Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/43560/2014

THE IMMIGRATION ACTS

Heard at Field House
On 22.6.15

Decision and Reasons Promulgated
On 08.09.15

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON
DEPUTY UPPER TRIBUNAL JUDGE O'RYAN

Between

Mr CLAUDIUS KENUTE HENRY
(Anonymity direction not made)

Appellant/Respondent

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent/Appellant

Representation:
For the Appellant: Mr Jacobs, Counsel instructed by Solomon Solicitors
For the Respondents: Ms K Pal, Home Office Presenting Officer

DECISION AND REASONS

1 The Secretary of State appeals with permission against the decision of the Fist tier Tribunal (FtT) (Judge of the FtT Ghani) dated 9th February 2015. We shall refer to the parties as they were in the FtT, that is that the Appellant is Mr Claudius Kenute Henry, and the Respondent is the Secretary of State for the Home Department.

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2 The Appellant had appealed to the FtT against the decision of the Respondent dated 9.10.14 to remove him administratively to Jamaica, his country of nationality, under s.10 Immigration and Asylum Act 1999. The Appellant's immigration history is set out at paragraph 10 of the FtT's determination and it is not necessary to repeat it all here.

3 The Appellant had resisted that decision on grounds that his removal would be contrary to immigration rules and would be unlawful under s.6 Human Rights Act 1998, on the grounds that his removal from the United Kingdom would amount to a disproportionate and therefore unlawful interference with his rights to private and family life under Article 8 of the European Convention on Human Rights.

4 The Appellant asserted that he had a family life with his family members, being:

(i) his wife, Myrtle Nerissa Williams-Henry (Nerissa), Jamaican national, present in the UK with discretionary leave to remain (DL), last granted from 10.9.13 to 10.9.16;

(ii) his son, Kadeem Kanal Naoir Henry (dob 25.5.91 therefore 23 at date of decision, and FtT appeal hearing), Jamaican national, present in the UK and last granted DL from 24.12.13 to 23.12.16; and

(iii) his daughter, Kelia-Gabe Shimmarie Ackiel Henry (dob 21.4.96, therefore 18 at date of decision, and FtT appeal hearing), Jamaican national, present in the UK and last granted DL from 24.11.13 to 24.11.16).

5 The appeal came before the FtT on 14.1.15. The Tribunal allowed the appeal.

6 A fair summary of the Respondent's grounds of appeal against the FtT's determination is that the FtT erred in law in:

(1) failing to have regard to the public interest in removal, in particular as specified in Part 5A 2002 Act, s.117B, and in particular failing to have regard to:

(i) the need to maintain effective immigration control;

(ii) the fact that the Appellant's family life was established when he was present either unlawfully or at best with precarious immigration status; and

(iii) whether the Appellant was financially independent;

(2) failing to have regard to:

(i) the Appellant's past dishonesty in use of a forged immigration stamp and by maintaining a pretence that he had at one point separated from his wife;

(ii) the fact the family members themselves do not have settled status and his children are adults;

(3) misdirecting himself in law in considering whether it would be reasonable to expect the Appellant to return to Nigeria and/or for the Appellant's wife to

leave everything in the UK behind and start afresh; the relevant test being to consider where there would be unjustifiably harsh consequences in doing so.

7 Permission to appeal was granted by FtT Judge Mark Davies on 30.3.15 on the grounds that:

"2 The Judge appears to have had no regard whatsoever to the public interest when reaching his decision. That is clearly an error of law.

3 The grounds and the determination do disclose an arguable error of law."

8 It was not indicated on what particular grounds permission was being granted. We treat permission as having been granted on all grounds.

9 We heard submissions from the parties. Ms Pal, for the Respondent, relied on the Secretary of State's grounds of appeal. She suggested that the issue of the Appellant's use of deception by use of a forged immigration stamp and letter had been raised at paragraph 5 of the determination, but not actually considered or addressed later in the determination, for example at paragraph 53 onwards where Article 8 was being considered. She accepted that the failure 'may' not have made a difference to the outcome, but that consideration of issues such as deception was central to the consideration under Article 8 ECHR. A further deception point was the Appellant's admitted pretence that he had been separated from his family for a period of time, for the apparent purpose of protecting the position of his family members after he had been refused leave to remain in the UK.

