Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/05096/2018**

THE IMMIGRATION ACTS

Heard at:
Field House, London
On: 1 February 2019

Decision & Reasons Promulgated
On: 13 February 2019

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MOHAMMED [T]
(ANONYMITY NOT DIRECTED)

Respondent

Representation:

For the Appellant:	Ms S Kunha	(Home Office Presenting Officer)
For the Respondent:	Mr W Shea	(Counsel)

DECISION AND REASONS

1. This is the Secretary of State's appeal to the Upper Tribunal, brought with the permission of a Judge of the First-tier Tribunal, from a decision of the First-tier Tribunal (the tribunal) which it made on 19 July 2018, to allow the claimant's appeal against the Secretary of State's decision of 9 February 2018 refusing to grant him leave to remain in the United Kingdom (UK) on the basis of family life under Article 8 of the European Convention on Human Rights (ECHR).

2. I have not made any anonymity order in this case. The tribunal did not do so and, although the claimant was represented before me, I was not invited to do so.

3. Put simply and briefly, the background circumstances are as follows: The claimant is a national of Pakistan and he was born on 1 January 1991. He came to the UK, as a student, in 2011. He subsequently entered into a relationship with one [SP], a female British citizen resident in the UK, and the two have cohabitated since July 2013. She is the mother of three children and of those, the claimant is the father of the youngest two. The eldest (and the one whom the claimant has not fathered) was born on 8 February 2010. The younger two were born on 17 July 2014 and 3 August 2017 respectively. The evidence is that all five persons live together as a family unit. During the course of a previous immigration application the claimant submitted a TOEIC certificate which was subsequently found to have been obtained with the use of a proxy test taker. So, there was deception on the claimant's part. I do not think even now he accepts that but the allegations have been tested now before two differently constituted tribunals and on each occasion that matter has been resolved against him.

4. Prior to the birth of his second child the claimant applied for leave to remain in the UK on the basis of family life. The Secretary of State refused that application and the claimant appealed. But on 21 June 2016, a tribunal dismissed his appeal under Article 8 of the ECHR outside the rules. The claimant went on to make a similar application on 17 January 2017 which the Secretary of State refused on 9 February 2018 and which he, again, appealed. This time, though, as noted above, he was successful.

5. The hearing which led to the tribunal's decision of 19 July 2018 took place on 5 July 2018. The claimant gave oral evidence as did Ms [P]. Both parties were represented. The tribunal, in its written reasons, reminded itself of the existence of the previous tribunal's decision and that, following the well known case of *Devaseelan* [2002] UKAIT 00702, the previous findings represented its own starting point. It then concluded that there was nothing before it to enable it to depart from the previous finding that the claimant had, as alleged, used a proxy test taker. The consequence of that was that his application could not succeed under the Immigration Rules because he fell foul of what are referred to as the "suitability requirements". So, that led to a consideration of the situation outside the rules under article 8 of the ECHR and that, in turn, led to an evaluation as to the relevance of the children. As to the eldest, the tribunal found evidence suggesting significant contact between that child and the natural father to be unreliable and unpersuasive. But the tribunal accepted that there was "likely to be some contact" between the two. It thought that that child's best interests would lie in her remaining with her UK based mother. As to the two children whom the claimant had fathered, the tribunal considered it would be in their best interests to be raised by both of their parents. The tribunal, uncontroversial I think, went on to conclude that Article 8 of the ECHR was engaged and so it then went on to consider the proportionality of removal of the claimant bearing in mind the particular situation of the children. As to all of that it said this:

"35. In considering the legitimate public aims under Article 8(2) in assessing proportionality, I apply the provisions of s 117B of the 2002 Act (steps 4 and 5). As to proportionality, reading across my findings of fact as set out above, I find as follows:

I S 117B(1) (the public interest in immigration control) is in the public interest. The Appellant's immigration history is very poor. He has been without leave since 2014, even if it were accepted that his leave to remain application in 2012 was not secured by using deception, which it is not. He has, in effect, been without leave since 2012 because he used deception to secure leave which was granted to 4 January 2014. When asked why he had not returned when his student leave expired, he stated that he came to the UK because he wanted to study and the UK had been recommended as a good place to study and later 'the family came'. However, there was nothing to prevent him from returning to Pakistan at the time and making an out of country application to return to the UK as the spouse of Mrs [P].

