Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/07011/2016**

THE IMMIGRATION ACTS

Heard at The Royal Courts of Justice	**Decision & Reasons Promulgated**
On 11 September 2017	**On 4 October 2017**

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS FRESHA RAJESHBHAI PATEL
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant (Secretary of State): Mr S Kotas, Senior Home Office Presenting Officer
For the Respondent (Ms Patel): Mr A Swain, Counsel, instructed by Eagles Solicitors

DECISION AND REASONS

1. This is the Secretary of State's appeal against a decision of First-tier Tribunal Judge Jessica Pacey whereby she allowed the appeal of Ms Patel against the Secretary of State's decision refusing to grant Ms Patel further leave to remain under Article 8. For ease of reference I shall throughout this decision refer to the Secretary of State, who was the original respondent, as "the Secretary of State" and to Ms Patel, who was the original appellant, as "the claimant".

2. The claimant is a national of India who was born on 12 February 1991. She arrived in this country on 20 April 2008 with a student visa valid until 30 June 2009. Her leave was extended until 13 November 2010 and then

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again until 20 October 2013. Soon after arriving in this country she met her partner, Mr Sariaya, who had three children, twins now aged 13 and a son, now aged 9. The twins are a boy and a girl, and the boy suffers from a disability.

3. I will refer to Judge Pacey's findings below. Amongst them she found that the claimant was the "de facto mother" of these children and because of her childcare responsibilities, she did not attend her college as she needed to in accordance with the leave she had been granted. For this reason, her leave, which as noted above had been further extended until 20 October 2013, was curtailed on 3 February 2012.

4. The claimant then, on 5 September 2012, applied for leave to remain as the unmarried partner of Mr Sariaya, and she was granted leave to remain (on the ten year route) until 17 January 2016. In order to satisfy the requirements of this application the claimant submitted an English language test certificate which purported to show that she had passed the necessary test in oral and written English required under the Rules. It is in respect of this test that her problems have subsequently been occasioned.

5. Prior to the expiry of her leave, on 14 January 2016 the claimant applied for further leave to remain in the UK as the partner of the sponsor, who has indefinite leave to remain; his children are British citizens. This application was refused because the Secretary of State believed that the English language test certificate which had been submitted within the application made in 2012 had been obtained fraudulently, by use of a proxy.

6. The claimant appealed against this decision and her appeal was heard before First-tier Tribunal Judge Pacey, sitting at Sheldon Court, Birmingham on 31 March 2017. As already noted above, in a decision and reasons promulgated on 11 April 2017, Judge Pacey allowed the appeal.

7. The Secretary of State now appeals against Judge Pacey's decision, leave having been granted by First-tier Tribunal Judge Easterman on 20 July 2017.

8. The application had been refused on suitability grounds, as already referred to above, because the Secretary of State believed that the English language oral test had been taken by a proxy, and not by the claimant herself. The Secretary of State relied essentially upon generic evidence which is very common indeed in these cases and has been the subject of considerable jurisprudence. Judge Pacey's decision was made following consideration of some of the authorities and some of this evidence. It is not entirely clear from the decision whether or not she considered that the claimant had established that she had not used fraud in obtaining the certificate or whether she believed that the Secretary of State had not established that she had, but whatever test she applied she found in the claimant's favour. She did not consider that the Secretary of State could properly rely upon suitability grounds to refuse the application.

9. The central issue before Judge Pacey was whether or not the claimant had taken the test herself. Judge Pacey had regard to one of the earlier cases in which this issue had been considered by this Tribunal which is *SM & Qadir v SSHD (ETS – evidence – burden of proof)* [2016] UKUT 229, in which a Presidential Tribunal had considered (as was the state of evidence at that time) that the generic evidence which was being adduced by the Secretary of State in very many of these cases was sufficient to satisfy the burden of proof which was initially on the Secretary of State to show that fraud had been used. What was decided in *SM & Qadir* was that the burden then passed to an applicant to put forward an explanation as to why he or she should still be believed when he or she contested that position. If he or she did so, the burden would then shift back to the Secretary of State who would have the burden of proving her case.

10. In this particular case Judge Pacey stated as follows, with regard to the effect of *SM & Qadir*:

> "21. I remind myself of *SM & Qadir*... in which it was held that the Secretary of State was required to discharge the evidential burden of proving that a TOEIC certificate had been procured by dishonesty and the legal burden.
>
> 22. In this case she has not done so...".

