Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/19241/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25 April 2018	**On 11 May 2018**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MANPREET SINGH
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer
For the Respondent: Mr M Moriarty, Counsel

DECISION AND REASONS

1. Although the appellant in these proceedings is the Secretary of State, I refer to the parties as they were before the First-tier Tribunal.

2. The appellant is a citizen of India born on 24 February 1990. He arrived in the UK on 3 December 2011 as a student, with leave to remain subsequently granted until 30 March 2016. On 17 March 2016 he made an application for leave to remain on human rights grounds, with reference to Article 8 of the ECHR, as a partner and parent. His application was refused in a decision dated 26 July 2016.

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3. The appellant appealed against that refusal and his appeal came before First-tier Tribunal Judge Row ("the FtJ") on 11 August 2017, the result of which was that the appeal was allowed.

4. The respondent's decision accepted that the appellant has a 'qualifying' relationship with his British citizen partner, and did not dispute that he has a parental relationship with his son B and his partner's son S. However, the basis of the refusal to grant leave to remain was in terms of the suitability requirements of the Article 8 Rules. The respondent was of the view that the appellant had obtained an English language test certificate by deception and that he had used that TOEIC certificate in support of an application for leave to remain dated 13 February 2013.

The FTJ's decision

5. The FTJ referred to the respondent's reliance on the now familiar 'generic' witness statements in ETS cases, namely from Peter Millington and Rebecca Collings. He also referred to a printout which indicated that a test taken by the appellant on 28 November 2013 was invalid because the test had been taken by a proxy.

6. He concluded that that generic evidence provided a *prima facie* case that the test was taken by proxy, and that it was open to the appellant to rebut that case. He referred to the appellant's evidence that he took the test himself. However, he said that it was perhaps surprising that having been effectively accused of conspiracy to defraud in the decision letter, the appellant had taken no steps to protest his innocence to ETS and to demand an explanation from them. The appellant's evidence was that he had sent them an email. However, the FTJ said that he did not produce a copy of that email at the hearing and concluded that there was no email.

7. At [9] the FTJ said that there were nonetheless, matters that caused him to doubt the accuracy of the information provided by ETS to the respondent. He noted that the data provided by ETS indicated that two tests were taken, one at New London College on 28 November 2012 and the other at Manchester College of Accountancy and Management on 18 June 2013. The appellant's case was that he never took any test at Manchester College. The respondent had accepted that the appellant never took any such test at Manchester College and that the information provided by ETS in that respect was incorrect. The FTJ said that it appeared that the printed data related to someone else called Manpreet Singh, with a different date of birth, 2 March 1990. However, he referred to the fact that the printout indicated that both people referred to had the same passport number, which was the appellant's passport number. He said that there was no explanation of how that had happened.

8. He then stated that those facts "hardly inspires confidence that the information provided by ETS can be relied upon".

9. In the next paragraph he concluded that "On balance" the appellant had rebutted the prima facie case against him and that the respondent had not shown that the appellant took the test by proxy. Accordingly, he concluded that the appellant met the suitability requirements of Appendix FM. He further concluded that he was able

to meet the requirements of paragraph EX.1 and similarly, s.117B(6) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act").

10. He found that the appellant had a genuine parental responsibility with his son B, and although he may have such a relationship with his partner's older child, he concluded that it was not necessary to consider that matter. The issue, he said, was whether it was reasonable to expect the appellant's child to leave the United Kingdom.

11. He next referred to the respondent's guidance dated August 2015 in relation to Appendix FM. He referred to the fact that the Presenting Officer before him indicated that that guidance still represented the respondent's position. He said that the respondent's position was that it was not reasonable to expect a British citizen child to leave the EU.

12. He thus concluded that as the appellant met the requirements both of paragraph EX.1 and s.117B(6) of the 2002 Act, the public interest does not require his removal. Thus, the decision to refuse leave to remain represented a disproportionate interference with his Article 8 rights, and on that basis the appeal was allowed under Article 8.