10 Ms Pal also averred that there had been no consideration of the issues under s.117B Nationality, Immigration and Asylum Act 2002, in particular, whether the Appellant spoke English, was financially independent and whether any private or family life had been developed at a time when the Appellant's status in the UK had been unlawful or precarious.

11 For the Appellant, Mr Jacobs argued that the determination should be read as a whole; the issue of use of deception had been dealt with at paragraph 5. He asserted that the Respondent's case appeared to be that she was insisting that a matter dealt with at one point in the determination be repeated at the end of the determination; this was unnecessary. Mr Jacobs suggested that Ms Pal had conceded in her submission that:

(i) the FtT had adequately set out the Secretary of State's concerns re: deception at paragraph 5; and

(ii) any failure to revisit the deception issue was not material.

12 As to whether s.117B NIAA 2002 had been sufficiently addressed, Mr Jacobs referred to the headnote in **Dube (ss.117A 117D)** [2015] UKUT 90 (IAC) (24 February 2015), which provides:

"(1) Key features of ss.117A 117D of the Nationality, Immigration and Asylum Act 2002 include the following:

(a) judges are required statutorily to take into account a number of enumerated considerations. Sections 117A 117D are not, therefore, an *a la carte* menu of considerations that it is at the discretion of the judge to apply or not apply. Judges are duty bound to "have regard" to the specified considerations.

(b) these provisions are only expressed as being binding on a "court or tribunal". It may be that the Secretary of State will consider it in the interests of good administration and consistency of decision making on Article 8 claims at all levels to have express regard to ss.117A 117D considerations herself, but she is not directly bound to do so.

(c) whilst expressed in mandatory terms, the considerations specified are not expressed as being exhaustive: note use of the phrase "in particular" in s.117A(2): " In considering the public interest question, the court or tribunal must (in particular) have regard— ".

(d) section 117B enumerates considerations that are applicable "in all cases", which must include foreign criminal cases. Thus when s.117C (which deals with foreign criminals) states that it sets out "additional" considerations that must mean considerations in addition to those set out in s.117B.

(e) sections 117A 117D do not represent any kind of radical departure from or "override" of previous case law on Article 8 so far as concerns the need for a structured approach. In particular, they do not disturb the need for judges to ask themselves the five questions set out in **Razgar** [2004] UKHL 27. Sections 117A 117D are essentially a further elaboration of Razgar's question 5 which is essentially about proportionality and justifiability.

(2) It is not an error of law to fail to refer to ss.117A 117D considerations if the judge has applied the test he or she was supposed to apply according to its terms; what matters is substance, not form."

13 He argued that the specific text of s.117B therefore need not be set out by the FtT. He further argued that the issues that are to be taken into account under s.117B NIAA 2002 did not in any event raise any issue which was adverse to the Appellant, and had little relevance to the determination of the appeal; for example:

(i) s.117B(2) regarding the ability so speak English; the Appellant was fluent in English (and in any event we observe that under Appendix FM he, as a national of Jamaica, he is not subject to the English language requirement, as per GEN 1.6);

(ii) s.117B(3); the Appellant was financially independent, at least to the extent that he was dependent of his wife, who earned sufficient income for the family to be financially independent;

(iii) whereas s.117B(4) provides:

"(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully."

Mr Jacobs argued that the present appeal did not principally concern the Appellant's private life (s.117B(4)(a)), rather, his family life, and further, that the Appellant's family life was not *formed* at a time when the Appellant was present unlawfully in the UK; rather, this was a family life which originated many years ago, back in Jamaica.

14 As to the Respondent's last ground, that the FtT had misdirected itself in law by asking whether it was reasonable for the family life to be enjoyed outside the UK; Mr Jacobs submitted that this did not represent a misdirection in law; the proportionality test still raised the question of reasonableness, as per the House of Lords Judgement in **Huang** ([2007] UKHL 11). In the present case, the FtT had appropriately directed itself in law at paragraph 53, referring to **Huang**, and reached a conclusion at para 56 on the reasonableness test which was open to it on the evidence. If any further reference to the public interest was needed at any point after paragraph 5, Mr Jacobs asserted that the reference at the end of paragraph 56 to 'the public end being served' was an adequate reference.