11. Judge Pacey then went on to state that she had accepted the claimant as credible and made some other observations with regard to the evidence adduced on behalf of the Secretary of State as follows:

> "The Home Office Presenting Officer provided a generic printout of result from Portsmouth International College for the relevant date but I note that no address for the college was given nor is the origin of the printout clear. In relation to this appellant there is a very brief printout showing her name and correct date of birth. However, there is nothing detailed to explain why the decision had been reached that the test was invalid (merely, in the refusal, a brief reference to a recording which would not in any event be relevant to the wring element). There is no specific report on the recording and no explanation of why the result was printed twice."

12. Judge Pacey then went on to consider the children in the context of Section 55 of the Borders, Citizenship and Immigration Act 2009, to which I will refer below.

13. In his submissions to this Tribunal, on behalf of the claimant, although he submits that looked at in the round the judge did apply the test in *SM & Qadir* properly, he did accept that it was perhaps an "inelegant summary of *SM & Qadir*"; he also accepted that there could perhaps have been a "greater elaboration of the boomerang test" which a judge is required to consider, although he did nonetheless submit that the judge had analysed the credibility of the claimant against the Secretary of State's evidence.

14. In my judgment, the judge does not in this decision appear to understand the strength of the Secretary of State's case. At a later stage at paragraph 19 she engages in speculation as to where the test had been taken, and concludes that the "Portsmouth International College" where the Secretary of State claims the test was taken, was almost certainly in Portsmouth, because "unlike, as I say, Cambridge or Oxford" it is "in my view highly unlikely that a college would chose a geographical name that did not relate to its actual physical location". The claimant in her evidence gave an account of how she had taken the test in Canary Wharf.

15. There is, however, absolutely no reference to the printout which was supplied on behalf of the Secretary of State, which demonstrated that there had been a number of results submitted from Portsmouth International College which were found (within the generic evidence) to have been fraudulent, and that the number which is on the official score report, which is 0044201359030031, is in the middle of all the other numbers of the reports for other persons purportedly having taken the test at that centre. Also, when she says at paragraph 22 "there is nothing detailed to explain why the decision had been reached that the test was invalid (merely, in the refusal, a brief reference to a recording which would not in any event be relevant to the writing element" it does not appear that she appreciates what the generic evidence establishes, which is that in a very large number of cases indeed, the test was taken by a proxy. By describing the evidence as "a brief reference to a recording" the judge does not appear to be appreciating the strength of this evidence, which in most cases would establish (and certainly satisfies at the very least the initial burden of proof on the Secretary of State for this effect) that the test was taken by a proxy. Also, if the test was indeed taken by a proxy, the statement that this "would not in any event be relevant to the writing element" is incorrect, because the whole process would be invalidated. If a proxy had been used, the Secretary of State would not need to establish also that the writing test was also taken by the same proxy, but the fact that the oral test had been could certainly not be said to be irrelevant for this purpose.

16. The judge also appears not to have considered the relevance of the evidence supplied by Professor French, which was before her, and from which it is apparent that the Secretary of State's case in reliance on the generic evidence is considerably stronger than it had appeared to be at the time the Presidential Tribunal was making its decision in *SM & Qadir*. The position now can properly be said to be as follows. The very great likelihood is that the bulk of the decisions made by the Secretary of State were correct, but it cannot be ruled out that there are some, albeit not many, decisions in which a "false positive" was shown.

17. Had the judge demonstrated in her decision that she understood the strength of the Secretary of State's case, it might be that she could then have considered the claimant's evidence against that case, but her starting point as shown from paragraph 21 and 22 was that the Secretary of State's case was so weak that, notwithstanding what had been found in *SM & Qadir*, that the generic evidence at least satisfied the initial burden

of proof which the Secretary of State was required to satisfy, the Secretary of State had not satisfied even this burden.

18. For this reason, the Judge’s decision either that the Secretary of State had not established that a proxy had been used or alternatively that the claimant had established that a proxy had not been used, is not sustainable. This is a material error, because it was on this basis that the decision was made. It follows that the decision will have to be remade, but for the reasons which follow I am able to remake this decision myself, on the basis of the other findings which were made by the judge with regard to Article 8. Although there will be no finding as to whether or not the Secretary of State was entitled to make the findings she did with regard to suitability, Mr Swain, on instructions, informed the Tribunal that the claimant was happy for this decision to be remade without any finding being made with regard to the ETS test.

