Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/09859/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5 May 2017	**On 10 May 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

WEI LIN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation

For the Appellant: Mr T. Melvin, Home Office Presenting Officer
For the Respondent: Mr H. Kannangara, Counsel instructed by Lisa's Law Solicitors

DECISION AND REASONS

1. The respondent (hereinafter "the claimant") is a citizen of China born on 23 December 1983. This appeal arises from a decision of the appellant (hereinafter "the Secretary of State") made on 20 October 2015 to refuse the claimant leave to remain in the UK and the claimant's subsequent appeal to the First-tier Tribunal (heard by Judge Hembrough) where the appeal was allowed. The Secretary of State is now appealing against the decision of Judge Hembrough, which was promulgated on 4 January 2017.

Background

2. The claimant entered the UK in September 2009 with leave as a Tier 4 (General) Student, which was subsequently extended on several occasions.

3. On 22 January 2014 he married a Chinese citizen with indefinite leave to remain in the UK and on 4 June 2014 he was granted leave to remain as a spouse until 4 December 2016.

4. The claimant and his wife have a son, born on 24 September 2014, who is a British citizen.

5. On 29 April 2015 the claimant was notified that his continuing leave was cancelled on the basis that he had made false representations in an application to extend his leave made on 4 May 2012 where it was alleged he had obtained an Educational Testing Service ("ETS") certificate fraudulently.

6. On 1 June 2015 the claimant made an application for leave to remain as a partner under Appendix FM.

7. On 20 October 2015 the application was refused. In the refusal letter, the Secretary of State stated that the claimant's application was unable to succeed under the Immigration Rules because the deception used in taking the ETS test rendered him unsuitable under the Suitability requirement in Section S-LTR 1.6 of Appendix FM. It was also considered that there were not exceptional circumstances that would warrant allowing the application under Article 8 ECHR outside the Immigration Rules.

8. The appellant appealed to the First-tier Tribunal.

Decision of the First-tier Tribunal

9. The judge first considered whether the claimant had used deception to obtain an English language certificate. At paragraph [46] the judge concluded:

> *"I have been satisfied to the required standard that the [claimant] submitted a fraudulent TOEIC test certificate in connection with his Tier 4 application resulting in the grant of leave of 4 May 2012. This I find to be conduct such as to justify the refusal of his application for a visa on suitability grounds with reference to paragraph S-LTR 1.6 of Appendix FM."*

10. The judge then turned to consider Article 8 outside the Immigration Rules.

11. He found that as the claimant has a wife with settled status and a child with British citizenship in the UK, his removal would interfere with his

family and private life and engage Article 8. The judge also found that removal of the claimant would be lawful under Article 8.

12. The judge then assessed the proportionality of removing the claimant. The judge directed himself to apply Section 117B of the Immigration, Nationality and Asylum Act 2002 ("the 2002 Act") and to have regard to the claimant's child's best interests.

13. At paragraphs [58] - [60] the judge stated:

> "*The reality is that if the [claimant] is removed he will be separated from his British child at a crucial time when the child will be starting to look beyond his relationship with his mother…..*
>
> *It is clearly in the best interests of the child that the integrity of the family unit is maintained. The mother has settled status and is employed here. The child is a British citizen with an entitlement to all of the rights appurtenant to such citizenship…….*
>
> *Whilst it is often said that a British child is not a "trump card" I am aware of no reported case where it has been held reasonable for a British child to leave the UK and I do not consider it reasonable to expect this child to leave the UK."*

14. At paragraph [62] the judge concluded:

> *"The [claimant] is not subject to deportation. The requirements of Section 117B(6)(a) and (b) of the 2002 Act are met and the public interest does not require his removal."*

Grounds of appeal and submissions

15. The grounds of appeal argue that the judge, in carrying out the proportionality assessment, has failed to give adequate weight to the claimant's deception or adequate reasons for finding that the child's best interest's outweigh the public interest. It is contended that the judge has treated the fact of there being a British child as a "trump card".

16. Mr Melvin made succinct submissions that reiterated the points made in the grounds of appeal, highlighting that, in his view, the judge had assessed proportionality without factoring in that the claimant had used deception.

17. Mr Jannangara argued that the judge had applied, and had had in mind, the relevant case law and statutory provisions. He also argued that the claimant had never been an overstayer and there was only one factor (the deception) weighing against him rather than multiple factors. Mr Jannangara maintained that looking at the overall proportionality assessment, it is clear the judge arrived at a proper conclusion.

