Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/25317/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 4 September 2018	**On 1 October 2018**

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

MS HIRA ABID
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr N Paramjorthy, Counsel instructed by Burney Legal Solicitors
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a national of Pakistan who was born in August 1988. She first entered the United Kingdom in April 2011 with leave as a Tier 4 Student. Her leave was extended once but was then curtailed to end on 1 June 2014. The reason for that curtailment was because the college she was at had closed. Just prior to when that leave was due to end on 30 May 2014 she applied for further leave under Tier 4, that application being refused on 15 April 2015. The appellant appealed against this decision and it appears that the appeal was subsequently dismissed. However be that as it may on 6 September 2016 she applied for leave to remain as the spouse of Mr Pervaiz, who is a Pakistani citizen who is in this country now with indefinite leave to remain. The appellant had married Mr Pervaiz in January 2016.

2. That application was refused on 27 October 2016 and the appellant appealed against that decision.

3. The appeal eventually came before First-tier Tribunal Judge Peter-John S. White sitting at Hatton Cross on 14 March 2018, but in a Decision and Reasons promulgated on 17 April 2018 he dismissed the appeal. The appellant now appeals to this Tribunal leave having been granted by First-tier Tribunal Judge P J M Hollingworth on 2 July 2018.

4. The reason why the application was refused was because it had come to light that in her previous application or in one of her previous applications the appellant had submitted a false English language certificate as evidence of her ability to speak English. An investigation of these certificates had been carried out following a report by the BBC Panorama programme which had found that there had been widespread abuse of the system and that many thousands of applicants had dishonestly obtained English language certificates through the use of a proxy.

5. At the hearing before Judge White the issue of whether or not the appellant had used fraud was considered very carefully indeed and Judge White's finding that she had is entirely sustainable. Apart from anything else, as Judge White notes at paragraph 25, in March 2013 when this test result was obtained this was only shortly after the appellant had previously failed to score high enough marks on a previous test to achieve the standard necessary for the certificate and yet her score on the speaking test was a perfect 200 out of 200. In these circumstances, Judge White's conclusion that she had exercised fraud in obtaining the test result was an inevitable one.

6. However matters had moved on because by the time of the hearing before Judge White the appellant had given birth to a daughter who I understand is now 18 months old. Because the daughter was born in this country to a settled migrant (her father) she is a British citizen. Accordingly any decision maker must have regard to what is set out within Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 (inserted by Section 19 of the Immigration Act 2014 from 28 July 2014 onwards) which provides as follows:

> "**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."

7. In this case, Judge White considered that this Section did not apply because it was reasonable to expect the child to leave the UK with both

her parents and return with them to Pakistan. Quite apart from the other matters to which I will refer below, the judge does not appear to have had any evidence before him to the effect that the appellant's husband would be prepared to return to Pakistan with the rest of his family but in light of what is said below that is not of any material importance.

8. The real difficulty with this decision is that it fails to have regard to the guidance which has at all material times been given by the respondent (referred to for example in the decision of this Tribunal in *SF and Others v SSHD (Guidance, post – 2014 Act) Albania* [2017] UKUT 00120), which is that save in cases involving criminality, "the decision maker must not take a decision in relation to the parent or primary carer of a British citizen child where the effect of that decision will be to force that British child to leave the EU, regardless of the age of that child."

9. Certainly, insofar as Judge White considered it reasonable to expect the British citizen child to leave the UK with both her parents that would appear to fall foul of the guidance.

10. Moreover, the guidance also provides that it will not be reasonable ever to expect a British citizen child to leave the UK.

11. Mr Clarke on behalf of the respondent does not seek to persuade this Tribunal that Judge White's decision did not contain the material error of law referred to above. The highest he is able to put the respondent's case is that it might still be proportionate to require the appellant herself to leave the country, leaving her child behind with her husband, because (as he rightly says) this appellant has only been permitted to remain in this country because she had exercised fraud. Without deceiving the relevant authority into believing that her English was of a sufficiently high standard far earlier than it was, she would not have been allowed to remain.

12. Be that as it may, I am nonetheless bound when remaking the decision to have regard to Section 117B(6) the effect of which is that because the appellant has a genuine and subsisting parental relationship with her daughter and it would not be reasonable to expect her daughter to leave the United Kingdom (because she is a British citizen) the public interest does not require her removal, notwithstanding that in other circumstances it would.

13. It follows that I must remake this decision allowing the appellant's appeal and I shall do so.

Decision

I set aside the decision of First-tier Tribunal Judge Peter-John S. White as containing a material error of law, and remake the decision as follows:

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

No anonymity direction is made.

Signed:

Upper Tribunal Judge Craig Date: 20 September 2018