Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/05061/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30 January 2019	**On 19 February 2019**

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

MRS NAZMOON NAHAR TANNI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Chowdhury, Solicitor, Liberty Legal Solicitors
For the Respondent: Mr S Kotas, Home Office Presenting Officer

DECISION AND REASONS

1. In a decision sent on 14 November 2018 Judge NMK Lawrence of the First-tier Tribunal (FtT) dismissed the appeal of the appellant, a citizen of Bangladesh, against the decision made by the respondent on 1 February 2018 to refuse leave to remain. The judge found that the appellant could not meet the suitability requirements of paragraph 276ADE(1)(i) because she had used deception in two TOEIC tests she took in 2012; and that she could not succeed on s.117B(6) NIAA 2002 or Article 8 grounds outside the Rules because, although one of her two children (T), had been in the UK

for nine years, it was reasonable to expect T to leave the UK and there were no strong reasons for finding that returning T to Bangladesh would affect him adversely.

2. The appellant's grounds challenged both limbs of the judge's decision.

3. In relation to the suitability issue (which forms ground (1)), it was submitted that the judge erred in failing to consider as an aspect of the appellant's innocent explanation, the significance of the documentary evidence showing that the appellant had sat and passed the IELTS test in 2007 (when in Bangladesh) and whilst in the UK had completed her bachelor degree from the London Metropolitan University before she sat the TOEIC test. In addition, the judge was said to have failed to take into account that the appellant had never sought to use the TOEIC certificate at all. What the appellant had said in her oral testimony regarding the purpose of taking this test (she stated it was part of her husband's plan to migrate to the US), should have been treated as an honest and credible explanation.

4. In relation to the second aspect of the appellant's challenge (which forms ground (2)), it was submitted that the judge failed to understand that the Home Office had already accepted that it was not reasonable for the child T to leave the UK and that, in any event, the judge had misapplied the guidance given by the Court of Appeal in **MA (Pakistan)** [2016] EWCA Civ 705.

5. I am not persuaded by ground (1). The judge was clearly aware that the appellant had passed and obtained a good score in her IELTS and had completed a diploma course. Whilst he does not expressly refer to the ability to speak English as shown by these results, it was plainly something he took account of. On the evidence in the case, the evidence regarding her past proficiency in English was not a consideration that was capable of specifically affecting the issue of deception, since that turned on the explanation she had given for taking the two TOEIC tests in 2012. Here the judge justifiably attached weight to two matters. First in her witness statement the appellant made a simple denial of the allegation of deception coupled with an assertion that she took the tests personally, although she did not need to. Second, in her oral testimony the appellant was initially unable to give any reasons why she took the tests if she did not need to and had then for the first time proffered the reason that it was to assist her intention to migrate to the USA. When asked if that answer showed it would have assisted her to take the test a second time in the hope of getting a high score, she denied it (paragraphs 8-9). Further, in her oral evidence the appellant first said she had forgotten she had taken the TOEIC tests and then that she could not consider taking it a second time. As the judge noted, she had taken no steps to obtain the voice recordings despite the respondent's statement that it was the same voice on both tests.

6. I consider the judge's assessment of the issue of deception was entirely within the range of reasonable responses. He was entitled to find that the respondent had discharged the burden of proof on him to establish the allegation of deception and that the appellant had failed to provide an innocent explanation.

7. However, the appellant must succeed on ground (2). As Mr Kotas conceded, the judge inverted the test set out in **MA (Pakistan)** so that it became, not strong reasons for refusing leave, but strong reasons for granting leave (see paragraph 40). Further and in any event, the judge entirely overlooked that the respondent as recently as February 2018 had stated in a letter granting leave to her husband and T that it would not be reasonable to expect T to leave the UK. The judge wholly failed to consider the implication of these decisions for his assessment of reasonableness.

8. For the above reasons I conclude that the decision of the judge is vitiated by legal error and should be set aside.

9. I turn to consider whether I am in a position to re-make the decision without further ado, bearing in mind that Mr Kotas submitted I should adjourn it to await test cases on a series of **KO (Nigeria)** [2018] [UKSC issues due to be heard by a presidential panel in February. Were I of the view that my task of re-making required me to consider all the facts in the context of a general proportionality assessment, I would have agreed with Mr Kotas.

10. However, the case falls in my view squarely within the compass of s.117B(6). The child T has been in the UK for more than seven years and the respondent has accepted, as recently as 1 February 2018, that it is not reasonable to expect the child to leave the UK.

11. Mr Kotas submitted that Lord Carnwath in **KO (Nigeria)** clearly required that the s.117B(6) assessment had to be made in the context of the real world. However, in talking about the real world Lord Carnwath was addressing whether the test of reasonableness was or was not made out if regard was had to likely realities flowing from the refusal decisions at issue. Here the respondent has effectively conceded that the reasonableness requirement is met.

12. Even if satisfaction of the conditions set out in s.117B(6) is not enough on its own to demonstrate that it would not be proportionate to require the appellant to leave the UK, I cannot see that the appellant's deception was of such an order as to reverse the balance of factors in her favour. She did not use the TOEIC tests to seek to obtain leave to remain. But for concerns about her past deception in 2012, it would appear she would have been granted extension of leave as a dependant of a Tier skilled worker.

13. For the above reasons, I conclude that:

    The decision of the FtT judge is set aside for material error of law;

    The decision I re-make is to allow the appellant's appeal on Article 8 grounds by reference to s.117B(6).

No anonymity direction is made.

Signed Date: 14 February 2018

Dr H H Storey
Judge of the Upper Tribunal