Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/40677/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reason Promulgated**
On Tuesday 29 October 2019	**On Wednesday 6 November 2019**

Before
MR JUSTICE DOVE
(SITTING AS AN UPPER TRIBUNAL JUDGE)
UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MAROOF CHOWDHURY

Respondent

Representation:

For the Appellant: Ms S Jones, Senior Home Office Presenting Officer
For the Respondent: Mr S Karim, Counsel instructed by Kalam solicitors

DECISION AND REASONS

BACKGROUND

1. This is an appeal by the Secretary of State. For ease of reference, we refer to the parties as they were before the First-tier Tribunal notwithstanding that, strictly, the Secretary of State is the Appellant in this Tribunal.

2. The Respondent appeals against a decision of First-Tier Tribunal Judge Mayall promulgated on 26 June 2015 ("the Decision") allowing the Appellant's appeal on human rights grounds (Article 8) against the Respondent's decision dated 22 October 2014 cancelling the

Appellant's leave to enter. The basis of the Respondent's decision was that the Appellant had used a proxy test taker when obtaining a TOEIC English language test certificate in 2012 and had used that test certificate to obtain leave to remain as a student in the same year. Although the Judge allowed the appeal on human rights grounds, he dismissed the appeal "under the Immigration Rules" finding at [62] of the Decision that the Appellant had used a proxy test taker and concluding at [65] of the Decision that he had acted dishonestly.

3. The Respondent appealed the Decision on three grounds. First, that the Judge had erred by failing to engage with the Immigration Rules ("the Rules") when concluding that Article 8 would be breached by removal. Second, that the Judge failed to give sufficient weight to the public interest in light of the Appellant's deception. Third, that the Judge had failed to give reasons for concluding that it would not be reasonable to expect the Appellant's British child to leave the UK and therefore allowing the appeal on the basis that Section 117B (6) Nationality, Immigration and Asylum Act 2002 ("Section 117B (6)") was met. There was no cross-appeal by the Appellant against the dismissal of the appeal under the Rules.

4. Permission to appeal was granted to the Respondent on 29 September 2015 by First-tier Tribunal Judge Mark Davies in the following terms so far as relevant:

> "…2. The Judge's conclusions that it would be unreasonable for the Appellant's child to leave the United Kingdom is based on little or no evidence. There appears to be no evidence before him for him to conclude that the Appellant's child and the child's mother could not relocate.
> 3. The Judge puts forward little or no reasoning why the Appellant was entitled to make a freestanding Article 8 claim.
> 4. It is arguable that the Judge has not given sufficient weight to the fact that the Appellant had used deception to try to remain in the United Kingdom and the public interest in maintaining effective immigration control.
> 5. The grounds and determination do disclose an arguable error of law."

5. The Respondent's appeal came before Deputy Upper Tribunal G A Black who, in a decision promulgated on 28 January 2016 ("the Second Decision") found an error of law in the Decision, set it aside and re-made it, dismissing the appeal on all grounds. It is worthy of note that no issue was taken by the Appellant with the finding of deception made in the Decision.

6. The Appellant sought permission to appeal the Second Decision to the Court of Appeal. He raised four grounds. First, whether Judge Black had erred by setting aside the Decision when the Decision disclosed no material error of law. At [33] of his grounds, the Appellant for the first time challenged Judge Mayall's finding that the Appellant had exercised deception. We observe that this assertion was included at the end of a

ground which contended that the First-tier Tribunal Judge had not erred in law.

7. The other three grounds focussed on the Deputy Judge's conclusions when re-making the Decision. Ground two challenged the Deputy Judge's re-making of the decision without first hearing evidence herself. Ground three challenged the Deputy Judge's conclusions as to the reasonableness of expecting a British child to leave the UK, applying Section 117B (6). By ground four, the Appellant challenged the Deputy Judge's proportionality assessment.

8. By a decision dated 1 November 2017, Lord Justice Singh granted permission to appeal giving the following reasons:

> "1. Although the second appeals test applies, I bear in mind that the UT allowed the SSHD's appeal against the FTT decision, which had allowed the A's appeal on Article 8 grounds.
> 2. The A raises four grounds of appeal. I consider that Grounds 2 and 3 do raise points of general principle or practice. I also consider that there are compelling reasons to grant permission on Grounds 1 and 4, in particular because the UT may have erred in law in a way that has an impact on the best interests of a very young child and one who is a British citizen."

