Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/16953/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30 May 2019	**On 10 June 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE HILL QC

Between

MELLY BEGUM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr T Chaudhary, Kingdom Solicitors
For the Respondent: Miss Cunha, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal from the decision of First-tier Tribunal Judge Freer which was promulgated on 26 February 2019. The appellant is a national of Bangladesh. She was born on 10 June 1994. Her appeal required an examination of whether her English language test had been carried out fraudulently and whether, irrespective of that, there were human rights grounds which would entitle her to leave to remain.

2. The judge's assessment of the principal issue regarding the English language examination is less than satisfactory. In the findings at paragraph 30 the judge says this.

> "The [appellant] was speaking in her own cause and her husband was not tendered for cross-examination. Nobody else who saw her take the TOEIC examination was tendered in evidence. The husband's account is extremely brief. He must have known she was not a British citizen when he decided to marry her and must have had some realistic idea about her various achievements. Her husband specifically chose Elizabeth College for her, she stated in oral evidence and as history shows the test turned out to be run by crooks. She gave a conflicting explanation that she saw it advertised in a newspaper in her college. I conclude that the only witness was unreliable on a number of questions of importance. The impression is wholly consistent with the respondent's view of her ETS test result. There are no reliable test results in the cohort to which she belongs."

3. The judge went on at paragraph 56 to express his decision as follows:

> "The Appellant gave a fraudulent test result in 2012 and consequently all her leave to remain after that was on an unsupportable basis. This was about five years after her arrival in the UK. The contextual evidence was strongly suggestive of fraud with the knowing co-operation of the Appellant and goes well above the 50/50 level towards the respondent. Alternatively, if she took the test but the result was over written unknown to her, I do not find it probable that she would have passed it otherwise."

4. I tend to agree with the observation made to me this morning by the Secretary of State's representative that this is a case where the First-tier Tribunal Judge may well not have been assisted by the manner in which the case was presented before that First-tier Tribunal. For example not absence of evidence from the husband left the judge with a very thin context within which to make findings of fact. But this is a case where the Secretary of State is alleging fraud, something which must be properly particularised and proved. The civil standard still applies but fraud must be made out on cogent and convincing evidence.

5. I find nothing in the decision to suggest that the judge properly turned his mind to the issue of active fraud on the part of this appellant, as opposed to an institution generally believed to be responsible questionable test results across the board. The fact that a language school itself has questions to answer about the propriety of its conduct is not (without more) evidence of fraud on the appellant's part. I consider that the reasoning of the judge in relation to his finding of fraud is insufficient and that the decision should be set aside.

6. The principal issue which was recognised when permission to appeal was granted was in the judge's approach to the statutory public interest considerations under Section 117B(6) and reference was made in the grant of permission to the decision of the Upper Tribunal in **JG (Section 117B(6): "reasonable to leave" UK) Turkey [2019] UKUT 00072 (IAC) (Rev 1)**. I am grateful to Mr Chaudhary for providing me with a full copy of that decision. Put shortly, where public interest considerations are to be considered under 117B it should be done in full, taking into account all relevant matters.

7. Section 117B(6) strongly suggests that where there is a genuine and subsisting relationship with a qualifying child it would be unreasonable to require the individual to leave. Qualifying child, for these purposes, is a British citizen; and in this instance, there are two children who have the status of British citizens. This factor was not considered at all by the judge. In fact, paragraph 67 is an extremely superficial assessment of Section 117B, rendered entirely nugatory by the lack of any reference to sub-section (6), which is direct relevant in this case. The judge gave no or inadequate consideration to the best interests of the children or indeed to the delicate balancing exercise which must be carried out following the well-known principles in **Razgar**. For this further error of law, the decision must be set aside.

8. I concur with the view expressed by both representatives before me that the proper course in this instance is to remit the matter to the First-tier Tribunal for the decision to be made afresh by a judge other than Judge Freer. The errors identified are so fundamental that a complete rehearing is necessary. It is perfectly conceivable that another judge may well come to exactly the same conclusion, but it is important that the correct approach is adopted and the law properly applied.

Notice of Decision

(1) The appeal is allowed and the decision of the First-tier Tribunal is set aside;
(2) The appeal is remitted to the First-tier Tribunal to be heard afresh by a judge other than Judge Freer.
(3) No findings of fact are preserved.
(4) No anonymity direction is made.

Signed *Mark Hill* Date 5 June 2019

Deputy Upper Tribunal Judge Hill QC