II As to the economic wellbeing of the UK, it must be shown that the Appellant is financially independent and that he speaks English (s 117B(3)). Although he gave his evidence in Urdu, it was clear that the Appellant was able to understand much of what was said during the hearing. He has also provided evidence of recently obtained English language certificates. I accept, on the balance of probabilities, that the Appellant is sufficiently proficient in spoken English to be able to integrate into society.

III There is no evidence before me, however, that the Appellant is financially independent. As stated above, there was no recent documentary evidence that Mrs [P] was employed.

IV However, even if the Appellant were financially independent and could speak English sufficiently well to integrate into society, I bear in mind the guidance in **AM (s 117B) Malawi [2015] UKUT 260 (IAC)**, at headnote 3, that an appellant 'can gain no positive right to a grant of leave from either s117B(2) or (3), whatever the degree of fluency in English, or the strength of his financial resources'.

V As regards S 117B(4) and (5), the Appellant's relationship with Mrs [P] began when the Appellant's presence in the UK was at worst unlawful and at best precarious (see the finding of Judge Watson at [47], which was not challenged before me). I can therefore give little weight to it.

VI As to the provisions of S117B (6), the Appellant has a genuine and subsisting parental relationship with his two British national children. As the Appellant is living with Mrs [P] and [Z] and [A], and he is their biological father, I find on the balance of probabilities that he does have a genuine and subsisting relationship with them.

VII Is it unreasonable to expect the children to leave the UK? The Court of Appeal in MA stated that powerful reasons would need to be established to it would be reasonable to expect the children to leave the UK. Miss Hashmi referred me to **SF and others (Guidance, post-2014 Act) Albania [2017] UKUT 00120 (IAC)**, but urged me also to take into account the Family Migration: Appendix FM Section 1.0b guidance, at p 35 (the Guidance). However, there is little within the Guidance at p 35 which would assist the Appellant.

VIII **SF** highlighted that it was the Respondent's policy, when considering whether it was reasonable to expect a British citizen child to leave the UK, that it would '… usually be appropriate to grant leave to the parent or primary carer, to enable them to remain in the UK with the child, provided that there is satisfactory evidence of a genuine and subsisting parental relationship. It may however be appropriate to refuse to grant leave where the conduct of the parent or primary

> carer gives rise to considerations of such weight as to justify separation, if the child could otherwise stay with another parent or alternative primary carer in the UK or in the EU'. The circumstances that may result in a refusal are criminality falling below the thresholds set out in paragraph 398 of the Immigration Rules, or a very poor immigration history.
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> IX In the Appellant's case, it is stated in the RL that due to the Appellant's use of a fraudulent certificate to obtain leave to remain, this is sufficiently weighty to justify separation from his child.
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> X I find that the Appellant has (i) a poor immigration history (he has used deception to gain leave in the past); (ii) although he has a genuine and subsisting relationship with his children, there was no reliable evidence to suggest that he played such an active part in their upbringing that they would miss him more than would otherwise be expected; (iii) he and his partner have always known that his presence in the UK was at best precarious and at worst unlawful when they met; (iv) they both knew that he would not be permitted to stay in the UK unless he met the provisions of the Immigration Rules; (v) The Appellant's attitude from his oral evidence was that he was not prepared to leave the UK, even if the decision went against him, because he had decided to settle in the UK because the laws were good here.
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> XI However, it is clear from **MT & ET (child's best interests; ex tempore pilot) Nigeria [2018] UKUT 00088 (IAC)**, that the offences must be more than 'run of the mill' (in the case of MT, who received a community order for the use of a false document to obtain employment). The Appellant was not in fact prosecuted for use of a false English language certificate. The immigration history must also be very poor. MT had been in the UK unlawfully for a considerable period of time, and had made an asylum claim which was found to be false, and pursued various legal means of staying in the UK and this was not thought to be sufficient to constitute a 'powerful' reason for it to be found reasonable to expect a qualifying child to leave the UK. However undeserving the Appellant may be, I find that the use of a TOIEC certificate and his immigration history cumulatively is not sufficient for it to be reasonable to expect three British national children to leave the UK, particularly as (i) Yashfa is now 8 years of age and at school and (ii) she has some connection to her biological father, who remains in the UK, and it is more likely that she will see him if she remains in the UK than if she leaves.
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> 36. It follows from the above that I allow the appeal under Article 8"

