



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/07811/2018

THE IMMIGRATION ACTS

**Heard at FIELD HOUSE
On 21 December 2021**

**Decision & Reasons Promulgated
On 25 January 2022**

Before

**DEPUTY JUDGE OF THE UPPER TRIBUNAL
GA BLACK**

Between

**MD JUBAIR MOSHIN
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M. Biggs (Counsel)

For the Respondent: Mr D. Clarke (Senior Home Office Presenting Officer)

ERROR OF LAW - DECISION AND REASONS

1. This is an appeal against a decision by the First-tier Tribunal (Judge Devittie) ("FTT") who dismissed the appellant's human rights claim in a decision and reasons promulgated on 1 November 2018.

Background

2. The appellant, a citizen of Bangladesh, entered the UK as a student in 2009 with leave until 2013. Thereafter he applied for leave on family and private life grounds which was refused on 29 January 2015 with no right of appeal. In January 2017 he applied on human rights grounds on the basis of his marriage. The application was refused because the appellant failed to meet the Immigration Rules as to Suitability as he used deception in his English Language test ("TOEIC"), and as to Eligibility on immigration grounds. He and his wife have a child born on 4 July 2017 and the appellant's wife also has a child from a previous relationship born on 8 December 2008.

Grounds of appeal

3. In grounds of appeal the appellant argued that the FTT failed to consider Article 8 with reference Part 5A to section 117B(6) Nationality, Immigration & Asylum Act 2002 ("NIAA") which applied to his two children qualifying as British citizens ((**KO** (Nigeria) & others v SSHD [2018] UKSC 53) & **EV** (Philippines)). The FTT failed to make any findings as to the best interests of the older step child in terms of reasonableness.
4. The FTT erred by taking into account the deception used by the appellant in his TOEIC application and by placing weight on the same in terms of public interest.

Permission to appeal

5. Permission to appeal was granted in judicial review proceedings at which both parties consented to the appeal on the basis that there was no proper consideration of section 117B(6) and in particular erred by having regard to the fraudulent conduct of the appellant when assessing the public interest. In an order dated 20 August 2020 the question of costs was raised and an order made by Master Bancroft-Rimmer CO/626/2019 that the issue of costs to be transferred to the Upper Tribunal to be dealt with when the outcome of the substantive proceedings is known.
6. Thereafter permission to appeal was granted by the Vice president of the Upper Tribunal on 21 October 2021.

Error of law hearing

7. At the hearing before me Mr Clarke indicated that having read the skeleton argument prepared by Mr Biggs, he was able to concede that the FTT erred on the section 117B(6) argument.
8. Mr Biggs relied on his skeleton argument and further oral submissions were not necessary. He raised the issue of costs in the JR proceedings noting that the Upper Tribunal was not able to deal with the same at this hearing but that there would need to be resolution of the issue of costs. Both representatives agreed that the end of the substantive hearing for the purposes of costs was the error of law proceedings under section 12 2007 Act.

9. I considered the arguments put in both the grounds of appeal and the skeleton argument. I was satisfied that there was a material error in law in the FTT decision in which there was no consideration of section 117B(6) which was applicable to the appellant's two children as British citizens. The FTT considered where the best interests of the children lie and found for the youngest child that was to remain with her parents. There was no issue taken with that finding. However, in considering the older step child, the FTT made findings that were not consistent; on the one hand finding that there was no evidence as to contact with his biological father [19] and on the other finding that his best interests lie in maintaining contact with his father [21]. The FTT further erred in finding that the interests of the children were outweighed by public interest factors namely the fraudulent conduct of the appellant. There was no consideration of the fact that both children and the appellant's wife are British citizens nor was there any detailed assessment of evidence as to the reasonableness of the older child leaving the UK with his parents. The FTT failed to make an express finding as to whether it would be reasonable for the appellant's partner to leave the UK. In short there was no reference to nor proper consideration of the issues under section 117B(6) which of course is free standing.
10. Accordingly I decided that there was a material error of law and set aside the decision. Mr Biggs indicated that the remaining grounds were not pursued and that the findings in respect of the TOEIC could be preserved. The matter is to be remitted to the First-tier Tribunal for re hearing on Article 8 and section 117B(6). The findings as to the deception are preserved.
11. As to the issue of costs for the judicial review the matter has been referred to PRJ Kopieczek on 22.12.2021.

Notice of Decision

The appeal is allowed. The decision involves the making of a material error of law and is set aside. The matter is to be remitted for re hearing in the FTT at Taylor House (not before FTJ Devittie) on Article 8 and the application of section 117B(6) NIIA.

A Bengali/Sylheti interpreter is required.

No anonymity direction is made.

Signed

Date 11 January 2022

GA Black
Deputy Judge of the Upper Tribunal