15 Mr Jacobs averred that there was no material error in the determination, but that if, contrary to his submission, the present Tribunal found that there was, then he invited us to allow the appeal and remit back to the same Judge to address any shortcomings in the decision.

16 In reply, Ms Pal summarised her earlier submissions, and invited this panel to re-make the decision itself, if we found any material error of law in the FtT's determination.

Error of law ruling

17 We stood the matter down for a short period to discuss the matter. When we resumed the hearing, we informed the parties that we were of the view that the FtT's decision did contain a material error of law, such that we intended to set aside the determination.

18 Our reasons for so finding are as follows, addressing the Respondent's grounds of appeal as we have summarised them at paragraph 6 above.

Ground 1

19 The Respondent's first ground raises the question of whether the Judge had adequate regard to the pubic interest in removal. s.117A(3) NIAA 2002 defines the public interest question as follows:

> "(3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2)."

20 We note that the Judge did not refer to Part 5A of the Nationality Immigration and Asylum Act 2002, ss.117A-D in his decision. However, as per **Dube (ss.117A 117D)** [2015] UKUT 90 (IAC), headnote 2: "It is not an error of law to fail to refer to ss.117A 117D considerations if the judge has applied the test he or she was supposed to apply according to its terms; what matters is substance, not form."

21 Although the Judge could have addressed the public interest question as raised in Part 5A NIAA 2002 in more detail, we find that in substance, the Judge has had sufficient regard to the considerations set out in Part 5A. At paragraph 52 and 56, the Judge finds:

> "53 As far as proportionality is concerned, a fair balance must be struck between the rights of the individual and the interest of the Community and the severity and consequences of the interference will call for careful assessment at this stage."
>
> 56. ... I find with the evidence before me that many factors weigh heavily in favour of the Appellant remaining within the family unit in the UK than factors in favour of the Appellant's removal. ... I find that the interference cannot be said to be proportionate to the public end being sought to be achieved."

22 These passages suggests that the Judge had, in referring to the interest of the Community, the factors in favour of the Appellant's removal, and the public end sought to be achieved, taken the public interest question into account.

23 In particular, the need to maintain effective immigration control was refereed to at the end of para 52, and the precarious nature of the family's permission to be in the UK was referred to at the end of para 50.

24 As to whether the Judge had adequate regard to the issue of whether the Appellant was financially independent, we note that Ms Pal for the Respondent made no oral submission on this point and did advance any argument as to what particular level of financial income would be required under Part 5A and/or the Immigration Rules for the Appellant to be treated being financially independent. However we have considered paras 14-18 of **AM (S.117B)** [2015] UKUT 260 (IAC) (17 April 2015). Paragraph 18 in particular provides:

> "The mere fact that the evidence in a particular case establishes fluency or financial independence to some degree, does not prevent the Respondent from relying upon these matters as public interest factors weighing against the claimant. The Respondent would only be prevented from doing so if a claimant could demonstrate fluency, or financial independence, to the level of the requirements set out in the Immigration Rules."

25 Insofar as this is authority for the proposition that the Appellant was required to meet the financial requirements for an application for leave to remain under Appendix FM in order to prevent the Respondent from relying on lack of financial

independence as a public interest factor militating against the Appellant, then we would observe that the Judge considered at para 44 that the Appellant's wife appeared to be earning £1500 per month after tax. This was clearly based on her evidence at paragraph 38 of her witness statement dated 6.1.15 (Appellant's bundle pages 125-132). Having taken that witness's (unchallenged) evidence into account, it would be artificial to assume that the Judge had not also taken into account the evidence contained in the paragraph immediately preceding it, in which the Appellant's wife gave more particular evidence about her income, and in which she asserted that her overall gross income exceeded £18,600, ie the relevant level under Appendix FM. We find that no material error established by the Respondent's first ground.

Ground 2

26 Although we have observed that the Judge undertook a balancing exercise at paragraph 56 of the decision, we are of the view that the Appellant's past dishonesty has not been properly taken into account in the determination as a relevant consideration in the proportionality exercise in the appeal. The dishonesty relied upon by the Respondent in her refusal letter of 9.10.14 was that the Appellant had on 23.6.03 submitted an application for the Respondent which included his expired Jamaican passport, purporting to contain a stamp granting indefinite leave to remain (the application being that the Appellant was requesting that a similar endorsement be made on his new Jamaican passport). That stamp, and a letter purporting to be from the Respondent accompanying the original grant of ILR, were later (in 2007) found to be false. The Appellant later (2007) received a police caution in relation to these events.

