Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/30160/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
Oral decision given following hearing	
On 26 September 2017	**On 10 October 2017**

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MUSA ROKEYA SULTANA RIMA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant (Secretary of State): Mr I Jarvis, Senior Home Office Presenting Officer
For the Respondent (Mrs Rima): Mr N Ahmed, Solicitor, of Lincoln's Chambers Solicitors

DECISION AND REASONS

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1. This is the Secretary of State’s appeal against a decision of First-tier Tribunal Judge Beach who in a Decision and Reasons promulgated on 12 December 2016 following a hearing at Taylor House a little over three months earlier, on 30 August 2016, had allowed Mrs Rima’s appeal against the Secretary of State’s decision refusing to grant her leave to remain as a spouse of a person who is settled in the UK. For ease of reference, throughout this decision I shall refer to the Secretary of State, who was the original respondent, as “the Secretary of State” and to Mrs Rima, who was the original appellant, as “the claimant”.

2. The claimant is a national of Bangladesh who was born in May 1990. She entered the UK in February 2010 with leave to enter as a Tier 4 Migrant and then subsequently in July 2014 she applied for leave to remain as the spouse of a person who was settled in the UK. Her husband has indefinite leave to remain.

3. In August 2015 a decision was made refusing to grant the claimant further leave to remain. The reason for refusal was that she was not a suitable person because she had used a proxy in order to obtain her ETS test certificate.

4. The claimant’s appeal against this decision was, as already noted, allowed by First-tier Tribunal Judge Beach in a Decision and Reasons which was not promulgated until 12 December 2016, which was over three months after the appeal had been heard at Taylor House on 30 August 2016.

5. The Secretary of State’s grounds are contained within the file. At the very last moment, the Secretary of State applied for permission to amend her grounds to include a challenge to the decision on the basis that over three months had passed between the date of the hearing and the decision, such that in reliance on the decision of the Court of Appeal in *RK (Algeria)* [2007] EWCA Civ 868 which itself followed cases such as *Sambasivam v SSHD* [2000] Imm AR 85, the decision should not stand because the credibility findings could not be relied upon. Without making any finding as to the merits of this particular submission, I allowed the point to be argued. However, for the reasons which follow, it is not necessary for me to make any conclusive decision on this and indeed other arguments which had been advanced within the grounds.

6. Essentially, the Secretary of State’s appeal is advanced on the basis that the judge’s findings with regard to whether or not deception had been used in the taking and passing of the ETS test are unsustainable. It is said that at the very least the judge’s decision that it had not is inadequately reasoned. Had this been a live issue, I might well have so found; Judge Andrew granted permission to appeal on 10 August 2017, and I too I would certainly have granted permission to appeal had the only issue been whether or not the Judge’s decision that deception had not been used in the taking and passing of the ETS test was sustainable. However, for the reasons which follow, in my judgement this is not an issue I now need to determine.

7. It is a fact in this case that the claimant and her husband have a son, who is now 3 years old. Because this young boy is a child of a settled migrant he is a British citizen. Accordingly, the provisions of Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 (inserted by Section 19 of the Immigration Act 2014) will apply. This provides as follows:

> "117B Article 8: public interest considerations applicable in all cases:
>
> ...
>
> (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".

8. A "qualifying child" is defined within Section 117D as including a child who is a British citizen. It is not in dispute that the claimant has a genuine and subsisting parental relationship with this child, who is a qualifying child.

9. At the outset of this hearing I told Mr Jarvis, representing the claimant, that my provisional view was that any error in Judge Beach's decision was not material because in light of the claimant's current guidance (which was that it would never be "reasonable" to insist that a British citizen child leave the UK), the claimant's appeal had to succeed in any event on Article 8 grounds. Mr Jarvis, having heard the provisional view of this Tribunal then advanced an argument that the provisions of 117B(6) did not apply in this particular case. In order to be fair to Mr Jarvis, I will not summarise his arguments, but will set out his submission as he made it to this Tribunal, as follows:

> "Section 117B(6) does not apply because there is no expectation that this child will leave the UK. He will remain with the settled parent. It is not like *MA (Pakistan)* – all of those cases involve non-settled people, in which the parent applicants were relying upon the strength of the private life of the qualifying child with seven years residence or more, because in those cases, all of these applicants would have had to leave as a family unit. This is a case in which a British child remains in the UK with a settled parent.
>
> That is a reality. If the approach this Tribunal has suggested today is correct, then Parliament should be presumed to have intended to prevent the Secretary of State from removing a person even with what in this case we say is serious deception, where colleges have been involved on the face of it, and sometimes proven, in criminal practices, or in a case with a particularly bad immigration history.

The guidance which the Tribunal has mentioned, which I think is still correct guidance, as quoted by the Tribunal in *SF (Albania)* [2017] also says – which is often missed – that the Secretary of State will not grant leave to remain if she considers that the personal conduct of the applicant is adverse enough. That would mean that the Secretary of State would consider whether it was appropriate to separate the parent applicant from the British child.

The Secretary of State's guidance does not say that separation could never be a reasonable argument or assessment in a case with a British child. We say that is a consequence of your misinterpretation of Section 117B(6). If you take the word 'expect' out of Section 117B(6) it would have no bearing whatsoever on the meaning of the Section.

A child with seven years has to go, but in that case there had to be an expectation the child would leave. In practical reality this child resides with his father".

10. Although Mr Jarvis informed the Tribunal that an argument along these lines was shortly to be made before the Court of Appeal, I consider this submission to be completely contrary to what is provided within Section 117B(6). It is an argument which has been advanced before this Tribunal by other Presenting Officers, but it has never, so far as I am aware, been successful. In my judgement, it would be non-sensical to give effect to Section 117B(6) where a British citizen child might otherwise leave the UK with the departing parent, but ignore the provision in circumstances where it was so obviously unreasonable to expect that child to leave that there was no question of his doing so. That would seem to be the effect of what Mr Jarvis is suggesting. The Secretary of State may or may not wish to consider whether separation was appropriate in a case such as this, but she is currently prevented from so considering by the provision of Section 117B(6) which states in terms that where it would not be reasonable to expect a child to leave the United Kingdom (as in her guidance she accepts would always be the case where a British citizen child is involved) "the public interest does not require" the removal of the parent. The reason why this provision was enacted is because Parliament has recognised that ideally a child should be entitled to be brought up by both parents (as recognised for example in the European Charter of Fundamental Rights at Article 24(3)) and that it is only where the conduct of a parent has been sufficiently serious as to render him or her liable to deportation that the public interest still requires the removal of that parent.

11. Unless and until the Court of Appeal decides that the interpretation of this Tribunal is wrong, this Tribunal will continue to give effect to what it regards as the clear and obvious purpose of this provision.

12. As, in accordance with what is stated within Section 117B(6), the public interest does not require the removal of this claimant, it must follow that

whether or not Judge Beach's findings with regard to whether deception was used in the obtaining of the ETS test certificate is sustainable (which as I have already indicated it may very well not be), any error with regards to this finding is immaterial, because it would not be proportionate for Article 8 purposes to remove this claimant in any event.

13. Accordingly, there being no material error of law in Judge Beach's decision, the Secretary of State's appeal must be dismissed and I will so order.

Notice of Decision

There being no material error of law in the decision of the First-tier Tribunal, the Secretary of State's appeal is dismissed, and the decision of the First-tier Tribunal, allowing the claimant's appeal, is affirmed.

No anonymity direction is made.

Signed:

Upper Tribunal Judge Craig Dated: 9 October 2017