Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/02311/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21 March 2018	**On 11 April 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE ESHUN

Between

MISS MILITA GHOSH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr T Shah, Solicitor
For the Respondent: Mr I Jarvis, HOPO

DECISION ON ERROR OF LAW

1. The appellant has been granted permission to appeal the decision of First-tier Tribunal Judge Doyle dismissing her appeal against the decision of the respondent to refuse further leave to remain in the UK as the partner of a Tier 2 migrant under the points- based system. The Respondent made her decision on 20 June 2016.

2. The appellant is a national of Bangladesh, born on 27 November 1987. On 18 April 2011 she was granted leave to enter the UK as a Tier 2 student until 31 October 2012. On 29 April 2013 the appellant was granted leave to remain in the UK as a Tier 4 student until 31 December 2014. On 26

June 2013 the appellant's leave to remain in the UK as a Tier 4 student was curtailed so that it expired on 25 August 2013. On 24 August 2013 the appellant made a combined application for leave to remain in the UK as a Tier 4 student. On 20 June 2016 the appellant's application for leave to remain as a Tier 4 student was refused.

3. In the meantime, the appellant had on 21 February 2014 applied for a residence card as the extended family member of an EEA national. The appellant appealed the refusal of this application. The appeal was listed for hearing on 4 February 2015. On 30 January 2015 the appellant withdrew the appeal.

4. On 4 February 2015 the appellant made an application for leave to remain in the UK as the spouse of a Tier 2 migrant. That application was refused on 26 June 2016. It is against this decision that the appellant appeals.

5. The judge noted at paragraph 11(a) that the respondent's focus in this case was entirely on the validity of the English language test produced by the appellant in support of the application she made on 24 August 2013 for leave to remain in the UK as a Tier 4 student. The appellant had relied on a TOEIC certificate from Educational Testing Services (ETS). That test certificate said that the appellant sat and passed an English language test at Colwell College on 19 September 2012. The test provider subsequently declared the test certificate to be invalid.

6. The judge made the following findings in respect of the TOEIC certificate:

   (i) At paragraph 11(a) the judge said that no evidence in relation to the test that the appellant insists that she took and passed was produced. However, at paragraph 11(b) the judge made a finding of fact that the appellant was cross-examined about attending the test centre, sitting the various parts of the English language test, and her journey to and from the test centre. The judge said that the appellant answered each question without hesitation, and her answers were not challenged. This finding seemed to suggest as argued by Mr Shah and endorsed by Mr Jarvis that this was a positive acceptance of the appellant's evidence.

   (ii) At paragraph 11(e) the judge found that the appellant failed to produce reliable evidence that she sat and passed the English language test and that he had taken account of the appellant's evidence as at the date of the hearing.

7. I find that it is difficult to reconcile the findings made by the judge. I agree with Judge Robertson, who granted permission, that it was no clear from the decision, what in particular of the appellant's evidence as to where and when she took the test, resulted in the judge finding that she had failed to provide an innocent explanation, particularly when her responses were not challenged by the HOPO. Consequently, the judge's findings amount to an error of law.

8. There is the Article 8 issue. On 20 June 2016, the respondent refused the appellant's application for further leave to remain in the UK as the partner of a Tier 2 migrant. On 2 June 2016, the appellant's partner was granted indefinite leave to remain. He was therefore not a Tier 2 migrant as at the date of the respondent's decision and at the date of the hearing on 17 November 2017. The appellant was not grant permission to argue paragraphs 10 and 11 of her grounds because Judge Robertson, relying on Odeola [2009] UKHL 25, held that the judge was required to look at the date of decision when assessing the appellant's application. At the date of decision, the appellant's husband was no longer a Tier 2 migrant. Judge Robertson said that even if the judge did err in considering the position at the date of hearing in relation to the appeal under Tier 2, this would not materially affect the outcome of the decision. .

9 Judge Robertson however granted permission in respect of paragraphs 12 – 16 of the appellant's grounds. The grounds argued that the judge applied incorrect legal tests and case law in respect of section 55, and that the judge failed to follow the guidelines applicable to a qualified child under section 117B(6)(a).

10. Judge Robertson said that there was nothing within the decision which suggested that the respondent, who should have been aware of her own policies, took into account her guidance as to decisions which affect a British national child. As stated above, at the date of the respondent's decision the child had not been born. It was not apparent from the documents that the respondent was made aware when she made her decision that the appellant was expecting a child. Therefore, the respondent could not have erred in this matter. However, I find that there was nothing within the decision which suggested that the respondent's policy was drawn to the attention of the judge and considered by him pursuant to **SF and Others (guidance post-2014 Act) Albania [2017] UKUT 120 (IAC)**. This was an error of law. I was told by Mr Jarvis that the guidance referred to in **SF and Others** was still in force at the date the judge heard the decision. The guidance has since changed. The new guidance came into force in February 2018.

11. In the light of the errors that I have identified above, the judge's decision cannot stand.

12. The appellant's appeal is remitted to Taylor House for rehearing by a judge other than First-tier Tribunal Judge Doyle

Signed Date: 9 April 2018

Deputy Upper Tribunal Judge Eshun