27 Another matter relied upon by the Respondent was that the Appellant had previously (in or around 2007) made false representations to the Respondent that he had separated from his wife, whereas the Appellant later stated that this had not been true and that he had been encouraged to say this by his former representatives so that his own precarious immigration status did not affect his family.

28 Notwithstanding Mr Jacob's submission that these issues were adequately set out at paragraph 5 of the decision, it is clear that at this part of the decision (paras 5-13) the Judge was merely setting out the Respondent's case, and at no point in those paragraphs was the Judge attempting to engage with the issues. Regrettably, the Judge did not return to them at any later stage. To that extent, these 'dishonesty' issues are therefore to be distinguished from the other public interest considerations raised by the Respondent, and addressed in our paragraphs 19-25 above, and in any event, we consider the making of false representations and the commission of criminal offences to be of such potential importance that these issues demanded specific consideration, which they did not receive.

29 Further, Mr Jacob's attempt to re-characterise Ms Pal's observation that the Judge's failure to take into account the dishonesty of the Appellant 'may' not have been material to the outcome of the appeal as a concession by her that the error was not

material, was unwarranted. It seemed to us that at this point, Ms Pal was being conspicuously fair in the position that she took before the Tribunal, which was, it seemed to us, that the error was material unless one could say with some confidence that the error *would not* have made any difference to the outcome of the appeal. Her observation that it *may not* have made a difference was not to say that it would not have made any difference. The Tribunal appreciated the distinction she made at that point, even if Mr Jacobs did not.

30 The Judge therefore made a material error of law. We return below to the effect of such error.

Ground 3 - misdirection in law.

31 The Judge directed himself in law as to the test to be applied in the determination of the proportionality of the Appellant's proposed removal by reference to **Huang v SSHD** 2007 UKHL11 at paragraphs 51 and 53, and cited paragraph 20 of the House of Lord's Judgement in that case (although the Judge mistakenly attributes the quote to the judgment of the Court of Appeal in that case):

> "In an article 8 case where this question is reached, the ultimate question for the appellate immigration authority is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by article 8. If the answer to this question is affirmative, the refusal is unlawful and the authority must so decide."

32 The Judge also referred to and adopted at paragraphs 52 onwards the 5 stage approach in **Razgar v SSHD** [2004] UKHL 27.

33 We would observe that the *ratio* of **Huang** has received further consideration by the Supreme Court more recently, in **Patel & Ors v Secretary of State for the Home Department** [2013] UKSC 72 (20 November 2013), Lord Carnworth stated:

> "54. The difference between the two positions may not be as stark as the submissions before us have suggested. The most authoritative guidance on the correct approach of the tribunal to article 8 remains that of Lord Bingham in Huang. In the passage cited by Burnton LJ Lord Bingham observed that the rules are designed to identify those to whom "on grounds such as kinship and family relationship and dependence" leave to enter should be granted, and that such rules "to be administratively workable, require that a line be drawn somewhere". But that was no more than the starting point for the consideration of article 8. Thus in Mrs Huang's own case, the most relevant rule (rule 317) was not satisfied, since she was not, when the decision was made, aged 65 or over and she was not a widow. He commented at para 6:
>
> > "Such a rule, which does not lack a rational basis, is not to be stigmatised as arbitrary or objectionable. But an applicant's failure to qualify under the rules is for present purposes the point at which to begin, not end, consideration of the claim under article 8. The terms of the rules are relevant to that consideration, but they are not determinative."

55. Thus the balance drawn by the rules may be relevant to the consideration of proportionality."

34 Following such a self-direction in law, in which the Judge referred to **Huang** and **Razgar**, being the cases of highest domestic authority on the issue, we are of the view that there is no material misdirection in law within the determination.

Relief

35 In the light of the Judge's error of law (failing to have any or proper regard to the Appellant's past dishonesty), we indicated to the parties that we intended to set aside the FtT's determination under s.12(2)(a) TCEA 2007, which we now do.

