



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/02971/2016

THE IMMIGRATION ACTS

Heard at Field House  
On Wednesday 10 April 2018

Determination Promulgated  
On Tuesday 01 May 2018

Before

UPPER TRIBUNAL JUDGE SMITH

Between

MOHAMMED SHAHIN MIAH

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr G Denholm, Counsel instructed by Reiss Edwards Solicitors  
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. The Appellant appeals against a decision of First-Tier Tribunal Judge O'Malley promulgated on 3 April 2017 ("the Decision") dismissing his appeal against the Respondent's decision dated 19 January 2016 refusing his application dated 7 October 2015. The Appellant relies on his family life with his wife and his daughter who was born on 21 September 2015.
2. The Appellant is a national of Bangladesh. He came to the UK as a student on 19 September 2009. His leave was extended to 30 January 2015 in that capacity. On 24 July 2013 he married his wife. She is a British citizen born in the UK. He was granted leave in that capacity from 26 September 2013 to 27 March 2016.

3. On 22 November 2014, the Appellant was returning to the UK from Bangladesh when he was stopped, was refused entry and his leave was cancelled. This was on the basis that he had previously obtained leave using an English language certificate which had been obtained by use of a proxy test taker. This case therefore involves a so-called "ETS" allegation of deception.
4. The Appellant appealed against the refusal of entry and his appeal was heard by First-tier Tribunal Judge Manuell. He dismissed the appeal and challenges to that appeal decision failed. The Appellant then made the application, refusal of which has led to this appeal.
5. Judge O'Malley upheld the finding that the Appellant had used deception in the past. Following that finding, she considered Article 8 ECHR. She concluded that, although it was not reasonable to expect the Appellant's child to return to Bangladesh with him, the child could remain in the UK with the Appellant's wife. On that basis, Judge O'Malley concluded that the decision to refuse the Appellant leave was not disproportionate and did not breach his human rights.
6. The Appellant appealed on four grounds which I expand upon below. Permission to appeal was refused by First-tier Tribunal Judge Foudy but granted by Upper Tribunal Judge McWilliam in the following terms so far as relevant:

".. Having found a genuine and subsisting relationship between the appellant and the child and that it would not be reasonable to expect the child to leave the UK (see [68] and [69]), it is arguable that the appeal should have been allowed on art 8 grounds."
7. The matter comes before me to decide whether the Decision contains a material error of law and, if so, to re-make the decision or remit the appeal for rehearing to the First-Tier Tribunal.

### **ERROR OF LAW DECISION**

8. I can deal very shortly with grounds two and three as set out in Mr Denholm's skeleton argument. Ground two which appears at [9] to [10] of the grounds is that, applying paragraph EX.1(b) of Appendix FM to the Immigration Rules ("the Rules"), the Judge failed to give adequate reasons for concluding that there were no insurmountable obstacles to the Appellant's wife residing in Bangladesh.
9. The Judge dealt with this issue at [65] to [67] of the Decision as follows:

"[65] If I am wrong on the suitability point, I would move on to consider the application under EX1, that is whether there are insurmountable obstacles to family life with his partner and/or child continuing outside the UK. I find that if he is removed his wife will remain in the UK. I accept her evidence that she would not wish to go to Bangladesh as she is unfamiliar with the country, having visited only once and that, although she does understand Bengali she is not fluent in that language. I accept that she has built a career which she continues, balancing those responsibilities with childcare.

[66] I rely on and repeat the finding of the previous Tribunal that the relationship is genuine and subsisting and that there is family life between them.

[67] Having established that the relationship would continue at a distance, I find that there are not insurmountable obstacles to their family life continuing in those circumstances. Ms Rahman and the appellant are in good health and Ms Rahman would be able to visit the appellant in Bangladesh if he were removed. In addition, I find that they are familiar with computer equipment, as Ms Begum [sic] works in banking in back office roles including auditing, and the appellant was studying business administration. I find they would be able to use technology to facilitate communication. I find that if Ms Rahman wished to relocate she would be free to do so as the wife of a Bangladeshi citizen and I find that the appellant would have family support and cultural familiarity to allow him to establish himself and support his family in Bangladesh. I find that his uncle and mother would be among those who would provide support and that his wife would provide support for him if he [sic] remained in the UK. I find that his wife would have support from her immediate and wider family in the UK to assist her in coming to terms with his removal."

10. If the Judge's reasoning in those paragraphs is to be read as being that there would not be insurmountable obstacles to family life continuing between the Appellant and his wife in Bangladesh because she would not in fact go with him, then that is an error of law. However, it is implicit in the Judge's findings that if the Appellant's wife did not go with him that would be a choice which she makes and not one forced on her by circumstances which would render her return with the Appellant unreasonable. Although the Appellant's wife may well be unfamiliar with Bangladesh, she speaks the language and, as the Supreme Court made clear in Agyarko and Ikuga v Secretary of State for the Home Department [2017] UKSC 11 ("Agyarko"), the threshold is a high one and is not met on the evidence here. The Appellant's wife may prefer not to accompany the Appellant if he is removed but there are no insurmountable obstacles to her doing so for the reasons given by the Judge. If there is an error of law disclosed by ground two, therefore, it is not material.

11. There is similarly no error of law in relation to ground three which is at [11] to [12] of the grounds. This ground concerns the Judge's finding that there are no "very significant obstacles" to the Appellant's integration in Bangladesh. The Judge's finding on this issue is based on her reasoning at [73] to [74] of the Decision as follows:

"[73] If I am wrong on the finding above, I would be required to consider whether there are very significant obstacles to his reintegration in Bangladesh. I find that there are not. He is an educated man, in good health with family in Bangladesh upon whom he can rely for support and accommodation. I find that he would also be able to rely on his wife for financial support on his return. He has been out of Bangladesh for 8 years, as an adult. During his time in the UK he has obtained useful skills for the workplace. I find that he would be able to reintegrate using his cultural and linguistic skills relevant to Bangladesh without any significant difficulty. He has given no specific evidence of any private life in the UK and I find that any friendships or connections which have been established can be maintained by remote communication. The appellant does not work and has no private life around employment.