9. By a consent order dated 8 July 2019, the parties agreed that the Second Decision should be set aside and that the appeal should be remitted to this Tribunal for redetermination. The matter therefore comes before us to re-make the Decision.

DISCUSSION AND CONCLUSIONS

10. We can deal very shortly with the Respondent's ground asserting an error of law in Judge Mayall's application of Section 117B (6). Ms Jones indicated at the outset of her submissions that the Respondent accepts that a British child cannot generally be expected to leave the UK and that this position applies in this case as any other, notwithstanding the finding of deception. She pointed out that the Respondent's grounds were drafted as long ago as June 2015 and case-law had moved on significantly since then. She accepted therefore that the Respondent's third ground could not be pursued. She also accepted that it would be difficult to pursue a positive case given that concession. As we indicated at the hearing, therefore, we allow the Appellant's appeal on human rights grounds on the basis that Section 117B (6) is met and therefore that removal of the Appellant (who is in a genuine and subsisting relationship with his British citizen child) would be disproportionate.

11. We turn to deal with a further point raised by Mr Karim. He drew our attention to the Appellant's ground one of his grounds of appeal before the Court of Appeal which challenges, inter alia, the First-tier Tribunal Judge's finding that the Appellant has exercised deception. Mr

Karim accepted that this finding was not challenged by the Appellant prior to the grounds before the Court of Appeal. He also accepted that there was no cross appeal by the Appellant in relation to the dismissal of the appeal under the Rules. He submitted however that case-law in relation to so-called ETS cases (as this is) has moved on and that the First-tier Tribunal Judge had erred by applying too high a standard of proof for the Appellant to meet. Following the case of SM and Qadir (ETS – Evidence – Burden of Proof) [2016] UKUT 229 (IAC) ("SM & Qadir"), Mr Karim submitted that a Judge would have to consider only the plausibility of the innocent explanation provided by an appellant in order to discharge his evidential burden which would then shift the legal burden of proof back to the Respondent.

12. Mr Karim suggested three possible ways forward. First, he accepted that we could conclude that the Appellant was precluded from arguing this issue on this occasion, having failed to advance it as a ground of appeal earlier. Second, he also accepted that, in light of the Respondent's concession in relation to the Article 8 case, we could also conclude that any error was immaterial. He pointed out in that regard though that the error might not be immaterial for the future as the finding of deception might influence the Respondent's decisions as to indefinite leave to remain and citizenship in due course. Third, we could indicate that we were minded to re-open the appeal on this issue and hear submissions on it.

13. Having retired for a short period to deliberate, we indicated that we would follow the first option. We therefore concluded that it was too late for the Appellant to raise this issue now. We indicated that we would provide our reasons in writing for reaching that conclusion which we now turn to do.

14. The Appellant raised this issue at [33] of his grounds before the Court of Appeal in the following way:

> "The appellant also now challenges the FTT's conclusion relating to deception. It is submitted that whilst this was not challenge below, in light of the recent Presidential test ETS/TOEIC case determined by the UT Qadir and Ors, IA/31380/2014 and others, where it was held that the respondent does not in these types of cases have sufficient evidence to discharge the burden, the appellant submits that the deception finding of the FTT must also be set aside in the interests of justice."

15. We make three observations about the way in which this challenge is raised. First, as we have already noted, there was no challenge by way of cross-appeal or before Judge Black in the Upper Tribunal. No explanation is offered for this ground not having been pleaded earlier (save perhaps by reference to the "recent" decision of SM & Qadir which had only just been promulgated). Second, this paragraph appears in a section challenging Judge Black's finding of an error of law in the Decision. Third, and as such, the challenge is completely at odds with

the remainder of ground one which asserts no error of law in the Decision. The challenge at [33] on the contrary asserts that there is an error of law, albeit a different error of law to that found by Judge Black (unsurprisingly since this alleged error was not argued before her).