36 By way of disposing of the appeal, Mr Jacobs invited us to remit the appeal under s.12(2)(b)(i) TCEA 2007 to the same FtT judge to address the shortcomings in his determination. For her part, Ms Pal requested that the appeal be decided by the Upper Tribunal by way of proceeding immediately to re-hear and re-decide the appeal.

37 Mr Jacobs said he was in some difficulty if the appeal as to be re-heard, as he did not have full set of papers. This was, being some considerable way into the hearing, the first time that he mentioned any such difficulty.

38 We indicated that there being no challenge by the Respondent to the findings of fact made by FtT judge as to the family's circumstances and the existence of family life between the various family members, we were of the view that those findings should be retained, and that this was not a case where a remittal to the FtT would be necessary or appropriate under the relevant practice statement.

39 We allowed Mr Jacobs to take further instructions from the Appellant as to how he intended to pursue the appeal, and we indicated that in any further decision, the present Tribunal would wish to have any relevant evidence brought to its attention as to the issues not properly taken into account by the FtT, i.e. the Appellant's use of deception, and indeed, his wife's knowledge of the same. We allowed Mr Jacobs time to consider those matters and we interposed another case which we then dealt with.

40 Upon the present appeal being called on again, Mr Jacobs indicated that he now been able to consider the relevant paperwork and was able to indicate to us the evidence relevant to the issue of the Appellant's false representations. That evidence comprised the Appellant's witness statement dated 6.1.15 paragraph 13 to 14. In that evidence, the Appellant described that in 2002 an administrator at a college in Collingdale, London, at which the Appellant had been studying, applied to extend the Appellant's leave to remain as a student. When his passport was returned there was a stamp in his passport saying that he had indefinite leave to remain, and an accompanying letter outlining what the Appellant was entitled to in terms of travel and benefits. He also stated that his Jamaican passport in which that stamp was placed expired and he applied to the Home Office for the ILR stamp to be transferred to his new Jamaican passport. He denied being aware that the stamp was 'bogus'.

There are further passages at paragraph 22 as to how in 2007 he received a police caution in relation to this matter. Paragraph 25-26 address the issue of how he came to assert (falsely, he claims) that he had separated from his wife in 2007.

41 Mr Jacobs suggested that when the Appellant's appeal against an earlier decision of the Respondent dated 28.4.08 to remove him from the United Kingdom came before the Asylum and Immigration Tribunal (Immigration Judge Callow) on 16.6.08, Judge Callow had accepted the Appellant's explanation about how he obtained the ILR stamp and that this had not involved wrongdoing on the Appellant's part, and that when that determination had been reconsidered by the AIT on 10.11.08 (DIJ Shaerf), Judge Shaerf had not disturbed that finding.

42 In relation to the knowledge of the Appellant's wife Myrtle of the Appellant's false statement that he had separate from her in around 2007, Mr Jacobs initially appeared to assert that the Appellant's wife had not been aware that the Appellant was making an application on the basis that he had separated from her. However, we considered in open court the content of paragraph 30 of her witness statement dated 6.1.15 in which she appears to accept that she was aware that her husband the Appellant was making these assertions, apparently on the advice of their former representative, and that it was her husband who was the one who did not want to carry on the pretence and had given evidence about this falsehood in court (which in the context of the case means at the AIT reconsideration hearing of 30.10.08).

43 At this juncture we also considered the content of an interview at page A2-A3 of the Respondent's bundle entitled 'Immigration Service - Record of Interview) dated 3.8.07 conducted by PC Dave Elcome at Wembley Police Station, and a document at page 15 of the Appellant's bundle entitled 'Record of Formal Adult Caution' in relation to the Appellant, dated the same date, 3.8.07, signed by the same officer.

44 Mr Jacobs having drawn to our attention these elements of the Appellant's evidence, he did not call or seek to call any additional oral evidence from the Appellant or any additional witness. Both parties made closing submissions as to the re making of the decision on Article 8 grounds; the Appellant asserting, in summary, that the Appellant's removal would be disproportionate, and the Respondent, the converse.