[74] His evidence was that he has not made any effort to consider employment options in Bangladesh. I find support from the decision of MA in reaching my

conclusion that his failure to turn his mind to that is not something which weighs in his favour...”

12. Again, although it appears to be part of the Judge’s reasoning that the Appellant could be financially supported by his wife who would remain in the UK, there is no material error. Given the high threshold which applies in relation to the test of whether there are “very significant obstacles” to a person’s integration in his home country, the Judge’s finding was clearly open to her if not inevitable on the facts and evidence here for the other reasons the Judge gave. I refer to what is said about that test by the Court of Appeal in Secretary of State for the Home Department v Kamara [2016] EWCA Civ 813.
13. That brings me to the remaining grounds on which Mr Denholm relied at the hearing. The first ground at [3] to [8] of the grounds of appeal concerns the Judge’s findings about the “ETS” allegation (“the ETS issue”). The fourth ground at [13] to [18] of the grounds of appeal concerns the Judge’s findings in relation to the Appellant’s daughter (“the Article 8 issue”).

#### The ETS issue

14. The starting point in relation to this issue, as Judge O’Malley recognised at [25] onwards is that the ETS issue was determined in a previous appeal involving the same parties. As such, the “Devaseelan” principles (arising from the case of Secretary of State for the Home Department v D (Tamil) [2002] UKIAT 00702) apply. Those principles relate to second appeals involving the same parties and apply as follows (taken from [39] to [41] of the judgment in that case):
- (1) The first Judge’s determination should always be the starting-point.
  - (2) Facts happening since the first Judge’s determination can always be taken into account by the second Judge.
  - (3) Facts happening before the first Judge’s determination but having no relevance to the issues before him can always be taken into account by the second Judge.
  - (4) Facts personal to the Appellant that were not brought to the attention of the first Judge, although they were relevant to the issues before him, should be treated by the second Judge with the greatest circumspection.
  - (5) Evidence of other facts may not suffer from the same concerns as to credibility, but should be treated with caution.
  - (6) If before the second Judge, the Appellant relies on facts that are not materially different from those put to the first Judge the second Judge should regard the issues as settled by the first Judge’s determination and make his findings in line with that determination.

- (7) The force of the reasoning underlying guidelines (4) and (6) is greatly reduced if there is some very good reason why the Appellant's failure to adduce relevant evidence before the first Judge should not be held against him.

The Tribunal in Devaseelan made clear that those guidelines are not intended to cover every eventuality.

15. The Appellant submits that the Devaseelan principles should not be applied with full force here because matters have moved on in relation to the reliance which can be placed on the Respondent's evidence about the ETS issue (the so-called "generic evidence") when considering whether an appellant has exercised deception. Mr Denholm relied in his submissions on the Court of Appeal's judgment in Majunder v Secretary of State for the Home Department [2016] EWCA Civ 1167 upholding the Tribunal's decision in SM and Qadir (ETS - Evidence - Burden of Proof) [2016] UKUT 229 (IAC) ("SM and Qadir").
16. The starting point for my consideration of the Decision in this regard is what was found by the previous Judge (Judge Manuell). It is worthy of note in this regard that Judge Manuell had before him the report of Dr Harrison which was the main source of the Tribunal's concerns about the Respondent's evidence in SM and Qadir. Judge Manuell considered that report albeit observing that it was obtained for another case. As such, Dr Harrison did not take account of the Appellant's own evidence. At [20] to [23] of Judge Manuell's decision, he set out the Appellant's evidence as follows:
- "[20] In the tribunal's judgment, the Appellant's own evidence was unsatisfactory. He was apt to seek to justify himself instead of answering the questions in fact put to him, whatever their source. He sought to persuade the tribunal of his innocence in principle rather than providing a coherent account of actual events. His inability to produce any form of receipt for his TOEIC test payment was surprising, given that the test cost £170 and was a vital document.
- [21] At his interview the Appellant immediately named the college where he said he sat the TOEIC examination. When challenged that the TOEIC certificate named a different college, the Appellant then said that he did not "actually remember". It is disturbing that the Appellant changed his answer as soon as he was challenged, because it suggests that his first answer was untrue and that he was aware or did not care that it was. His inability on reflection to name the college where he said he sat the test or to recall any relevant details of the test was even more surprising. According to his witness statement, he had attended two colleges only in the course of his United Kingdom studies, so there was little scope for confusion deriving from attendance at many different colleges. In any event, it is reasonable to consider that sitting an examination as a student to whom the outcome is important is a memorable event, not least because of the preparation necessary and the need to establish the geographical location of the place of the examination if unfamiliar. The Appellant provided no concrete description of any relevant matter nor of the conduct/content of the examination, despite the often peripheral detail of other matters he chose to mention in his witness statement, such as the place of his wedding reception. Stating that there were four modules merely recited what the certificate showed.
- [22] The Appellant now seeks to claim that his admittedly feeble performance when interviewed by the Immigration Officer at port was caused by a combination

of sorrow, nerves and fatigue. It is not easy to see why the Appellant should have been nervous to any significant degree, if he genuinely believed that all his immigration documents were in order. The Appellant had several opportunities in the course of the interview to explain any difficulties such as fatigue, yet said nothing. Individuals vary, of course, but the Appellant is an articulate and educated young man and it is not easy to see how his recollection failed so easily. The interview was of modest length and the Appellant was given every chance to explain himself.

