Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/03583/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28th July 2017	**On 08th August 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR WASEEM FAIZ
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr Tarlow (Senior Home Office Presenting Officer)
For the Respondent: Mr Burnett (Counsel)

DECISION AND REASONS

1. This is the Respondent's appeal against the decision of First-tier Tribunal Judge Andrew promulgated on 21st December 2016 in which she allowed the Appellant's appeal on human rights grounds under Section 6 of the Human Rights Act 1998.

2. The Judge in considering the appeal had to look at the Article 8 appeal through the lens of the Immigration Rules. The Respondent argued that the Appellant had utilised a proxy test taker when undertaking an English language test that he took at Watford. The Judge found that the Appellant did actually take the test and that the

Respondent was unable to succeed in showing that the Appellant was dishonest and therefore found that the suitability requirements and the eligibility requirements of the Immigration Rules were met, that he had a qualifying relationship under paragraph EX1 and found that therefore the Appellant met the requirements of the Rules. He then went on to find that that greatly diluted the public interest in removing the Appellant from the United Kingdom for the purposes of his Article 8 consideration of the appeal.

3. At [18] the Judge then went on to consider the best interests of the Appellant's child under Section 55 of the Borders, Citizenship and Immigration Act 2009 and went on to consider the statutory considerations listed at Section 117B of the Nationality, Immigration and Asylum Act 2002. That led him ultimately to find that the decision was disproportionate, given the fact he found that Section 117B(6) was met and that there was a genuine and subsisting relationship with a qualifying child and that it would not be reasonable to expect the child to leave the United Kingdom. The Judge therefore allowed the appeal.

4. The Respondent has now sought to appeal against that decision. Within the Grounds of Appeal the Respondent argues firstly that the Judge has given inadequate and insufficient reasons for his findings regarding whether or not the Appellant did cheat on his English language test. In the second Ground of Appeal it is argued that, although the Judge found that the Appellant did have a genuine and subsisting relationship with a qualifying child and it would be unreasonable to expect the child to leave the UK, that there were insufficient reasons given for that finding. It was argued the British child would not be required to leave and separation was justified in light of the Appellant's conduct in obtaining his English language certificate by deception.

5. I am grateful to the submissions made by both Mr Burnett of Counsel for the Claimant and Mr Tarlow, Senior Home Office Presenting Officer for the Secretary of State.

6. I note that permission to appeal in this case had been granted by First-tier Tribunal Judge Froom on 14th June 2017, when he found that it was arguable that the decision did not provide adequate reasons in respect of why the judge gave less weight to the Respondent's evidence regarding what was said to be an allegation of an ETS fraud.

7. First-tier Tribunal Judge Andrew noted that at [10] that at the commencement of the hearing a further bundle from the Respondent's representative was given to him. At [15] he noted the various documents filed by the Respondent and that he had considered the guidance given in **SM and Qadir v Secretary of State for the Home Department (ETS, Evidence, Burden of Proof) [2016] UKUT 00229**.

8. However, there is in fact no analysis within the decision of Judge Andrew of the actual evidence referred to and relied upon by the Respondent. The Respondent had filed statements from Peter Millington and Rebecca Collings, a statement from Matthew Lister, a printout regarding what was said to be the invalidity of the Appellant's ETS TOEIC test and a report from Professor Peter French. There is no analysis or consideration of the contents of the Respondent's evidence and no proper explanation as to the weight to be attached to it by the Judge.

9. In paragraph 16 he gives his reasons for finding that the Appellant had taken the test and at that stage he says he looked at the Appellant's statement. He says the Judge referred in some detail to an examination he took at paragraphs 8 to 49 of his statement. He said the Appellant was cross-examined by the Respondent's representative as to the manner in which the exam was conducted and that whilst the Judge accepted that it was unusual for the Appellant to have been told by his friend that he was to come down and take a test that day, and that he had no receipt for the £250 he paid to the college, the Judge said that he was satisfied on the balance of probabilities that having carefully considered the evidence and the manner in which the test was undertaken, the Appellant did actually take the test and the Respondent was unable to succeed in showing that the Appellant was dishonest.

10. I further note that at paragraph 22 that after having made that finding he accepted the Appellant had a good level of English and gave his evidence in English and appeared to have a good understanding of the questions that were put, but he noted that as far as Section 117B was concerned it was a neutral matter to be placed in the balance, rather than a positive factor in favour of the Appellant. But in terms of consideration as to whether or not the eligibility criteria were met, that was not actually part of the findings in that in regard.

11. Clearly when making findings and giving reasons although Mr Burnett is correct in saying that judgments do not need to be excessively long and a Judge is encouraged and recommended to give concise judgments, a judgment still does have to give adequate and sufficient reasons so that the losing party knows effectively why they have lost and it can be seen that all of the relevant evidence has been taken into account.

12. In this case regrettably in my judgment Judge Andrew has failed to give adequate and sufficient reasons for accepting the Appellant's evidence and to explain his findings that the Appellant actually did take the test and did not utilise a proxy test taker. There is, other than stating he has considered the documents filed by the Respondent, no consideration as to actually what those statements were or what they said and no analysis of that evidence. Although the Judge has referred to the Appellant's statement and although Mr Burnett is correct in saying the judge did not

need to read out the entirety of the Appellant's statement, he has not actually quoted anything from within that statement as to the evidence which he thought was significant in supporting the Appellant's contention that he actually took the test. Although he further goes on to say that he noted the manner in which the Appellant was cross-examined, again there is nothing there in terms of any findings as to what that manner was or what the Appellant actually said which led to the Appellant being credible.

13. It is unclear having read that judgment as to exactly what parts of the evidence the judge has really accepted or rejected and his reasons therefore. It is unclear to the losing party as to why they have lost.

14. In those circumstances the Judge has not complied with the duty to give adequate and sufficient reasons and that in my judgment does amount to a material error of law. The findings as to whether or not the Appellant did exercise a proxy test taker and whether or not the eligibility requirements were met under the Rules was a relevant consideration when considering the Article 8 case viewed through the prism of the Immigration Rules. I am not in a position to say that the decision would necessarily be the same had that error not been made and therefore I do find it is a material error of law.

15. That error also infects the findings regarding whether or not it would be reasonable to expect the child to leave the United Kingdom. Following the Court of Appeal case of **MA Pakistan** [2016] EWCA Civ 705, the actions of the parents do have to be taken into account when assessing whether or not it is reasonable to expect a child to leave the UK and in that regard if there is an error in the Judge's explanation of the reasons given regarding the alleged deception, that also affects the reasoning regarding the Article 8 assessment.

16. I therefore do set aside the decision of First-tier Tribunal Judge Andrew in its entirety. It has been agreed by both legal representatives that it is appropriate in those circumstances given that the decision will need to be remade and the Appellant's credibility reassessed that the matter is remitted back to the First-tier Tribunal for a rehearing de novo before any First-tier Tribunal Judge other than First-tier Tribunal Judge Andrew. I agree entirely with that submission.

Notice of Decision

I therefore do set aside the decision of First-tier Tribunal Judge Andrew, the same disclosing a material error of law;

The appeal is remitted back to the First-tier Tribunal for a rehearing de novo before any First-tier Tribunal Judge other than First-tier Tribunal Judge Andrew;

No anonymity direction is made.

Signed Date 5th August 2017

Deputy Upper Tribunal Judge McGinty