Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number HU/13822/2016**

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 20 September 2017	**On 25 September 2017**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

KULJEET SINGH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Bull, instructed by Just Legal Group
For the Respondent: Mr Mills, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, Kuljeet Singh, was born on 14 April 1985 and is a male citizen of India. By decision dated 26 May 2016, the respondent refused the appellant's application for further leave to remain on the basis of his family and private life. He appealed against that decision to the First-tier Tribunal (Judge Mohan) which, in a decision promulgated on 4 July 2017, dismissed the appeal. The appellant appealed against that decision and was granted permission to appeal as did the Secretary of State.

2. I was assisted by Mr Mills, who appeared for the Secretary of State at the Upper Tribunal hearing, who provided me with the results of his investigation of the English language test which the appellant had

undertaken. Mr Mills' investigation using the sources available to the Secretary of State revealed that, contrary what is asserted in the refusal letter of 26 May 2016, there exists no evidence to show that the appellant had fraudulently obtained a TOEIC certificate from ETS (Educational Testing Service). The ETS test analysis which was in the respondent's bundle indicated there was no evidence available in the usual Excel format. The respondent's bundle contains an exchange of emails in 2012 between the Secretary of State's officer and ETS Global. ETS Global stated that, having checked its databases, it had no record of the appellant having undertaken English language tests with TOEIC/ETS in the UK. However, as Mr Mills pointed out, ETS Global is a different organisation from ETS in the United Kingdom; there was, therefore, no evidence either way to show whether the appellant had in fact undertaken a test with a third party organisation. In consequence, whilst the evidence in this case may cast doubt upon the validity of the certificates obtained by the appellant, it did not cast the doubt upon which the Secretary of State had relied in refusing the application, namely that the appellant had fraudulently used a proxy to undertake a test which had consequently been declared invalid. In those circumstances, Mr Mills submitted, the Secretary of State's cross appeal should never have been lodged.

3. This brings me to the appellant's own appeal. Judge Mohan had correctly recorded [15] that the evidence in the bundle "did not support the respondent's contention that [the appellant] had taken a test by proxy". That is a finding supported by the submissions made to me today by Mr Mills. The judge was, therefore, correct to conclude [17] that the evidence was "insufficient for me to be satisfied that the appellant obtained his English language test by fraud". Thereafter, however, the judge did fall into error. In assessing the appeal on Article 8 ECHR grounds, he concluded [42] that it was "proportional *(sic*) and reasonable for the appellant to go to India to make his application for entry clearance even though this will involve separation between his wife and his child". Mr Mills submitted that that analysis was incorrect. The judge had failed to have regard to Section 117B(6) of the 2002 Act (as amended) and also to the respondent's current policy. That the judge should have had regard to the policy is confirmed by the Upper Tribunal decision in **SF (guidance, post 2014 Act) Albania [2017] UKUT 00120 (IAC)**. Given that the appellant's wife and child are both British citizens, the public interest does not require the appellant to leave the country to make an application from India. That remains the case notwithstanding the fact that the appellant is an overstayer who has established a private and family life in the United Kingdom when he had no right to be in this country. Both representatives agreed that the appeal against the immigration decision should be allowed on Article 8 ECHR grounds.

Notice of Decision

The decision of the First-tier Tribunal which was promulgated on 4 July 2017 is set aside. I have remade the decision. The appeal against the decision of the respondent dated 26 May 2016 is allowed on Article 8 ECHR grounds.

No anonymity direction is made.

Signed Date 22 September 2017
Upper Tribunal Judge Clive Lane