The grounds and submissions

13. The grounds on which permission to appeal was granted contend that the FTJ's reasons for finding the appellant had rebutted the evidence against him are inadequate. Although the FTJ had found that the information contained in the printed data did not inspire confidence, it is said in the grounds that the information was nevertheless accepted by the FTJ and Counsel for the appellant.

14. Given that the FTJ had noted that the appellant had failed to take any steps to protest his innocence, and that he did not send any email as claimed, that cast doubt on the appellant's credibility in respect of his innocent explanation. Thus, it is argued that there was no basis for the judge's finding that the appellant had rebutted "the respondent's evidence", as there was no further evidence, other than that which was rejected.

15. Reliance is placed on the decision in *MA (ETS - TOEIC testing) Nigeria* [2016] UKUT 450 (IAC), a decision which the grounds assert was relied on by the respondent's representative at the hearing. Thus, it is said that there may be reasons why a person who is able to speak English to the required level would nevertheless cause or permit a proxy candidate to undertake an ETS test on their behalf, or otherwise to cheat. It is said that the FTJ had erred by failing to give adequate reasons for holding that a person who speaks English would therefore have no reason to secure a test certificate by deception.

16. The grounds continue that although the respondent accepts that the ETS verification system is not infallible, it is adequately robust and rigorous. In any event, the respondent must necessarily rely on information provided to her by an applicant which has been certified as being true by a third party. If the third party withdraws

the certificate, as here, and is no longer able to vouch for the validity of the information, then the basis of leave is also removed.

17. It is thus argued that the FTJ's proportionality assessment was coloured by his error in respect of his finding that the appellant had rebutted the assertion of deception. In addition, he had failed to identify compelling circumstances indicating a breach of Article 8 (outside the Rules).

18. Lastly, it is said that there was nothing to prevent the appellant returning to India in order to apply for the correct entry clearance. Any separation would be temporary and proportionate in the interests of an effective immigration control.

19. In oral submissions, Mr Melvin relied on the grounds. He accepted that it is not apparent from the FTJ's decision that he made any findings in terms of the appellant's English language ability vis-à-vis the contention that his decision was contrary to the decision in *MA (Nigeria)*. Mr Melvin indicated that there was a note or minute from the Presenting Officer who appeared at the hearing before the FtJ stating that *MA (Nigeria)* was relied on, although that note has not previously been relied on, was not referred to in the grounds and has not been served.

20. It was submitted that although the FTJ had recognised the error in relation to the other test that the appellant was said to have taken, that was not a sufficient basis from which the FTJ could have concluded that the appellant had rebutted the allegation of deception. Reliance was placed on the judicial review decision of the Upper Tribunal in *R (on the application of Nawaz) v Secretary of State for the Home Department (ETS: review standard/evidential basis)* [2017] UKUT 00288 (IAC). Reference was made in particular to [43], [45] and [47]. Likewise, the decision of the Court of Appeal in *Ahsan v Secretary of State for the Home Department* [2017] EWCA Civ 2009, in particular at [25] - [33] in support of the submission that the appellant could have requested a tape of the test and sought independent expert evidence.

21. Further, in terms of the FTJ's proportionality assessment, that should have started from the standpoint that the appellant had used deception in obtaining an English language certificate. It was accepted however that if, contrary to the respondent's submissions, I concluded that the FTJ's assessment of the deception point was sustainable, there was a sufficient basis for the Article 8 appeal to have been allowed. At least, that is as how I understood the submission that was made initially.

22. In his submissions Mr Moriarty contended that nowhere did the FTJ suggest that the appellant's English language ability was a sufficient basis from which to conclude that he had rebutted the allegation of deception. This was not therefore, an *MA (Nigeria)* case.

23. It was at the very least open to the FTJ to conclude that the Secretary of State had not discharged the legal burden of proof and the FTJ was entirely correct to look at the weaknesses in the respondent's evidence.

24. Furthermore, it was submitted that s.117B(6) was correctly applied by the FTJ in order to allow the appeal. In that context I was referred to *Treebhawon and others (section 117B(6))* [2015] UKUT 00674 (IAC), in particular at [20].

25. Likewise, in relation to general principles, I was referred to *Dasgupta (error of law – proportionality – correct approach)* [2016] UKUT 0028 (IAC), especially at [17] – [23].