6. The Secretary of State's application for permission to appeal to the Upper Tribunal followed. It is perhaps not inaccurate to suggest that to some extent the author of the grounds used a rather scatter-gun approach. But the central contentions were to the effect that the tribunal had failed to adequately explain why it was departing from the findings and conclusions of the previous tribunal and had failed to identify any "exceptional circumstances" such as to enable it to justify allowing the appeal. A grant of permission followed and the granting judge relevantly said this:

> "2. The judge has referred to the decision in *Devaseelan*. It is arguable however that the judge has given insufficient reasons for departing from the findings made when the appellant's earlier appeal was dismissed. It is also arguable that the judge has made inconsistent findings of fact and failed to give sufficient weight to the public interest considerations in the assessment of proportionality."

7. Permission to appeal having been granted, the matter was listed for a hearing before the Upper Tribunal (before me) so that consideration could be given to the question of whether or not the tribunal had erred in law and, if so, what should flow from that. Representation at that hearing

was as indicated above and I am grateful to each representative. I have taken into account what both of them have had to say in reaching my decision.

8. The first thing to say is that the tribunal's decision of 19 July 2018 is careful, thorough and comprehensive. That does not, of itself, mean that it is free from legal error but that does represent a good start. Nevertheless, it is necessary for me to consider the points made in the written grounds, the oral submissions and the grant of permission.

9. As to that, the primary point appeared to be what was said to be a failure on the part of the tribunal to explain why it was reaching conclusions which differed from those which had been reached by the previous tribunal. In fact, though, a careful reading of both decisions reveals that, as to factual findings, there was really no material disagreement at all. The second tribunal, like the first tribunal, found that the claimant had used a proxy test taker. The first tribunal had decided with respect to the eldest child that she "has no regular contact with her father". That in my view scarcely differs if it differs all from the second tribunal's conclusions to the effect that claims which had been made regarding contact were discrepant and unreliable. The second tribunal did nevertheless make the limited finding that there was likely to be some contact between father and daughter. That conclusion itself is criticised at one point but, to my mind, it simply represents the application of logic and common sense. Further, it is not of itself inconsistent with the first tribunal's finding. I am not really very sure that the situation of the eldest child was a primary consideration in the mind of the tribunal when it decided to allow the appeal on Article 8 grounds but, whether it was or not, I detect no error on the part of that tribunal in the way that approached and resolved that issue.

10. The tribunal did ultimately, of course, reach a different conclusion on Article 8 to that of the previous tribunal. The factual background before the second tribunal, of course, was different in an important material respect in that there was an additional child of the family. The previous tribunal did consider that the two children who had by that time been born could be expected to leave the UK and return to Pakistan. But on the basis of the different factual situation now obtaining it was, in my judgment, clearly open to the tribunal to reach a different view on the material before it. It did that and it was entitled to do that.

11. The tribunal is criticised for failing to identify "exceptional circumstances" such as to enable it to allow the appeal. But what it did was consider matters through the prism of section 117B of the Nationality, Immigration and Asylum Act 2002. As to section 117B(6) it concluded that the claimant had a genuine and subsisting parental relationship with his own two children and that it was not reasonable to expect those children to leave the UK. Having reached that view it was not required to cast around for anything else which it might have thought to have been exceptional.

12. I am not sure why it was thought by the granting judge that the tribunal had made inconsistent findings of fact. I have not been able to detect any for myself and I was not taken to any by Ms Kunha. As to the public interest considerations it seems to me to be entirely clear that the tribunal took such matters seriously and took them into account in its overall assessment. It did, for example, note what it described as the claimant's very poor immigration history. But it was entitled to conclude, as it did, that such considerations were outweighed by the matters relating to the children.

13. In the circumstances I have not been able to detect any error of law in this tribunal's careful decision. That decision shall, therefore, stand.

Decision

The decision of the First-tier tribunal did not involve the making of an error of law. Accordingly, that decision shall stand.

Signed: Date: 11 February 2019

Upper Tribunal Judge Hemingway

Anonymity

I make no anonymity direction. No such direction was made by the First-tier Tribunal and none was applied for before me.

Signed: Date: 11 February 2019

Upper Tribunal Judge Hemingway