Discussion in remaking the decision

45 We retain the following findings from the decision of the FtT dated 9.2.15, unaffected by the material error of law:

* The determination of DIJ Shaerf was the starting point in terms of assessment of the extent of family life [50];
* Circumstances have moved on since that date [50];
* The Respondent accepted that at least from 2010 to 2014 (when the decision under appeal was taken) the Appellant had established that he and his wife had

been cohabiting and they have reconciled and continue to live as a family in the marital home [50]'

* The children, although bot now adults, continue to live in the family home. the Appellant daughter remains financially dependent on the Appellant's wife [50];

* There exists an emotional bond between the appellant and his children which cannot be said to have been severed upon the children attaining majority [50];

* The Appellant has established private and family life with his wife and children [52];

* The Appellant has not simply been a father to his two children but a friend, a mentor and guiding force in their lives [54, and see also remainder of that paragraph, and paragraph 55, wherein the witness evidence of the Appellant's children and wife is set out as to the bonds that exist between them];

* **The Appellant plays a central part in the family** [56];

* It would not be reasonable to expect the Appellant's wife to leave everything behind and start afresh in Jamaica [56];

* The Appellant's wife works as a Dyslexic Support Tutor at the University of Bedfordshire and as a Special needs Support Teacher in a Secondary School in Dunstable. She has specialist training to work with in this area and has sacrificed a considerable amount of money and time in studying to become a specialist in this field. This expertise would be lost [56];

* If the Appellant were removed, this would inevitably cause disruption and separate from the family unit.

46 If we were deciding the appeal on the basis of those findings we would be minded to allow the Appellant's appeal against removal on the basis, overall, that the disruption to the family life existing between the Appellant and his family members was disproportionate to the legitimate aim of maintaining immigration control.

47 However, the picture presented by those findings of the FtT is incomplete, without a proper consideration of the dishonesty issues raised by the Respondent.

48 The first of these is the use of the false ILR stamp in an application made to the Respondent on 23.6.03. It is necessary to see what offence, if any, was actually committed and admitted to by the Appellant.

49 In the first instance, we reject any suggestion by Mr Jacobs that the AIT in its determination dated 14.7.08 (Judge Callow) absolved the Appellant of wrong doing in this regard. It is right to accept that Judge Callow provided as follows at paragraph 15 of that determination:

> "Adverse to the Appellant is the general public interest in maintaining a consistent and effective policy of immigration control, and in particular the circumstances that the immigration history of the appellant involved some deceit, *albeit without his knowledge*." (Emphasis added).

50 However, due to other errors of law within that determination, Senior Immigration Judge Moulden held on 3.9.08 that:

> "16 Having found that there are material errors of law I adjourn for a second stage reconsideration with all issues at large. The flaws in the findings of fact and the need for these to be augmented mean that a fresh fact-finding exercise is required."

51 In our view, Judge Callow's remark, 'albeit without his knowledge' was little more than a passing remark, which did not in any event survive Judge Moulden's later error of law determination.

52 In the second stage reconsideration, Judge Shaerf did not appear to make any particular findings as to the Appellant's culpability for the possession of a false ILR stamp, considering instead, and in detail, the issue of whether the Appellant had continuously remained in a relationship with his wife, notwithstanding the assertions made in his name that he had separated from her (and we return to this point below).

53 Therefore, there is no finding of fact which serves as a starting point for our consideration of the Appellant's culpability for possession of the false ILR stamp and letter.

54 In fact, the evidence on this is rather thin. There is an assertion by the Respondent in the refusal letter dated 9.10.14 (page 1 of 13) that in August 2007 the Appellant was cautioned in relation to his possession of the stamp, for the offence of obtaining pecuniary advantage by deception.

55 The interview of the Appellant under caution conducted by PC Dave Elcome on 3.8.07 does not shed much light on what offence the Appellant was being interviewed about; certainly, the interview that we have seen does not demonstrate that it was put to the Appellant at any point that he was guilty of any particular offence, or how he responded to any such allegation.

56 Finally, the Record of Formal Adult Caution dated 3.8.07 at page 15 of the Appellant's bundle does not specify the offence for which the Appellant was being cautioned. At the prompt 'Title of offence(s)' there is a typed (and we think computer-generated) entry reading 'Error! Reference source not found'. That same response is found in answer to a number of questions posed on the form.

57 However, the copy of the form we have seen has some details in manuscript and bears the signature of PC Elcome, and, following the text 'I admit that I committed the offence(s) detailed above', is the Appellant's signature.

