Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/07806/2016**

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 2 October 2018	**On 19 March 2019**

Before

UPPER TRIBUNAL JUDGE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SHAHEEN MUSARAT
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr Diwnycz, Senior Home Office Presenting Officer
For the Respondent: Mr Caswell, instructed by Reiss Solicitors

DECISION AND REASONS

1. I shall refer to the appellant as the respondent and the respondent as the appellant (as they appear respectively for the First-tier Tribunal). The appellant, Shaheen Musarat, is a female citizen of Pakistan who was born on 3 March 1981. She made a human rights application for indefinite leave to remain in the United Kingdom on the basis of a marriage to a person present and settled in the United Kingdom. By a decision dated 3 March 2016, the Secretary of State refused the application. The appellant appealed to the First-tier Tribunal (Judge Monaghan) which, in a decision promulgated on 5 December 2017, allowed the appeal. The Secretary of State now appeals, with permission to the Upper Tribunal. The finding of the judge that the

appellant had not falsified the result of a Life in the United Kingdom test is not challenged.

2. *Inter alia*, the Secretary of State challenges the First-tier Tribunal decision on the basis that the judge has failed to carry out any or any proper consideration of Section 117B of the Nationality, Immigration and Asylum Act 2002 (as amended):

> **Article 8: public interest considerations applicable in all cases**
>
> (1) The maintenance of effective immigration controls is in the public interest.
>
> (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
>
> (a) are less of a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—
>
> (a) are not a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (4) Little weight should be given to—
>
> (a) a private life, or
>
> (b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.
>
> (5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.
>
> (6) 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.

3. The Secretary of State also relies upon *Dube (Sections 117A-117D)* [2015] UKUT 0090 (IAC):

1) Key features of ss.117A-117D of the Nationality, Immigration and Asylum Act 2002 include the following:

(a) judges are required statutorily to take into account a number of enumerated considerations. Sections 117A-117D are not, therefore, an a la carte menu of considerations that it is

at the discretion of the judge to apply or not apply. Judges are duty-bound to "have regard" to the specified considerations.

4. The judge has made no specific reference to Section 117 and the Secretary of State contends that she has fallen into error by failing to apply it.

5. The facts are unusual. The appellant applied for indefinite leave to remain as a spouse. Her application was refused in the first instance because the Secretary of State considered that she had relied on a false document. Further, the appellant failed to submit evidence that she had an English language test at level B1 or above. The application was considered outside the immigration rules under Article 8 ECHR and within the rules under Appendix FM and paragraph 276ADE. In each case, respondent found that the appellant could not qualify for leave to remain. The judge found that the refusal in respect of false document not been established on the facts. She did find, however, that the appellant could not meet the requirements for indefinite leave to remain under paragraph 287 because she did not demonstrate sufficient knowledge of the English language. Otherwise, however, she was satisfied that the respondent had not submitted that the appellant could not meet the other requirements for leave to remain as a spouse. The judge found that the appellant fell within the provisions of D-ILRP 1.2;

D-ILRP.1.2. If the applicant does not meet the requirements for indefinite leave to remain as a partner only for one or both of the following reasons-

(a) paragraph S-ILR.1.5. or S-ILR.1.6. applies;

(b) the applicant has not demonstrated sufficient knowledge of the English language or

about life in the United Kingdom in accordance with Appendix KoLL,

the applicant will be granted further limited leave to remain as a partner for a period not

exceeding 30 months, and subject to a condition of no recourse to public funds

Not surprisingly, given the refusal on the basis of submission of false document, the Secretary of State had not proceeded to consider the provisions of D-ILRP.1.2. However, the rule is unequivocal; the applicant *should* be granted a further period of limited leave in the light of the unchallenged findings of the judge. The submission made in the grounds of appeal that the appellant would need to make a fresh application to the Secretary of State is not valid. If, for example, the only issue taken by the Secretary of State in respect of the appellant's application had been that of English language knowledge (in other words, what the judge has now found) then D-ILRP.1.2. would have required the respondent to issue a period of 30 months leave; in such a scenario, the rule does not require the apply to make a fresh application for limited leave. I find that the judge was correct to hold that D-ILRP.1.2. was immediately brought into play as a consequence of her findings of fact in respect of the false document refusal and the English language requirement.

6. It follows that the judge was also correct to take into account in the Article 8 ECHR appeal that the appellant was able to meet the requirements of D-ILRP.1.2 and should be granted 30 months leave to remain. The judge found at this factor 'must weigh very significantly in favour of the appellant in the assessment of proportionality such as to mean that any attempt to remove her would not be in the public interest and would be disproportionate in all the circumstances.' That was an analysis which I consider to be free of legal error.

7. Other than with regards to her ability to speak English, the judge did not, as the grounds of appeal assert, in terms apply Section 117B, which applies in all Article 8 ECHR appeals:

> Article 8: public interest considerations applicable in all cases
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> (1) The maintenance of effective immigration controls is in the public interest.
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> (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
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> (b) it would not be reasonable to expect the child to leave the United Kingdom.

8. Whilst the judge's omission may have been a legal error, it is necessary to consider whether or not it was material to the outcome of the appeal. Considering the detailed provisions of the section, the only relevant consideration is in sub-section (3). Although she does not say so in terms, it is clear from the evidence before the judge

that the appellant does not have recourse to public funds but is reliant financially upon her husband. She is not, therefore, the burden upon taxpayers and, in that context, financially independent. Significantly, the leave to remain which should be granted to the appellant under D-ILRP.1.2. must contain a condition that she would not have recourse to public funds. It follows logically that leave to remain subject to such a condition is issued on the basis that the recipient is financially independent. In my opinion, whilst the judge should have considered and applied the entirety of section 117, her failure to do so has not vitiated her analysis or the outcome of the appeal. The Secretary of State's appeal against her decision is dismissed.

Notice of Decision

The appeal is dismissed.

No anonymity direction is made.

Signed Date 2 February 2019

Upper Tribunal Judge Lane