16. That then impacts on the submission made by Mr Karim that Singh LJ had considered this point arguable. There is no way of knowing whether he did because, as we note, the focus of ground one is that there was no error of law in the Decision and that it should not have been set aside. It is therefore not at all clear to us that Singh LJ found there to be any arguable error on this point or that he even considered it. He makes no mention of the ground not having been raised before and the reference when dealing with ground one to the best interests of the Appellant's child tends to suggest that he was focussing only on whether the First-tier Tribunal Judge had made any error of law in relation to Section 117B (6).

17. Finally, and in any event, the basis on which the appeal was remitted to this Tribunal does not indicate that this was one of the reasons why the appeal was conceded. We refer to the statement of reasons agreed between the parties which sets out the reasons why the appeal was conceded in the following terms:

> "7. The parties agree that the Upper Tribunal made material errors of law when re-determining the Appellant's appeal. In particular, the parties agree that the Upper Tribunal was required to consider the proportionality of the Appellant's removal under Article 8 by reference to s.117B(6) of the 2002 Act, and that it failed to properly apply this provision in that:
>
> i. The Upper Tribunal had regard to the Appellant's fraudulent conduct in assessing the public interest, which is not a matter falling for consideration when applying s.117B(6): see KO (Nigeria) v Secretary of State for the Home Department [2018] 1 WLR 5273, at [17];
>
> ii. Notwithstanding having concluded that there were no insurmountable obstacles to family life continuing in Bangladesh, the Upper Tribunal failed to set out any reasons for why it would be reasonable for the Appellant's child to leave the UK, including in light of the child's UK nationality;
>
> iii. The Upper Tribunal wrongly concluded (parasitic on these matters) that there was no basis to consider the Appellant's circumstances under Article 8 outside the Rules.
>
> 8. The parties accordingly agree that this matter should be remitted to the Upper Tribunal to re-determine the Appellant's appeal in accordance with this Statement of Reasons. it will be for the Upper Tribunal to make such directions as it considers appropriate as to the need for any new evidence to allow it to re-determine the Appellant's appeal."

18. Also, of importance is what is said at [5] of the Statement of Reasons by way of background to that concession as follows:

"The Appellant appealed the Respondent's decision to cancel his leave to the First-tier Tribunal ("FTT"). His appeal was heard by FTT Judge Mayall, who determined as follows:

i. Having taken into account the evidence, including the Appellant's oral evidence, the Appellant had fraudulently obtained the TOEIC test certification. FTTJ Mayall concluded in this regard that the Appellant was not a credible or honest witness when dealing with the test (see at [57]);
ii. By reason of this finding, the Appellant's leave was properly cancelled having regard to paragraph 321A of the Immigration Rules (see at [66]), and further that the Appellant did not otherwise qualify for leave to remain under the Immigration Rules as a partner or as a parent under the relevant provisions in Appendix FM (see at [81]);
iii. However, having regard to the provisions of s.117B of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), the Appellant's removal would result in an unlawful interference with the Appellant's rights under Article 8 of the European Convention on Human Rights ("ECHR") (see at [92]).
iv. The Appellant's appeal was therefore dismissed pursuant to the Immigration Rules but allowed on Article 8 grounds."

19. As we observed at the hearing, therefore, the issues before us had been limited by agreement between the parties in the Statement of Reasons. We do not accept that there is any good reason to re-open other issues, particularly in circumstances where the issue which the Appellant seeks to raise was not properly raised previously.

20. For those reasons, the Second Decision having been set aside by the consent order, we re-make that decision, allowing the Appellant's appeal on human rights grounds (Article 8) following the Respondent's concession, on the basis that the Appellant is in a genuine and subsisting relationship with a qualifying (British) child and it would not be reasonable to expect that child to leave the UK. The Appellant is therefore entitled to succeed based on Section 117B (6) and we so conclude.

DECISION

For the avoidance of doubt, the decision of Deputy Upper Tribunal Judge G A Black promulgated on 28 January 2016 is set aside. We re-make the decision and allow the Appellant's appeal on the basis that he is entitled to succeed based on Section 117B (6) Nationality, Immigration and Asylum Act 2002. His removal would therefore be disproportionate.

We allow the appeal of the Appellant (Mr Chowdhury) on human rights grounds.

Signed

Upper Tribunal Judge Smith Dated: 4 November 2019