26. Furthermore, insofar as the respondent contends that the appellant could apply for entry clearance, that would be refused under the suitability grounds on the basis of the respondent's assertion as to deception.

27. In reply, contrary to what I understood to be Mr Melvin's earlier submissions, he said that it was not accepted that the appellant could succeed under s.117B(6) if the suitability requirements of the Rules were not met. There would need to a further assessment of who would look after the child and so-forth.

28. In terms of the *MA (Nigeria)* point, the appellant's witness statement refers to his English language ability and that he had no need to use a proxy test taker.

Assessment

29. It is understandable why the respondent is aggrieved with the FTJ's decision. With all due respect to the FTJ, had his decision been rather more detailed, and had it included a more thorough analysis of the evidence which led him to his conclusions, the scope for complaint would have been much reduced.

30. For example, whilst the FTJ's decision does not refer to any analysis of the appellant's English language ability as discussed in the decision in *MA (Nigeria)*, it is evident from the FTJ's manuscript record of proceedings that that case was referred to on behalf of the respondent. Furthermore, neither of the appellant's nor his partner's witness statements are referred to in terms of the details given as to the circumstances in which the test taken in November 2012 was undertaken. Both of their witness statements contain evidence in that respect, for example his partner stating that she travelled to the test centre with the appellant, and so-forth. The appellant's witness statement gives details as to the taking of the test in terms, for example, of the content of the test. Furthermore, the oral evidence was barely summarised.

31. However, having said all that, I am satisfied that the FTJ gave sustainable reasons for concluding that the appellant had rebutted the prima facie case of deception. It is important to bear in mind that, as the authorities make clear, assessments in this area are very fact-specific. Here, what the FTJ was concerned about was what was plainly a very significant anomaly in the evidence in relation to the appellant. The respondent's decision dated 26 July 2016 is predicated on the conclusion that the appellant took tests at two test centres, New London College, and Manchester College of Accountancy and Management. It was accepted before the FTJ that he did not in fact take any such test at the Manchester College. The FTJ noted that the printed data related to someone else called Manpreet Singh, with a different date of birth but with the same passport number as that of the appellant. He said that there

was no explanation of how that had happened, and it appears there was no explanation. He was fully entitled to conclude that that hardly inspired confidence in the information provided by ETS.

32. It is not as if the FTJ was in some way looking for reasons to find in favour of the appellant. He made it clear that he found it surprising that the appellant had taken no steps to protest his innocence to ETS, or to demand an explanation for the allegation of deception. He found that the appellant's evidence that he sent an email to them was not true.

33. The assessment of the evidence and its relative weight was a matter for the FTJ. Plainly, it would not be sufficient to conclude that another judge might have come to a different conclusion. One must also bear in mind, albeit that the FTJ did not make specific reference to it, that the appellant and his partner in their witness statements gave an account of the test taken by the appellant and its surrounding circumstances.

34. I do not consider that there is any merit in the *MA (Nigeria)* point made on behalf of the respondent. There is no indication from the FTJ's decision that he considered that any ability in English that the appellant may have had any bearing on the question of whether he used deception in the taking of the English language test. I can see that it could equally be argued that there is no indication that the FTJ took into account what the appellant and his partner said about the *circumstances* in which the test was taken and that therefore that evidence could not be said to support the FTJ's conclusion of a lack of deception. However, the situation in relation to those two issues (language ability and test circumstances) is subtly, but significantly, different. If the FTJ had taken into account the appellant's English language ability to support his conclusions, that would probably have been impermissible. On the other hand, it would have been permissible for him to have regard to the evidence of the circumstances in which the test was taken.

35. I am satisfied that the FTJ was entitled to conclude that the appellant met the suitability requirements of the Rules. He went on to find that therefore, paragraph EX.1 was satisfied. However, the two do not necessarily follow, because there are other eligibility requirements of the Rules that need to be satisfied. Having said that, the skeleton argument on behalf of the appellant that was before the FTJ at [16] made the point that the respondent had identified no further grounds for refusal under the partner route in Appendix FM.