58 A police caution, as the record document itself makes clear, does not amount to a criminal conviction, but, as is also clear from the form, involves an admission from the person cautioned that they have committed a criminal offence. The principal difficulty in knowing how to treat this evidence is that the title of the offence is missing. We have not seen any evidence supporting the Respondent's assertion in the refusal letter that the offence was of obtaining a pecuniary advantage by deception.

59 Whilst noting the limitations of the evidence before us, we note that it is not a possibility in the present case that the Respondent erroneously granted ILR to the Appellant following his application for further limited leave to remain as a student, as the Respondent asserts that the documents were false, not that they were issued in error. The Appellant has not disputed this. Further, we note the Appellant's admission that he did in fact submit the letter and stamp to the Respondent with his application on 23.6.03, and he has not, as we say, argued at any point that the documents were genuine.

60 If, as he asserts, the Appellant was not knowingly involved in procuring a false ILR stamp in his passport and the associated letter purporting to be from the Home Office, then the only other explanation that we can think of for these events occurring is that the College administrator was involved in the criminal act of obtaining a false document for the Appellant, without the Appellant's invitation or knowledge. We think the probability of this occurring is very low. We find that the Appellant's protestations made within his witness statement that he was not involved in any wrong doing, and that he agreed to receive the caution only 'under protest' (IJ Callow, para 3(b)) do not ring true. We find, on a balance of probabilities, that the Appellant was knowingly involved in obtaining a false ILR document and accompanying letter in or around 2002, which he later used in 2003 when applying for the ILR stamp to be transferred to his new Jamaican passport.

61 However, these events were 12-13 years ago. The Respondent, notwithstanding that they were provided with these documents on 23.6.03 in support of the application to have the ILR endorsement transferred to his new passport, did nothing until 2007 when the Appellant was interviewed under caution about these matters. Even then, the police formed the view that a caution was an appropriate outcome, which suggests, we think, that they were of the view that the evidence before them was insufficient to mount a prosecution or that the matter was not sufficiently serious to warrant a prosecution. Given the passage of time since both the obtaining of the false document in or around 2002, and the caution in 2007, we find that the police were better placed in 2007 than are we in 2015 to determine the level of seriousness of this Appellant's criminal culpability. We are of the view that we are entitled to take into account, as in indication of the seriousness of the Appellant's criminal behaviour, the manner in which the Police dealt with the matter in 2007, which was merely to issue a caution, which, as we have observed, is not a conviction.

62 Given the passage of time since these events, and taking into account the manner in which they were dealt with by the police in 2007, we do not find that the Appellant's

wrongdoing, such as it may have been, remains, in 2015, a significant factor militating as a public interest consideration against those factors which are relied upon by the Appellant in support of his contention that his removal would be disproportionate.

63 The other matter which we are concerned with is the Appellant's apparent deception of making an application for leave to remain in 2007 on the alleged basis that he had recently separated from his wife.

64 It is appropriate to consider the findings of DIJ Shaerf on this matter in his determination of 10.11.08, made much nearer in time to the relevant events than we are today. His findings were not appealed by the Appellant to the Court of Appeal. Those finding included:

(i) "I do not find the evidence of the Appellant and his wife relating to the subsistence of their marriage to be credible" [D15 para 38]

(ii) **"I find the Appellant has failed to discharge the burden of proof to the requisite standard, the balance of probabilities, to show he has continuously or at least for long periods lived with his wife and children at 98 Gardenia Avenue and that his marriage is subsisting. Similarly, I do not accept the Appellant's explanation why he used 117 Gardenia Avenue as an address, relying on advice given by his solicitors, which advice he had vehemently protested**" [D15 para 39]

(iii) The Judge did not accept a reason advanced by the Appellant's wife as to why she had not attended the earlier hearing of the Appellant's appeal, on 16.6.08: "I conclude that the Appellant's relationship with his children is not as close and intense as claimed" [D16 para 42]

(iv) "I find that he has contact with his children but not of the degree and quality claimed at the hearing or in his wife's statement." [D16 para 43]

(v) "I am satisfied that the Appellant has established a private and family life with his estranged wife and their children" [D17 para 45]

(vi) "I have found that the Appellant's wife and children have limited leave to remain in the United Kingdom and whilst the Appellant may not be completely estranged from his wife he has not shown that his marriage was at the date of the application, decision or hearing subsisting." [D18 para 49].