[23] The Appellant asserted repeatedly that he had no need to falsify a test since he speaks good English. The tribunal noted that the Appellant did indeed speak fluent English at his hearing but no examples of the Appellant's written work were produced. It is not in any event for the tribunal to attempt to judge matters which must be determined by accredited experts, but the Appellant's apparent ability in spoken English does not in itself mean that he might have wished to spare himself the trouble of taking a test in person, especially a test with various components and where he might have lacked confidence in the outcome."

I pause to note that the Judge, somewhat presciently, there took into account precisely the sort of factors in the appellant's evidence which the Tribunal in SM and Qadir advocated as warranting consideration.

17. Having considered the Respondent's and the Appellant's evidence about the ETS test, Judge Manuell concluded at [25] of his decision as follows:

"[25] The tribunal finds that there has been a material change of circumstances. It is satisfied on the balance of probabilities that the Respondent has discharged the burden of proof of showing that the TOEIC certificate produced by the Appellant to obtain an extension of stay was validly cancelled by ETS. This means that the Appellant was a party to fraud. There can be no doubt that his Tier 4 (General) Student Migrant visa would not have been renewed had the Home Office been aware that the TOEIC certificate was false. The Appellant would have been removed from the United Kingdom if he had failed to depart voluntarily and he would have faced difficulties in the event of seeking to make an out of country entry clearance application as a spouse. The Appellant has failed to demonstrate any procedural error or unfairness on the Respondent's part.

18. Although in the passages which I set out above Judge Manuell may not have gone through the same exercise as more recent authorities advocate of considering the respective evidential burdens before reaching that conclusion, it is clear from the order in which he considered the evidence - first the Respondent's and then that of the Appellant - before concluding that the Respondent had satisfied the legal burden, that he was, in essence, following the same process.

19. The findings of Judge Manuell were then the starting point for Judge O'Malley's consideration. The Judge was referred to what was said in SM and Qadir. However, as she observed at [29] of the Decision, if she was to re-make the decision about the ETS issue, then the interview record would be an essential document and that was not produced nor sought. As Mr Tufan also pointed out to me, if the Judge had gone on to reconsider this issue for herself, she had before her the report of Professor French on which the Respondent relies as rebuttal

evidence to that of Dr Harrison. SM and Qadir is very far from being the last word about the Respondent's evidence in ETS cases (see, by way of example, MA (ETS-TOEIC testing) [2016] UKUT 00450(IAC)). As is also clear from SM and Qadir itself, the Respondent's "generic evidence" is accepted as discharging the evidential burden on her with the consequence that what becomes important is the Appellant's own evidence. Further, as the Tribunal has noted in that and other cases, the question of whether a person has engaged in fraud in an ETS case is fact sensitive.

20. Based on the evidence which was before Judge O'Malley, she was entitled to reach the conclusion she did at [28] of the Decision based on what is said at [27] of the Decision as follows:

"[27] Mr Moore accepted that there were some changed circumstances here as the marriage continued and the child had been born but submitted that the previous decision stands in relation to the ETS certificate and in relation to the credibility of the appellant as many of the findings relate to that point. He submitted that the inconsistencies were identified and there was motive as the appellant had failed an English test weeks before this test was taken and the appellant was aware that he had to obtain the certificate to make his application.

[28] I read the determination and concluded that **Devaseelan** applies in this case. The decision of Judge Manuell was not overturned despite application both to the First-tier and the Upper Tribunal for leave to appeal. The appellant had given evidence on the issues around the test at that time and in this hearing I did not have all that evidence before me, because neither party had included items such as the witness statement or interview of the appellant."

21. For the reasons set out above, Judge O'Malley was entitled to reach the conclusion she did that there were no changed factual circumstances since the date of Judge Manuell's decision and, accordingly, applying the "Devaseelan" principles, she should regard the ETS issue as settled by the earlier decision and make her findings in line with that earlier decision. The grounds do not disclose any error of law in the Decision in relation to the ETS issue.

### The Article 8 issue

22. That then leaves me with ground four which raises Article 8 ECHR, in particular in relation to the Appellant's child. Since I have found no error of law in relation to the ETS issue, it follows that the Appellant cannot succeed in his application within the Rules. He fails under the Rules on suitability grounds because of his character and conduct arising from the finding that he is party to a fraud.
23. I have already explained also why there is no error of law in the Judge's findings about the Appellant's wife's ability to relocate to Bangladesh with him if she chooses and that there are no very significant obstacles to the Appellant's integration in Bangladesh. For the reasons given by the Judge in relation to those issues, the Appellant cannot succeed in his application outside the Rules based on his family life with his wife or his private life.

24. That then leaves the only remaining element of his family life which is the focus of ground four and that is the Appellant's relationship with his child who is a British citizen. The Appellant cannot succeed in that regard by reference to EX.1 of Appendix FM within the Rules because of the suitability finding. However, the position of the Appellant as parent of that child is relevant to consideration of the public interest when looking at section 117B (6) of the Nationality, Immigration and Asylum Act 2002 ("section 117B (6)") which provides:

- "(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"

It is not disputed that, as a British citizen, the Appellant's child is a "qualifying children". Nor is it disputed that the Appellant has a genuine and subsisting parental relationship with his daughter.

25. The Judge dealt with this issue at [68] to [69] of the Decision as follows:

"[68] In relation to his daughter, I find the parental relationship genuine and subsisting. I find that his child is under the age of 18 years, being only 18 months old. She is a British Citizen living in the UK. I find that she would remain with her mother in the UK and therefore would not be removed with the appellant. I have considered the guidance helpfully provided by Mr Moore and accept that it would not be reasonable to expect the child to leave the UK, however, that is not the evidence before me. The evidence of Ms Rahman was that she would not want her daughter to grow up in Bangladesh as she does not know how the education or healthcare system works and does not feel they are up to the standards available to her in the UK.

