens of Albania.

23. Having carefully considered the arguments advanced I find that the grounds raise no material error of law and the decision of the First-tier Judge stands.

    The appeal is dismissed.

**Anonymity Order**

The First-tier judge made no anonymity direction and I make none.

**TO THE RESPONDENT**
**FEE AWARD**

The First-tier judge made no fee award and I make none.

Signed Date 12 January 2018

G Warr, Judge of the Upper Tribunal