36. In any event, there is no error in the FTJ's assessment of the application of s.117B(6). Even if therefore, the FTJ did err in law in his assessment of the deception point, that error of law is not material in that he would have been bound to allow the appeal, as he did, outside the Article 8 Rules.

37. S.117B(6) of the 2002 Act states as follows:

> (6) 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.

38. I said in my summary of the submissions made on behalf of the respondent before me that there was some ambiguity in the respondent's position in terms of the application of s.117B(6). Insofar as it was argued that *merely* meeting the strict words of that provision would not be a route to success for the appellant under Article 8, I disagree. I indicated at the hearing that I was conscious there may be Court of Appeal authority on the point. Both parties agreed that they would not seek the opportunity to make further submissions in relation to any such authority if I were to refer to it in my decision in circumstances where it unequivocally points to the answer to the question posed in this case. The decision of the Court of Appeal in *MA (Pakistan) & Ors, v Upper Tribunal (Immigration and Asylum Chamber) & Anor* [2016] EWCA Civ 705, is the authority. It is only necessary to quote from [17] – [20]. There, the Court said as follows:

> 17. Subsection (6) falls into a different category again. It does not simply identify factors which bear upon the public interest question. It resolves that question in the context of article 8 applications which satisfy the conditions in paragraphs (a) and (b). It does so by stipulating that once those conditions are satisfied, the public interest will not require the applicant's removal. Since the interference with the right to private or family life under article 8(1) can only be justified where there is a sufficiently strong countervailing public interest falling within article 8(2), if the public interest does not require removal, there is no other basis on which removal could be justified. It follows, in my judgment, that there can be no doubt that section 117B(6) must be read as a self-contained provision in the sense that Parliament has stipulated that where the conditions specified in the sub-section are satisfied, the public interest will not justify removal. It is not legitimate to have regard to public interest considerations unless that is permitted, either explicitly or implicitly, by the subsection itself.
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> 18. Ms Giovannetti QC, counsel for the Secretary of State, argued otherwise. She contended that there may be circumstances where even though the provisions of paragraphs (a) and (b) are satisfied and the applicant is not liable for deportation, the Secretary of State may nonetheless refuse leave to remain on wider public interest grounds. But as she had to accept, that analysis requires adding words to subsection (6) to the effect that where the conditions are satisfied, the public interest will not *normally* require removal, because on her approach, sometimes it will. I see no warrant for distorting the unambiguous language of the section in that way.
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> 19. In my judgment, therefore, the only questions which courts and tribunals need to ask when applying section 117B(6) are the following:
>
> (1) Is the applicant liable to deportation? If so, section 117B is inapplicable and instead the relevant code will usually be found in section 117C.
>
> (2) Does the applicant have a genuine and subsisting parental relationship with the child?
>
> (3) Is the child a qualifying child as defined in section 117D?

(4) Is it unreasonable to expect the child to leave the United Kingdom?

20. If the answer to the first question is no, and to the other three questions is yes, the conclusion must be that article 8 is infringed.

39. It appears to have been accepted on behalf of the respondent before the FTJ that it was not reasonable to expect either of the children in this case to leave the UK with the appellant to go to India. In that context it is as well also to point out that the FTJ referred to the respondent's guidance on the issue of 'reasonableness' in expecting British citizen children to leave the UK.

40. *MA (Pakistan)* is unequivocal in terms of how s.117B(6) is to be applied. There is no room for the contention, as suggested on behalf of the respondent before me, that where the suitability requirements of the Rules are not met, an appellant cannot take advantage of s.117B(6). That provision unequivocally applies to a person who is not liable to deportation. If it excluded people who were also caught by the suitability requirements of the Rules it would have said so (and so would the Court of Appeal).

41. Accordingly, the FTJ was correct to allow the appeal with reference to s.117B(6).

42. In all these circumstances, I am not satisfied that there is any error of law in the FTJ's decision. Insofar as it could be said that his decision betrayed a want of reasons in terms of the deception point, any error of law in that respect is not material.

Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law. Its decision to allow the appeal on Article 8 grounds is to stand.

Upper Tribunal Judge Kopieczek dated 8/05/18