[69] I find that it would not be reasonable to expect an infant British Citizen child of a British Citizen to leave the United Kingdom and it would not be in her best interests but that in this situation the child would not be expected to do so as she has another parent on whom she is dependent who can continue care in the UK. I am satisfied that it is in the best interests of the child taking into account that communication can continue by technological means, although I accept this will be the appellant speaking to her rather than her speaking to him; she can visit Bangladesh with her mother and that her needs will be met by her mother and the remainder of her family in the UK which the appellant identifies as a grandmother, aunts and uncles and great aunts and great uncles. The appellant's witness statement sets out the effect of his removal is that his daughter would have to accompany him but I find that this is not the case and that she will remain in the UK with her mother."

26. Although I observe that the above findings are made in the context of whether EX.1 of Appendix FM to the Rules would be satisfied based on the parental relationship if the adverse suitability finding were not upheld, EX.1. (a) is in analogous terms to section 117B (6) and the same considerations apply. The Judge goes on at [77] of the Decision to set out section 117B (6) and reaches her conclusions in this regard as follows:

"[79] The statute sets out in the plainest terms that the very proper public interest does not require removal where there is a qualifying child and it would not be



reasonable to expect the child to leave the UK. I rely on my earlier finding that neither the appellant's wife nor his child would leave the UK. I also rely on **FZ (China) v Secretary of State for the Home Department [2015] EWCA Civ 550** where the Court of Appeal dismissed the appeal in circumstances where, if the Claimant's wife was herself compelled to leave, the child would be compelled to go with her, but there was no compulsion on the wife and, in those circumstances, the child could not be said to be compelled either."

27. I disagree with Mr Denholm's submission that the Judge has erred in taking into account the Appellant's deception when judging the reasonableness of the child relocating to Bangladesh. That she was entitled to do so is clear from the Court of Appeal's judgment in MA (Pakistan) and others v Secretary of State for the Home Department [2016] EWCA Civ 705 ("MA (Pakistan)").
28. However, the passages cited above suffer from two other errors of law as follows. First, when considering in the context of whether it would be reasonable to expect the child to leave the UK, the Judge should not have decided that issue on the basis that the child would not do in fact leave because the Appellant's wife had indicated that she and her child would not return to Bangladesh if the Appellant were removed. The question is not whether it is reasonable to expect the child to leave the UK or remain in the UK with the other parent but only whether it is reasonable to expect the child to leave. To that extent, section 117B (6) is to be distinguished from section 117C (5) where the question is whether "the effect" of a parent's deportation would be unduly harsh on the child.
29. The Judge may have been led into her error in this regard by the reliance placed on FZ (China) (cited at [79] of the Decision) which concerns automatic deportation and not removal.
30. It is also possible that the Judge was led into error by the Respondent's guidance cited at [68] of the Decision. The guidance in force now is different in material respects from that available at the date of the Decision and I therefore deal with it below when re-making the decision. However, the (now clearer) argument apparently made by the Respondent in her guidance in relation to whether it is reasonable to expect a child to leave the UK, is that, as a first step, a decision-maker must consider whether the child will in fact be required to do so. That guidance is however the Respondent's interpretation of what is required under section 117B (6) and what matters is the wording of the legislation itself.
31. Second, and in any event, the Judge has erred by not considering the impact on the best interests of the child of separation from her father. It is fundamental to the proportionality assessment that account be taken of the impact of the removal on both the Appellant's family life and that of others with whom he shares that family life, namely his wife and child.
32. In summary, whilst, as I have already noted, there is no error of law in the Judge's finding that family life could be continued between the Appellant and his wife in Bangladesh, her finding at [69] of the Decision that it would not be reasonable to

expect the Appellant's child to leave the UK should have led her either to allow the Appellant's appeal or to conclude that it would be reasonable to expect the child to leave if, having balanced the best interests of the child against the other public interest factors, she reached the view that it would not be disproportionate to remove the Appellant. Even if she was entitled to factor into the equation at that point that the child would not be expected to leave, in judging the proportionality of removal, she would then need to take into account the impact on the Appellant's wife and child of separation from him.

33. For the reasons given at [28] to [32] above, I conclude that the Appellant has shown that there is an error of law based on his fourth ground. For those reasons, I set aside the Decision. I do so, however, only on the basis that the Judge has erred in consideration of the Appellant's case outside the Rules relating to his relationship with his British Citizen wife and child. I include in that the Judge's consideration of the Appellant's relationship with his wife simply because the Judge has not reached an express finding as to whether there are "insurmountable obstacles" to their family life continuing in Bangladesh and because such a finding may have a bearing on whether it is reasonable to expect the couple's child to leave the UK.
34. For those reasons, I set aside the Decision but I preserve all of the Judge's findings save for those which appear at [65] to [70] and [76] to [81].

### **Re-making of the Decision**

35. At the end of the hearing, both parties were agreed that the Decision could be re-made in this Tribunal. Further, both parties also agreed that if I found an error only on ground four, I could go on to re-make the Decision without further evidence or the need for a further hearing.
36. Following the hearing, however, I received a letter from Mr Denholm directing my attention to the fact that the Supreme Court had granted permission to appeal on the issue of how section 117B (6) is to be interpreted. The Supreme Court has before it four cases involving consideration of a child's interests in the context of removal and criminal deportation. Those cases were heard on 17-19 April 2018. In light of this development, Mr Denholm asked that I consider either postponing my error of law decision or proceeding with the error of law decision and postponing the re-making until the Supreme Court has given judgment in those cases.
37. I decline that invitation on both counts. The Court of Appeal's judgment in MA (Pakistan) will fall to be considered by the Supreme Court in the appeals which it has just heard. However, there is no conflicting authority on the issue determined in those cases, the judgment remains binding on me unless and until it is overruled and I consider it is rightly decided. Although the appeals have quite recently been heard by the Supreme Court, there is no indication on the Court's website that judgment will be given imminently and it could be quite

some time before judgment is handed down. I hope also that it will be plain from what I say below, the basis on which I have reached my conclusions and, therefore, if the law is changed by the Supreme Court's judgment, it should be evident to the parties what is the impact on this decision.