19. The judge considered the position of the children, all of whom are British in the context of Section 55 of the 2009 Act, and made the following findings:

> “The appellant has been acting as a de facto stepmother of her partner’s 3 children since 2008/9. They are now aged 12 (twins) [they are now 9, and I have to consider the Article 8 position as of today] and 8 [now 9]. Social services were involved with her partner’s children and were aware of the appellant’s role in their lives. In my view although social services might be able to assist her partner with the care of her children if she returned to India this is mere speculation and given the extremely tight budget on which all public services operate it is in the highest degree unlikely that they would be able to provide the level of care currently provided by the appellant, who acts as a mother to the children who call her ‘Mum’ and for whom clearly she is de facto their mother.”

20. At paragraph 25 Judge Pacey noted (and accepted as accurate) the “detailed oral evidence as to the care [the claimant] gave her de facto stepchildren” concluding that “it would in my view not be in the best interests for these children to lose their de facto mother if she were obliged to return to India even temporarily to apply for a visa to come back to the UK”.

21. In my judgment the judge’s findings as to the relationship between the children and the claimant are unimpeachable. On the basis of these findings, I can do no other but find that the claimant “has a genuine and subsisting parental relationship” with these children.

22. With this in mind, I am obliged when considering whether or not this appeal should be allowed on Article 8 grounds, to have regard to the provisions of Section 117B of the Nationality, Immigration and Asylum Act 2002, which was inserted by Section 19 Immigration Act 2014. This was part of the new Part VA which sets out the public interest considerations which the Tribunal is required to apply when considering an appeal brought under Article 8. The relevant parts of Part VA provide as follows:

"PART VA

ARTICLE 8 OF THE ECHR: PUBLIC INTEREST CONSIDERATIONS:

117A Application of this part

(1) This part applies when a court or tribunal is required to determine whether a decision made under the Immigration Acts –

(a) breaches a person's right to respect for private and family life under Article 8, and

(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard –

(a) in all cases, to the considerations listed in section 117B, and

...

117B Article 8: public interest considerations applicable in all cases

...

(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. ...

117D Interpretation of this Part

(1) In this part –

"Article 8" means Article 8 of the European Convention on Human Rights;

"Qualifying child" means a person who is under the age of 18 and who –

(a) is a British citizen...".

23. The children are all British citizens and are accordingly qualifying children and, as I have already found, in light of the judge's sustainable findings, the claimant has "a genuine and subsisting parental relationship" with these children.

24. I therefore have to consider whether or not it would be reasonable to expect these children to leave the United Kingdom, and if it is not, then by virtue of Section 117B(6) the public interest will not require the removal of the claimant, and in those circumstances, given the strength of her family life in this country with these children, her removal cannot be seen to be proportionate.

25. On behalf of the Secretary of State, Mr Kotas made two submissions. The first was that Section 117B(6) would only apply where there was a prospect of the children leaving the UK. As this would not happen in this case, this section did not apply. Mr Kotas accepted that he had (unsuccessfully) made this submission to another Upper Tribunal Judge before, and in my submission it is unarguable. It is not said within 117B(6) that the public interest does not require a person's removal where children are likely to leave the UK but this would not be reasonable; what it provides is that if it would not be reasonable to expect a child to leave the UK, then the public interest does not require that the child who will stay will be deprived of one of his or her parents.

26. Mr Kotas's next submission was that when considering what was "reasonable" a Tribunal had to have regard to all the facts, which would include the very great public interest in deterring people from relying on certificates fraudulently obtained.

27. While it may in certain circumstances be reasonable to expect a child to accompany both parents to another country (see *MA (Pakistan)* [2016] EWCA Civ 705), this is clearly in my judgment not the case here. The children are all British, are all settled in this country and one of the twins has a disability. The father is settled, having indefinite leave to remain. As Mr Kotas has accepted, there is no prospect of these children leaving the United Kingdom, and in my judgment that is because on the facts of this case it clearly is wholly unreasonable to expect them to do so.

28. It is perhaps surprising that when this appeal was argued before Judge Pacey, no reference was made to the effect of Section 117B(6) and certainly, Judge Pacey has not referred to this anywhere within her decision. However, I am entirely satisfied that even if the English language test certificate had been obtained fraudulently (about which I make no finding) by virtue of Section 117B(6) there is no public interest in removing the claimant. It follows that when considering whether her removal would be proportionate, given the strength of her family ties in this country, there can only be one answer, which is that it would not.

29. It follows that when remaking the decision, I must again allow it, on human rights grounds, Article 8 and I will so find.

Notice of Decision

I set aside the decision of First-tier Tribunal Judge Pacey, as containing a material error of law and substitute the following decision:

The claimant's appeal is allowed, on human rights grounds, Article 8.

No anonymity direction is made.

Signed:

Upper Tribunal Judge Craig   Date: 29 September 2017