Consideration

18. Section 117B of the 2002 Act sets out a number of considerations to which a judge carrying out a proportionality assessment must have regard. These include the consideration at Section 117B(6), which states that:

> *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.*

19. The affect of Section 117B(6) on an Article 8 proportionality assessment was explained by Elias LJ in MA (Pakistan) [2016] EWCA Civ 705 as follows:

> *17..[T]here can be no doubt that section 117B(6) must be read as a self-contained provision in the sense that Parliament has stipulated that where the conditions specified in the sub-section are satisfied, the public interest will not justify removal. It is not legitimate to have regard to public interest considerations unless that is permitted, either explicitly or implicitly, by the subsection itself.*
> *...*
> *19 In my judgment, therefore, the only questions which courts and tribunals need to ask when applying section 117B(6) are the following:*
> *(1) Is the applicant liable to deportation? If so, section 117B is inapplicable and instead the relevant code will usually be found in section 117C.*
> *(2) Does the applicant have a genuine and subsisting parental relationship with the child?*
> *(3) Is the child a qualifying child as defined in section 117D?*
> *(4) Is it unreasonable to expect the child to leave the United Kingdom?*
>
> *20.If the answer to the first question is no, and to the other three questions is yes, the conclusion must be that article 8 is infringed.*

20. In this appeal, it was common ground that the answer to the first question under Section 117B(6) was no and the answers to the second and third questions were yes. Accordingly, the only issue in contention in respect of Section 117B(6) was the reasonableness of expecting the claimant's son to leave the UK.

21. In MA(Pakistan) it was explained that the concept of reasonableness is not limited to a focus on the child and that it brings back into play all potentially relevant public interest considerations, including the conduct of a child's parents. See MA (Pakistan) at [88]: *"the conduct of the parents is relevant to their own situation which bears upon the wider public interest and does not amount to blaming the children even if they may be prejudiced as a result".*

22. Accordingly, the fact that the claimant used deception in a previous immigration application is relevant to the question of whether it would be unreasonable to expect the claimant's son to leave the UK. I agree with Mr Melvin that the judge appears to have left out of his proportionality assessment under Article 8 ECHR (and his consideration of reasonableness under 117B(6)) that the claimant used deception in an earlier immigration application (the judge has only considered this point in assessing whether the claimant can prevail under the Immigration Rules). However, I do not agree with Mr Melvin on the materiality of failing to consider the deception.

23. Regardless of how egregious the conduct of the claimant was, the issue for the judge was whether it was unreasonable to expect his son, who is a British citizen, to leave the UK. The Secretary of State has Guidance on the reasonableness of removing British citizen children. See paragraph 11.2.3 Immigration Directorate Instruction - Family Migration - Appendix FM, Section 1.0(B) "Family Life as a Partner or Parent and Private Life, 10 year Routes" dated August 2015 (which is referred to in the recent Upper Tribunal decision SF and others [2017] UKUT 120 (IAC)). This guidance makes clear that it would ordinarily be unreasonable to expect a British citizen child to leave the UK. It states that a decision to refuse to grant leave is only likely to be appropriate where the child would be able to remain in the UK and the conduct of the parent gives rise to consideration of such weight as to justify separation. The examples given are criminality and a very poor immigration history such as where there have been repeated and deliberate breaches of the Immigration Rules. Although an argument could be made that the deception of the claimant is sufficiently serious to justify separation under the terms of the Guidance, it is plain that the judge's conclusion on the reasonableness of the child being removed is not inconsistent with the principles set out in the Guidance about British children. I am satisfied, therefore, that although the judge erred by not taking into account the claimant's earlier deception when assessing reasonableness under Section 117B(6), given that the Secretary of State's own guidance is that it is rarely reasonable to expect a British citizen child to leave the UK, the error was not material.

24. Once the judge found that it was unreasonable for the claimant's son to be expected to leave the UK it inextricably followed that Article 8 would be infringed by the claimant being removed as Section 117B(6) stipulates that where the elements therein are satisfied there is no public interest in a person's removal. Adopting the formulation of Elias LJ in MA (Pakistan) at [20], because the answer to the first question under 117B(6) (is the claimant liable to deportation?) is no, and the answers to the other three questions (is the relationship genuine? Is the child qualifying? Is it unreasonable to expect the child to leave the UK?) are yes, the conclusion must be that Article 8 is infringed.

Decision

25. The appeal is dismissed. The judge has not made a material error of law and the decision of the First-tier Tribunal stands.

Signed

Deputy Upper Tribunal Judge Sheridan

Dated: 9 May 2017