38. I begin then with consideration of the Appellant's family and private life application within the Rules. I can deal with this very shortly. In reliance on the ETS deception which was found against the Appellant and on which I have concluded that Judge O'Malley was right to rely, I conclude that the Appellant cannot meet the Rules on suitability grounds, in particular S-LTR.1.6:

**"S-LTR.1.6.** The presence of the applicant in the UK is not conducive to the public good because their conduct (including convictions which do not fall within paragraphs S-LR.1.3. to 1.5.), character, associations, or other reasons, make it undesirable to allow them to remain in the UK."

39. The Appellant has been found to have exercised deception and to have been party to fraud. I recognise that the Appellant himself was not the organiser of the fraud, that this was a widespread fraud and that many others in the position of the Appellant took advantage of that fraudulent enterprise. It is nonetheless deception perpetrated with a view to circumventing the requirements of the Rules and therefore undermining the system of immigration control.

40. Since the Appellant fails on suitability grounds, paragraph EX.1. of Appendix FM to the Rules does not fall to be considered. If I am wrong about that, though, EX.1. (a) is in analogous terms to section 117B (6) which I consider below. I need consider therefore only EX. 1. (b) which provides (so far as relevant):

"(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen....and there are insurmountable obstacles to family life with that partner continuing outside the UK."

41. There is no issue about the genuineness of the relationship between the Appellant and his wife. The relationship is subsisting.

42. The Appellant's wife was born and educated in the UK. She works for HSBC and has been promoted most recently (according to her initial statement) to the position of a Senior Branch Clerk. She earned a good salary (£25,500) but reduced her hours to part time following the birth of the couple's child. The Appellant's wife has her family in the UK. As she explains at [10] of her initial statement, however, "[t]he importance of family ties in South Asian culture is an understanding that both me and the Appellant hold dearly". It is evident from what is there said that the Appellant's wife has retained at least cultural association with Bangladesh through her family. I note however and accept, as she says at [11] of the statement that the lifestyle of "British Bangladeshis" is very different to that of Bangladeshis living in Bangladesh. As a result, given her birth and upbringing in the UK, she may very well have a "limited understanding of the Bengali culture".

43. Against that, however, although the Appellant's wife clearly feels strongly that she should not be required to leave the UK and that the Appellant should not therefore be removed, she has not explained what are the insurmountable obstacles to her relocation to that country which she mentions at [12] of the statement. As she notes at [14] of the statement, she has visited Bangladesh once with the Appellant to meet her mother-in-law. She stayed three weeks. She says she found it "very hard" to adjust to things like the climate, the insects and the food. However, those do not come close to the sorts of obstacles which could be described as "insurmountable" when one looks at the Supreme Court's judgment in Agyarko (see for example the factors referred to at [71] and [73] of the judgment which were held not to meet that test).
44. Furthermore, the Appellant was himself born and grew up in Bangladesh. He has been out of that country since September 2009 and therefore less than nine years. His mother (at least) continues to live there. The Appellant's wife would therefore have some support in seeking to establish herself in that country if she chooses to accompany him on return, although I note the Appellant's evidence that his mother is elderly and would not be able to accommodate and support the family.
45. The Appellant would be able to work in Bangladesh. The Appellant's wife works in a bank and there is no reason why she would not be able to find similar work if she were to live there. It may very well be the case that her current employer, HSBC Bank, has a presence in Bangladesh. I note that the Appellant's wife says that she speaks limited Bengali but, if she were to live in Bangladesh, she would no doubt learn the language in the same way as the Appellant had to learn English when he came to the UK.
46. For those reasons, I am not persuaded on the evidence that there are "insurmountable obstacles" to the Appellant's wife accompanying him to Bangladesh. Family life between the couple could reasonably be expected to continue in that country. That is relevant also to the proportionality balance outside the Rules. Before turning to deal with that balance, though, it is necessary to consider the best interests of the couple's child.
47. The Appellant's daughter, A, was born in the UK on 21 September 2015. She is now aged under three years. For that reason, it is perhaps unsurprising that I have little evidence about her save for her birth certificate and some photographs. The Appellant's wife's most recent statement states that A could not be expected to move to Bangladesh because "[her] basic needs would not even be met such as clean water, safe housing, sanitation, medical care, education." However, since the Appellant's wife has not lived in Bangladesh herself, her perceptions are to some extent those of an outsider from that country. The Appellant does not deal with such matters in his statement. Whilst there will obviously be differences between standards in the UK and in Bangladesh to which both the Appellant's wife and A would have to adjust, those differences are not in themselves

sufficient to find that A's best interests point firmly in favour of remaining in the UK. In that regard, I note, for example, that the Appellant was himself educated to A level equivalent in Bangladesh. There would be little or no disruption to A's education in the UK at this stage in her life. She apparently attends nursery but is not in formal full-time education.

48. The strongest factor in favour of A's best interests being to remain in the UK is her British citizenship. That is a factor of some significance. The importance of British citizenship was underlined in the speech of Lady Hale (as she then was) in ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4 ("ZH (Tanzania)") in the following terms :-

“30. Although nationality is not a "trump card" it is of particular importance in assessing the best interests of any child .....