65 The Appellant made the same assertions before DIJ Shaerf as he has in the current proceedings, i.e. that he never in fact separated from his wife, and that the assertions in his application in 2007 that he done so were in fact false, but had been made on the advice of his then representative. His assertion, then, is that he had lied to the Respondent about having separated from his wife in 2007.

66 In fact, as may be seen from the findings of DIJ Shaerf above, that account was not accepted. Judge Shaerf found that, even taking the Appellant's explanations into account, that the Appellant <u>had</u> become estranged from his wife, and that their relationship was not that which they asserted. The Appellant advances no different evidence now as to his circumstances pre 2008, than that which he relied upon before Judge Shaerf.

67 So, the Appellant did lie in 2007/2008. However, the nature of the lie was not that he had falsely asserted to have been estranged from his wife and children, merely for the sake of their immigration applications; rather the nature of the lie was the converse: he had in truth become estranged from his family, but he was pretending to be in an ongoing relationship with wife, and he had given a false explanation to the AIT on reconsideration on 30.10.08 as to why he had stated in his 2007 application for leave to remain that he had become estranged.

68 Those matters were considered by the AIT in 2008. The events are now nearly 7 years ago. For her part, the Respondent now accepts that at least since 2010, the Appellant has been cohabiting with his wife and children. Our conclusion is that the Appellant has remained legally married to his wife throughout; that they had lived together in the UK after his arrival here, but that at some point in time (unknown) that ceased to be the case. We follow the findings made by Judge Shaerf that, at least by 2008, the Appellant was not in a subsisting marriage (however awkwardly that sits with his finding at para 45 that the Appellant had established a private and family life with his estranged wife and their children). At some point in time thereafter (no later than 2010) the Appellant's relationship with his wife had become resolved and he had resumed living with his wife and children. Circumstances have, as Judge Ghani observed at his para 50, moved on.

69 The extent of the Appellant's family life ties were observed by the FtT in the present appeal, and we have retained those findings of fact (para 35 above), such findings not being infected by any material error of law.

70 Summarising the issue, therefore: in the light of Judge Shaerf's (and our) finding, that the Appellant had by 2008 become separated from his wife, but that

(i) he was pretending before the AIT in 2008 not to have become separated, and gave a false explanation for his previous evidence; and

(ii) he continues in these false pretences even in his evidence today;

has the Appellant engaged in making false representations militating in favour of the public interest in removing him from the United Kingdom?

71 Given that the recent preserved findings of the FtT are that there are clearly strong family bonds between the family members, and those findings were made in the full knowledge that there had been past adverse finding made by the AIT regarding the strength of the Appellant's family ties, we are of the view that the fact that the Appellant has chosen to maintain something in later evidence which had previously

been disbelieved in 2008 does not significantly alter the weight to be attached to his current family ties. He may have better advised to say nothing more about those mattes in his witness evidence, but we do not treat the Appellant's evidence as being any less credible than did IJ Shaerf, whose findings as to the state of the Appellant's family ties have been surpassed by the passage of time, and by Judge Ghani's findings.

72 We therefore find that neither the Appellant's involvement in obtaining a false ILR document in or around 2002 (the circumstances of which remain, on the evidence before us, unclear), nor his representations in 2007/8 that he maintained his relationship with his wife but had given contrary evidence on bad advice, represent significant reasons militating in favour of there being a public interest in removing the Appellant. Much time has passed since these events. Although these issues should have been properly considered by the FtT in the present appeal, they do not, after proper consideration, disclose significant public interest reasons for requiring the Appellant's removal from the United Kingdom.

73 We ultimately concur with the FtT's view that the Appellant's removal from the United Kingdom would amount to a disproportionate and therefore unlawful interference with his right to private and family life under Article 8 ECHR.

Decision

74 (i) We find a material error of law in the FtT's decision of 9.2.15;

(ii) we set aide that decision;

(iii) we remake the decision, allowing the Appellant's appeal on article 8 grounds only, against the Respondent's decision of 9.10.14 to remove him from the United Kingdom.

(iv) the appeal (insofar as it is brought) under the immigration rules is dismissed.

75 There being no application for anonymity, no order for anonymity is made.

Signed

Deputy Upper Tribunal Judge O'Ryan
Date:

Deputy Upper Tribunal judge Rimington
Date: