Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/08848/2018

THE IMMIGRATION ACTS

Heard at Bradford Phoenix House **Decision & Reasons Promulgated**
On 6th March 2019 **On 9th April 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MUHAMMAD [A]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Z Malik (Counsel)
For the Respondent: Mrs R Petersen (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge L S L Mensah, promulgated on 10th October 2018, following a hearing at Bradford on 6th September 2018. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

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The Appellant

2. The Appellant is a male, a citizen of Pakistan, who was born on 23rd November 1982. He appealed against the decision of the Respondent dated 29th March 2018, refusing his application for permission to remain in the UK on the basis of his private and family life rights.

The Appellant's Claim

3. The essence of the Appellant's claim is that he is in a relationship with his wife, whom he met in 2014, and whom he married when he was illegally in this country, a fact of which both of them were aware. He is now with their child from her. He cannot return back to Pakistan because there are insurmountable obstacles for his partner and for his child. This is despite the fact that his wife is of Pakistani origin, and has family in both countries, and has been in the UK only since 2009. He states that his children would have a better education in the UK.

The Judge's Findings

4. The judge was faced, as a preliminary issue, with the question of whether the Appellant had exercised deception in taking his English language test, given the information from the ETS, which was provided as a result of "Project Façade", a criminal enquiry into abuse of the TOEIC, at the Universal Training Centre, in Watford. The Appellant denied using a proxy test taker. His solicitors demanded that the Respondent produced a voice recording. The Respondent was put on proof. They provided a voice recording. The Appellant accepted that it was not his voice on the recording. He continues to assert that he took the test. The judge concluded that a proxy test taker was indeed used and that, "I completely reject the Appellant's explanation" (paragraph 17).

5. Second, the judge then turned to the Article 8 claim. It was noted that the Appellant and his wife both admitted entering into a relationship at a time when the Appellant was illegally in the UK. Both knew that that was the case. There was a strong public interest in removing the Appellant in the light of his conduct given the need to maintain effective immigration control. Moreover, the Sponsor did not meet the minimum financial requirements. There was a strong public interest in removing the Appellant. It was accepted that the child was British through his mother. However, he was currently 1 year and 5 months old.

6. The Appellant's wife gave evidence that the Appellant plays a very active role in the lives of all the children of the family, two of which are from his wife's previous husband. The judge concluded that,

> "There is a paucity of evidence as to why it would be unreasonable for any of the children to live with the Appellant and his family in Pakistan and neither the Appellant or his Islamic wife provide anything other than bare and vague assertions regarding the reasonableness of the family relocating" (paragraph 19).

7. The appeal was dismissed.

Grounds of Application

8. The grounds of application state that the judge erred in failing to make any reasoned finding as to the application of Section 117B(6). The Tribunal's approach to the welfare of the Appellant's children was also legally flawed. The judge proceeded to determine the issue of the Appellant using a proxy to take his TOEIC test, in the context of his assessment of the Appellant's Article 8 rights.

9. Second, it is well-established that a person who is not liable to deportation, does not become subject to the public interest requiring that person's removal, where there is a genuine and subsisting parental relationship with a qualifying child. The judge does not deal with this issue with reference to the legislation (see Section 117B(6)). The decision of the judge with regards to Article 8, particularly with reference to the Appellant's child, who is a British citizen, and its effect on the Appellant being removed from the UK, had not been properly evaluated.

10. On 6th November 2018 permission to appeal was granted.

Submissions

11. At the hearing before me on 6th March 2019, Mr Malik, appearing on behalf of the Appellant, relied upon the recent Tribunal decision of **JG (s.117B(6)): "reasonable to leave" UK) Turkey [2019] UKUT 72**, which stands for the proposition that Section 117B(6) of the 2002 Act requires a court or a Tribunal to hypothesize that the child in question would leave the United Kingdom, even if this is not likely to be the case, and ask whether it would be reasonable to expect the child to do so. In that case, summitted Mr Malik, the Appellant was found to be dishonest. The Tribunal therefore held that, "public confidence in the Respondent's system of immigration control is likely to be adversely affected if this Appellant were to be absolved from the requirement to obtain valid entry clearance" (paragraph 86). This, however, was not the case here, submitted Mr Malik. In this case, the Secretary of State was not maintaining that it would be reasonable for this British citizen child to go with the Appellant to Pakistan. Unlike in **JG**, this case involved a British citizen child.

12. Second, in this case the Appellant was interviewed about the taking of the ETS exams (see pages 35 to 39 of the Appellant's bundle), following which the Secretary of State accepted (see page 39) that the Appellant was credible. The Appellant gave his answers in English. There were no concerns about his credibility in relation to the test. Two conclusions follow from this, submitted Mr Malik. First, that if the Secretary of State maintains that the Appellant is credible then, secondly, it is not possible for the Tribunal to say that he is not credible.

13. For her part, Mrs Petersen submitted that the grounds that are now being argued were not raised before the Secretary of state. The judge had accepted (at paragraph 17) that the Appellant could provide no explanation for the fact that the voice recording that was presented was not his voice, and yet the Appellant continued to maintain that he had sat the test. If he spoke fluent English before the judge, this was

a year after his having sat the test. It did not mean that he had actually taken the ETS test in person himself.

14. Second, as far as Article 8 was concerned, Mrs Petersen submitted that she would have to accept that a British citizen child existed in this case and that the decision in **JG** meant that the starting point was that one had to hypothesize on the basis that the child in question would leave the United Kingdom, even if this was not going to be the case.

15. In reply, Mr Malik submitted that even if Mrs Petersen was right in what she said, the Appellant still succeeded under Article 8, and this was because Mrs Petersen accepts that this would meet the natural consequence of the decision in **JG**, which holds that one has to hypothesize on the basis that the child would in fact leave with the parent. Second, even if it is accepted that at paragraph 17 the judge observed that the voice on the recording was not that of the Appellant, consideration had to be given to the case of **MA (ETS – TOEIC testing) [2016] UKUT 450**, because that too was the case where the voice recording was not that of the Appellant, and yet the Upper Tribunal had held that, "the question of whether a person engaged in fraud in procuring a TOEIC English language proficiency qualification will invariably be intrinsically fact-sensitive", so that on that basis this appeal should be allowed.

Error of Law

16. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision (see Section 12(2) of TCEA 2007). My reasons are as follows.

17. First, this is a case where the Appellant maintained that he had not used a proxy test taker. He put the Respondent Secretary of State to proof and demanded that the voice recording be produced. A voice recording was produced. It did not turn out to be the voice of the Appellant. The Appellant continued to maintain that he did take the test nevertheless. The judge held that, "I find the Respondent has proven a proxy test taker was used and I completely reject the Appellant's explanation" (paragraph 17). However, this is a case where the Respondent had accepted, following the Appellant's interview, that there were no concerns about the Appellant's credibility in relation to the taking of his test (see page 29 of the Appellant's bundle).

18. Second, there was the issue of the Appellant's reason for dishonesty. In **Majumdel and Qadir [2016] EWCA Civ 1167**, the Court of Appeal held (at paragraph 69) that

> "In considering an allegation of dishonesty the relevant factors included the following: what the person accused had to gain from being dishonest; what he had to lose; what is known about his character; the cultural environment in which he operated; how the individual accused of dishonesty performed under cross-examination, and whether the Tribunal's assessment of that person's English language proficiency is commensurate with his or her TOEIC scores; and whether his or her academic achievements are such that it was unnecessary or

illogical for them to have cheated. There was no criticism in this court by Mr Covats of that approach".

19. Third, however, the Tribunal below failed to follow this approach. The result of that was that there was no consideration of what the Appellant had to gain from being dishonest, what was known about his character and cultural environment, whether the judge's assessment of the Appellant's English language proficiency was commensurate with his TOEIC scores, and whether the Appellant's academic achievements are such that it was unnecessary or illogical for him to have cheated.

20. Fourth, the judge's failure to engage with these factors meant that he overlooked the fact that the Appellant did not use the TOEIC certificate to support any application for leave to remain in the United Kingdom. There was, accordingly, no reason for the Appellant to cheat in the light of his academic achievements and language proficiency. Furthermore, there was nothing about the Appellant's character or environment that was adverse to his interests. His English language ability was not put in doubt in the evidence that he gave before judge.

21. For all these reasons, the judge erred in law.

Remaking the Decision

22. I have remade the decision on the basis of the findings of the original judge, the evidence before him, and the submissions that I have heard today. I am allowing this appeal for the following reasons.

23. This is a case where the voice recording was not determinative of the appeal. In fact, it was accepted by the Secretary of State that the Appellant's credibility in relation to the taking of the test was not in doubt. In **MA (ETS – TOEIC testing) [2016] UKUT 450**, the Tribunal observed (at paragraph 10) that, "underpinning the issues is the Appellant's acceptance that the voice contained in the computerised voice files which are said to have been generated by his TOEIC speaking test is not his …..". The Appellant, of course, in this appeal also maintains that the voice on the recording was not his. In **MA**, the Upper Tribunal gave guidance that, "the question of whether a person engaged in fraud in procuring a TOEIC English language proficiency qualification will invariably be intrinsically fact-sensitive".

24. This being so, I am satisfied that as a question of fact the Appellant has not cheated. That then, leaves open the question as to how the assessment in relation to Article 8 falls to be determined. Ms Petersen is in agreement with Mr Malik that the effect of **JG** is that if the Appellant is removed then this requires the court or Tribunal to hypothesize that the child in question would leave the United Kingdom, and I find that this would indeed be the case, and that it would not be reasonable to expect the child to do so in this case because it is not in the best interests of the two children that the Appellant be separated from his wife and children, and it would be unreasonable to expect the two British children to leave the UK.

25. A third child was born on 13th April 2017. The evidence is that the Appellant plays a very active role in the lives of the three children. The balance of consideration falls in favour of the Appellant.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed.

No anonymity direction is made.

This appeal is allowed.

Signed	Dated
Deputy Upper Tribunal Judge Juss	3rd April 2019

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have made a fee award of any fee which has been paid or may be payable.

Signed	Dated
Deputy Upper Tribunal Judge Juss	3rd April 2019