31. .... all of these considerations apply to the children in this case. They are British children; they are British, not just through the "accident" of being born here, but by descent from a British parent; they have an unqualified right of abode here; they have lived here all their lives; they are being educated here; they have other social links with the community here; they have a good relationship with their father here. It is not enough to say that a young child may readily adapt to life in another country. That may well be so, particularly if she moves with both her parents to a country which they know well and where they can easily re-integrate in their own community .... But it is very different in the case of children who have lived here all their lives and are being expected to move to a country which they do not know and will be separated from a parent whom they also know well.

32. Nor should the intrinsic importance of citizenship be played down. As citizens these children have rights which they will not be able to exercise if they move to another country. They will lose the advantages of growing up and being educated in their own country, their own culture and their own language. They will have lost all this when they come back as adults. ....”

49. Of course, some of the factors which arose in that case are not relevant here. ZH was a case of removal where the parents were estranged and the child would therefore be separated from one parent if the other were removed. In this case, whether A and her mother relocate with the Appellant is a matter of choice for them. Neither could be forcibly removed. As I have already noted, the question is whether it would be reasonable to expect them to move on the assumption that they would do so.

50. Similarly, A is at a young age and may be capable of adapting more easily to a foreign country, particularly where she has not entered formal education in the UK. There are many families with children who move between countries in this global age. Children can and do adjust. I accept though that when A does enter into education, the standard of facilities in Bangladesh is likely to be lower and that, if she is expected to move to Bangladesh, she will be deprived of the level of educational and other facilities which she could expect to enjoy as a British citizen child. She will also be removed from her mother's wider family.

51. Based on her citizenship, and notwithstanding her young age, I am satisfied that it is in the best interests of A to remain in the UK rather than accompany her

parents to Bangladesh. Although it may be said that she is young and therefore more able to adapt, and although she is not yet of an age where relocation would disrupt her education, nonetheless, the loss of the benefits whilst growing up to which she is entitled as a British Citizen child is considerable.

52. I also accept that it is strongly in A's best interests to remain with both her parents. Although I did not hear evidence from the Appellant and his wife, it is clear from the written and other evidence that the Appellant and his wife and child are a committed and contented family unit. The following extract from the Appellant's recent statement is probably the clearest example of the depth of the Appellant's relationship with his family:

"[8] ....I want to continue to be a loving husband and father. Since we got married, me and my wife are living together with love and peace. It's been four years and eight months of our marriage during which time we have a daughter named [A]; She is two years and six months old. She goes to Old Church Nursery. She is my life and I can never imagine living without her. We have fun time together as my Daughter has now started talking. I can't explain how I feel when she called me Dad for the first time and I can do anything for my daughter.

[9] She is always with me as her mum goes to work. I take her nursery and take her back home, feed her, change her nappy, take her to the park. I enjoy my time with my spouse and daughter. As a family we go out to eat together, we go shopping together. We have a loving relationship where we can discuss our emotion, feelings, problems with each other and try to help each other. Despite the fact that I am going through such difficult times, when I look at my daughter I find comfort."

53. I accept that there would be a significant impact on A if the Appellant were removed and she remains in the UK with her mother. She will of course have no choice in the decision whether the family should relocate as a unit to Bangladesh or whether she and her mother should remain behind in the UK while her father is removed to Bangladesh. Of course, if she remained behind with her mother, she could retain contact via Skype and similar mediums of communication. Her mother also has a wider family living in the UK who could support A and her mother if the Appellant is removed without his wife and child. However, whilst those options may alleviate practical difficulties, they do not make up for the day-to-day physical and emotional contact between father and child of which A would be deprived in such a scenario.
54. For those reasons, the child's best interests are strongly to remain in the family unit with both parents and to remain in the UK.
55. I turn then to consider whether the decision to remove the Appellant is disproportionate when looking at the case outside the Rules.
56. The strongest factor in the Appellant's favour in this regard is his relationship with his child. For that reason, I begin with that factor. I have set out at [24] above, section 117B (6) and I do not repeat that. It is not disputed that the

Appellant is in a genuine and subsisting relationship with a qualifying child. The only factor which remains to be considered in this context is whether it is reasonable to expect that child to leave the UK if the Appellant is removed.

57. I have explained at [27] that when considering reasonableness in this context, I am required by the Court of Appeal's judgment in MA (Pakistan) to take into account public interest considerations. The issue then is the balance which should be struck between, on the one hand the best interests of A and on the other the public interest in removing the Appellant.

58. In MA (Pakistan), the Court of Appeal was concerned only with foreign national children who have lived in the UK for seven years or more. None of those cases dealt with the position of British Citizen children. That is not though a reason to distinguish the case; if anything, the position of a British Citizen child is likely to be stronger than that of a foreign national child who has lived here for only part of their lives (and see [102] of the judgment in MA (Pakistan)).

59. Although it is a conclusion which the Court of Appeal reached with some reticence, it was accepted in MA (Pakistan) that the question whether it is "reasonable to expect" a child to leave the UK incorporates consideration of other public interest factors. However, where the child is a "qualifying child", that is a factor leaning in favour of leave to remain being granted. That approach appears from [45] of the judgment as follows:

"[45] However, the approach I favour is inconsistent with the very recent decision of the Court of Appeal in *MM (Uganda)* where the court came down firmly in favour of the approach urged upon us by Ms Giovannetti, and I do not think we should depart from it. In my judgment, if the court should have regard to the conduct of the applicant and any other matters relevant to the public interest when applying the "unduly harsh" concept under section 117C (5), so should it when considering the question of reasonableness under section 117B (6) ..... the critical point is that section 117C (5) is in substance a free-standing provision in the same way as section 117B (6), and even so the court in *MM (Uganda)* held that wider public interest considerations must be taken into account when applying the "unduly harsh" criterion. It seems to me that it must be equally so with respect to the reasonableness criterion in section 117B (6). It would not be appropriate to distinguish that decision simply because I have reservations whether it is correct. Accordingly, in line with the approach in that case, I will analyse the appeals on the basis that the Secretary of State's submission on this point is correct and that the only significance of section 117B (6) is that where the seven year rule is satisfied, it is a factor of some weight leaning in favour of leave to remain being granted."

60. The submission of the Respondent in those cases with which the Court of Appeal there agreed is set out at [28] to [29] of the judgment as follows:

"[28] ...The focus is not simply on the child but must embrace all aspects of the public interest. She submits that in substance the approach envisaged in section 117B (6) is not materially different to that which a court will adopt in any other article 8 exercise. The decision maker must ask whether, paying proper regard to the best interests of the child and all other relevant considerations bearing upon the public interest, including the conduct and immigration history of the applicant

parent or parents, it is not reasonable to expect the child to leave. The fact that the child has been resident for seven years will be a factor which must be given significant weight in the balancing exercise, but it does not otherwise modify or distort the usual article 8 proportionality assessment. That test requires that where the parents have no right to be in the UK that is the basis on which the article 8 proportionality assessment must be made...

[29] Ms Giovannetti submits that essentially the same approach should be adopted when applying the reasonableness test; in essence, it is the usual proportionality test save that the fact that the child has resided in the UK for seven years will be a significant factor weighing in favour of the conclusion that it would not be reasonable to require the child to leave."

61. The Court of Appeal dealt with the weight which attaches to be given to the competing factors in section 117B (6) in the public interest balance at [46] of the judgment as follows:

"[46] Even on the approach of the Secretary of State, the fact that a child has been here for seven years must be given significant weight when carrying out the proportionality exercise. Indeed, the Secretary of State published guidance in August 2015 in the form of Immigration Directorate Instructions entitled "Family Life (as a partner or parent) and Private Life: 10 Year Routes" in which it is expressly stated that once the seven years' residence requirement is satisfied, there need to be "strong reasons" for refusing leave (para. 11.2.4). These instructions were not in force when the cases now subject to appeal were determined, but in my view, they merely confirm what is implicit in adopting a policy of this nature. After such a period of time the child will have put down roots and developed social, cultural and educational links in the UK such that it is likely to be highly disruptive if the child is required to leave the UK. That may be less so when the children are very young because the focus of their lives will be on their families, but the disruption becomes more serious as they get older. Moreover, in these cases there must be a very strong expectation that the child's best interests will be to remain in the UK with his parents as part of a family unit, and that must rank as a primary consideration in the proportionality assessment."

62. The Court reinforced that position at [49] of the judgment as follows:

"[49] ...the fact that the child has been in the UK for seven years would need to be given significant weight in the proportionality exercise for two related reasons: first, because of its relevance to determining the nature and strength of the child's best interests; and second, because it establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary."

63. That then brings me on to the Respondent's guidance which has recently been revised entitled "Family Migration: Appendix FM Section 1.0b" as published on 22 February 2018 ("the Guidance").

64. In relation to the position of the parent of a qualifying child, I refer first to the section headed "EX.1. (a) - Reasonable to expect (page 35 of the Guidance). That reads as follows:

"First, the decision maker must assess whether refusal of the application will mean that the child will have to leave the UK or is likely to have to do so. Where the decision maker decides that the answer to this first stage is yes, then they must go



on to consider secondly, whether, taking into account their best interests as a primary consideration, it is reasonable to expect the child to leave the UK...”

65. That interpretation of the provision whether it is reasonable to expect the child to leave also appears in the section of the Guidance which is headed “Reasonable to expect a child to leave the UK?” and which appears at page 74 onwards. That begins with the following statement:

“If the effect of the refusal of the application would be, or is likely to be, that the child would have to leave the UK, the decision maker must go on to consider whether it would be reasonable to expect the child to leave the UK.”

66. The Guidance then goes on to say this ([p76]):

**“Where the child is a British citizen**

Where the child is a British citizen, it will not be reasonable to expect them to leave the UK with the applicant parent or primary carer facing removal. Accordingly, where this means that the child would have to leave to the UK because, in practice, the child will not, or is not likely to continue to live in the UK with another parent or primary carer, EX.1(a) is likely to apply.

In particular circumstances it may be appropriate to refuse to grant leave to a parent or primary carer where their conduct gives rise to public interest considerations of such weight as to justify their removal, where the British citizen child could remain in the UK with another parent or alternative primary carer, who is a British citizen or settled in the UK or who has or is being granted leave to remain. The circumstances envisaged include those in which to grant leave could undermine our immigration controls, for example the applicant has committed significant or persistent criminal offences falling below the thresholds for deportation set out in paragraph 398 of the Immigration Rules or has a very poor immigration history, having repeatedly and deliberately breached the Immigration Rules.”

67. The Guidance appears to reflect in large part the Court of Appeal’s guidance in MA (Pakistan). It accepts that the usual presumption where a British Citizen child’s rights are at issue is that it is not reasonable to expect that child to leave and it is only where there are strong reasons of public interest for removal that a parent in a genuine and subsisting relationship with such a child should be removed. In such circumstances, of course, the British Citizen parent and child cannot be forcibly removed and the Guidance suggests therefore that the public interest might outweigh the child’s best interests in appropriate cases if the child can remain with the parent who is entitled to be in the UK.

68. It may be suggested by the Respondent that this appeal is to be distinguished from the position in MA (Pakistan) because, in accordance with what is said in the Guidance (which was not in force at the time of the Court of Appeal’s judgment in those cases), I am required first to consider whether the Appellant’s child will or is likely to be required to leave the UK with the Appellant and her mother or whether it is more likely that A will remain here with her mother. If that is what is intended by the Guidance, I disagree that this is what is required by Section 117B (6). As I have already noted at [28] above, section 117B (6) on its face requires only that there be a genuine and subsisting parental relationship

with a qualifying child (which I have accepted applies here) and an assessment whether it is reasonable to expect the child to leave the UK.

