Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/04873/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10 January 2019	**On 18 January 2019**

Before

Deputy Upper Tribunal Judge MANUELL

Between

Mr SUNNAT [R]
(NO ANONYMITY DIRECTION)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Maholtra, Counsel (instructed by Visas 24/7)
For the Respondent: Mr N Bramble, Home Office Presenting Officer

DETERMINATION AND REASONS

1. Permission to appeal was granted by Upper Tribunal Judge McGeachy on 29 November 2018 against the decision to dismiss the Appellant's Article 8 ECHR appeal made by

First-tier Tribunal Judge Monson in a decision and reasons promulgated on 23 July 2018.

2. The Appellant is a national of Uzbekistan, who had entered the United Kingdom as a student/student nurse in 2007. Subsequently his leave to remain was extended as a Tier 4 (General) Student but then his leave was curtailed on 23 October 2014 because it was considered by the Secretary of State that the Appellant had used deception in his ETS language test. The Appellant has since been an overstayer. On 29 January 2016 the Appellant made a fresh human rights claim, based on his relationship with his British Citizen child. The application was refused on 1 February 2016. The Appellant's appeal to the First-tier Tribunal was allowed but the Upper Tribunal found an error of law and the appeal was directed to be reheard. Hence it came before the First-tier Tribunal a second time.

3. Judge Monson found as a fact that the Appellant had used deception in his ETS language test, and had concealed that in a subsequent application to the Home Office. The Appellant was thus unable to meet the Suitability provisions of Appendix FM. The removal of the Appellant did not require the Appellant's daughter ("[S]") to leave the United Kingdom as a consequence. [S]'s parents were separated. [S] lived with her mother and had contact with her father. EX.1(a) could not apply because [S] did not have to leave the United Kingdom. Nor did section 117B(6) of the Nationality, Immigration and Asylum Act 2002 (as amended) apply, for the same reason that [S] did not have to leave the United Kingdom. On the other hand, there was very strong public interest in the Appellant's removal because of his two fold deception, the initial fraud in the test taking and its subsequent concealment. The Appellant could return to Uzbekistan and seek entry clearance from there if he wished. There were no exceptional circumstances and there was no Article 8 ECHR disproportionality. Hence the appeal was dismissed.

4. Permission to appeal permission was refused by First-tier Tribunal Judge Mark Davies on 30 August 2018 but was granted by Deputy Upper Tribunal Judge McGeachy because it was considered arguable that the judge had not correctly applied the provisions of section 117(B)(6) of the Nationality, Immigration and Asylum Act 2002 (as amended).

5. A rule 24 notice in the form of a letter to the Upper Tribunal dated 10 December 2018 from the Secretary of State for the Home Department opposed the appeal.

6. Miss Maholtra for the Appellant relied on the grounds submitted and the grant of permission to appeal. The judge had accepted that [S]'s best interests were for her father to remain yet it was far from clear that the father would be able to obtain entry clearance if he left and applied to re-enter as the judge proposed. Jagdeep, an unreported decision of Upper Tribunal Judge Plimmer (copy provided to the tribunal), showed that the child's best interests could outweigh the deception of a parent. The uncertainty of gaining entry clearance made the judge's conclusions unsustainable. The Secretary of State for the Home Department's own policy did not sanction the Appellant's removal. The appeal should be allowed and the decision remade in the Appellant's favour.

7. Mr Bramble for the Respondent relied on the rule 24 notice. There was no material error of law in the First-tier Tribunal's determination. There was no challenge to the judge's findings about the Appellant's deception. The judge's conclusions were logical. The child did not have to leave the United Kingdom. The appeal should be dismissed.

8. In reply, Miss Maholtra emphasised the problem of the Appellant's ability to re-enter the United Kingdom which the judge had not addressed. Home Office policy (19 December 2018) had not been applied.

9. The grant of permission to appeal was in the tribunal's view an over generous one which had paid insufficient attention to the text of the careful determination. The key finding was that [S] did not have to leave the United Kingdom when her father left, which distinguishes the present appeal from the situations described in the latest Home Office policy guidance. [S] lives with her mother, who is separated from the Appellant, i.e., the family is already living apart. [S] is supported by her mother. The unreported decision of Jagdeep's only factual connection was that the appellant in that appeal was also found to have committed deception. The children concerned would have had to have left the United Kingdom if the appellant left, unlike the facts of the present appeal.

10. Judge Monson had to perform a balancing exercise to determine proportionality. There was a strong case for the

Appellant's removal in furtherance of the legitimate objectives set out in Article 8.2 ECHR, impossible to ignore. It could not be said, and cannot be said, that the Appellant would not be able to obtain entry clearance under the Immigration Rules if a future application were made, although the Secretary of State for the Home Department's discretion will fall to be exercised in that event. The Appellant is an overstayer with no leave to remain, caused by his own actions. It would have been wholly illogical for those actions to have no consequences. It would have been proleptic of the judge to have formed any views about the prospects of entry clearance, particularly as it will be a matter of personal choice for the Appellant how and when to apply, and what supporting evidence to produce.

11. In the tribunal's judgment the First-tier Tribunal Judge's decision was open to him. There was no challenge to the judge's finding that the Appellant had used deception, twice. The judge found that it was in the Appellant's child's best interests that the Appellant should remain in close proximity to her where he could continue to take an active role in her care and upbringing. Nevertheless, wider proportionality considerations existed, as statute directs. The reasonableness of [S]'s leaving the United Kingdom did not arise for consideration because the judge found [S] did not have to leave. Requiring the Appellant to return to Uzbekistan to seek entry clearance would not produce unjustifiably harsh consequences, let alone harm to [S]. Nothing in the evidence before the judge indicated a different outcome.

12. The First-tier Tribunal Judge produced a thorough, balanced determination, which securely resolved the issues. The tribunal finds that there was no error of law and the onwards appeal must be dismissed.

DECISION

The appeal to the Upper Tribunal is dismissed.

There was no material error of law in the First-tier Tribunal's decision and reasons, which stands unchanged.

Signed **Dated** 10 January 2019

Deputy Upper Tribunal Judge Manuell