69. By contrast, the consideration under section 117C (5) is whether “the effect of [the parent’s] deportation” is unduly harsh which, read together with the relevant paragraph of the Rules entails a Judge considering whether it would be unduly harsh for a child to leave with a foreign criminal parent or for the child to remain in the UK without that parent. The consideration under Section 117B (6) is only whether it is reasonable to expect the child to leave the UK and not whether it is reasonable to expect the child to remain in the UK without one parent. If the latter were the wording of the legislation, then I can see the relevance of determining whether the child would in fact leave before one goes on to consider the effect on that child. However, that is not what the legislation says. As such, in my judgement, the Guidance in this regard imports words into the sub-section which do not there appear and/or puts an impermissible gloss on the statutory language.
70. I have already concluded that A’s best interests are strongly to remain with both her parents in the UK.
71. Returning then to what is said in MA (Pakistan), when considering the reasonableness of expecting a child to leave the UK, particularly strong reasons are required to refuse leave to a parent to whom section 117B (6) applies. As the Guidance makes clear, the presumption where a British Citizen child is concerned is that it is not reasonable to expect the child to leave but that it may still be appropriate to refuse leave to that child’s parent in circumstances where there are strong public interest reasons outweighing that child’s best interests. In such circumstances, leave may be refused where the child could remain in the UK with the other parent, leaving it to the parents to decide whether to relocate as a family or for the parent being removed to return alone to his home country. Put another way, in such cases, the child is not being required to leave but it may be reasonable to expect the child to leave when weighing that child’s interests against the public interest considerations.
72. Here, the main factor weighing against the Appellant is his deception in relying on an English language certificate to which he was not entitled. It might be argued that, but for that deception, the Appellant’s immigration history is impeccable. He came here legally and has not overstayed. He has made applications which were not hopeless or outside the Rules.
73. However, that is not an argument which is sustainable for two reasons. First, deception is a serious matter and, as I have noted at [39] above, it is the more so in this case because it was part of a wider fraudulent enterprise designed to circumvent immigration control.
74. Second, as appears from the bundle of additional ETS evidence to which Mr Tufan drew my attention, the ETS test date was 19 March 2013. Looking at the chronology as appears in the Respondent’s explanatory statement, the Appellant sought to extend his student leave on 3 May 2013. The date of the ETS test

coincides therefore with that application. As such, although the Appellant entered legitimately with leave as a student and applied properly to change colleges in 2011, thereafter his immigration history is clouded by the ETS deception. If the fact of the ETS certificate having been obtained by deception had been discovered sooner, he would not have been given further leave as a student and would not have been in a position to switch to his leave as a spouse. His relationship was formed and established at a time when, if the deception had been discovered, he would not have been entitled to remain. In short, the deception infects all but the first few years of his residence in the UK.

75. The public interest factor weighing against the Appellant is that his continued presence is contrary to the maintenance of effective immigration control. That is both as a direct result of his deception and, indirectly, because that deception prevents him being able to satisfy the requirements in the Rules from which he is excluded on suitability grounds.
76. I take into account in this regard that the Appellant has not been convicted of any criminal offence arising from his deception. This is not a deportation case. I take into account also that the Appellant is someone who, with many others, has taken advantage of a fraudulent enterprise organised by others and had no role in the organisation of the fraud.
77. I accept that there are no other public interest factors weighing against the Appellant in this case. He apparently now speaks English. The family appear to be financially independent. The Appellant's wife has a good job and the family are not supported by benefits. Nonetheless, for the reasons I have set out, as a result of his deception, the public interest in the removal of the Appellant is, in this case, a weighty factor.
78. Equally, there are no factors other than the position of A which weigh strongly in favour of the Appellant. I have already set out my reasons for finding that the Appellant's wife could accompany him to Bangladesh if she so chooses and that the Appellant could not succeed either on the basis of his family life with his wife or based on interference with his own private life.
79. The question whether it is reasonable to expect the Appellant's child to leave the UK therefore comes down to a balance between that child's best interests which are strongly in favour of remaining in the UK with both parents and the strong reasons of public interest favouring the Appellant's removal.
80. In determining that balance, I have regard to the Guidance published by the Respondent which states in unequivocal terms that it is not reasonable to expect a British Citizen child to leave the UK. As I have also recognised, the best interests of A are strongly in favour of remaining with both her parents in the UK. The Appellant's child and her parents form a genuine and subsisting family unit. The Appellant is clearly committed to his child. If the Appellant is removed without her and her mother, not only will the Appellant be deprived of that close relationship with his daughter, but, more importantly, A will be deprived of the physical and emotional day-to-day contact with her father. She is young (under

three years). However, if anything, the impact of separation from her father will be the more acute due to her age because her family will currently be her main focus.

81. I have regard to the fact that, in this case, the public interest factors weighing against the Appellant are strong and, were it not for his relationship with a British Citizen child, would undoubtedly be sufficient to outweigh the relevant family and private life interests in the proportionality balance.
82. However, balancing the interference with the best interests of a young British citizen child against the public interest in removal, I am satisfied that the interference in this case is disproportionate. The Respondent's decision to refuse the Appellant leave is therefore unlawful under section 6 Human Rights Act 1998.

### **DECISION**

**I am satisfied that the Decision contains material errors of law. The decision of First-tier Tribunal Judge O'Malley promulgated on 3 April 2017 is set aside. I re-make the decision. I allow the appeal.**

Signed

Dated: 30 April 2018



Upper Tribunal Judge Smith