Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/16906/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23 April 2019	**On 14 May 2019**

Before

UPPER TRIBUNAL JUDGE PITT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS SHABANABANU ISMAIL-GOCHA PATEL
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr S Kotas, Senior Home Office Presenting Officer
For the Respondent: Ms A Harvey, instructed by One Immigration Limited

DECISION AND REASONS

1. This is an appeal against the decision issued on 25 August 2017 of First-tier Tribunal Judge Gurung-Thapa which allowed the appellant's appeal against the refusal of leave on Article 8 ECHR grounds.

2. For the purposes of this decision I refer to the Secretary of State for the Home Department as the respondent and to Mrs Patel as the appellant, reflecting their positions before the First-tier Tribunal.

3. The background to this matter is that the appellant was born in India on 6 May 1990. She is therefore now 28 years old. She came to the UK as a student on 30 March 2011 and was granted leave in that capacity until 20 June 2014. As part of an application made on 15 November 2012 for an extension of leave she relied upon a TOEIC certificate obtained on 21 August 2012.

4. On 17 June 2013 the appellant was issued with a curtailment letter indicating that her leave would be curtailed as of 19 August 2013. She did not apply in time to extend that leave but on 27 November 2013 applied for leave to remain as a spouse and this was granted until 27 May 2016.

5. On 4 May 2016 she applied for further leave to remain as a spouse but this was refused on 24 June 2016. Her appeal against that decision came before First-tier Tribunal Judge Gurung-Thapa on 28 July 2017.

6. The First-tier Tribunal found that the appellant had obtained her TOEIC certificate using a proxy and could not meet the suitability requirements of the Immigration Rules; see [15]-[31].

7. The judge went on to assess whether the appellant qualified for Article 8 ECHR leave outside the provisions of the Immigration Rules. As part of that assessment she considered section 117B of the Nationality and Immigration Act 2002. It was not disputed that the appellant had a genuine and subsisting relationship with her two British children. The First-tier Tribunal was therefore required to consider the provisions of s.117B(6) as to whether the public interest did not require the appellant's removal because it would not be reasonable to expect her children to leave the UK.

8. The finding of the First-tier Tribunal on the reasonableness of the children leaving the UK was as follows:

> "51. In the instant case, I accept that the appellant had exercised deception in her TOEIC test and I do attach weight to this issue. However, having regard to the respondent's policy as referred to above, I find that it cannot be said that the appellant has a very poor immigration history or that there is evidence of criminality.
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> 52. The appellant has two children born on 15/08/2015 and 29/04/2017 who are British citizens and therefore comes under the definition of a qualifying child under Section 117B(6). I find that it is in the children's best interests to be with both parents and I note the children's father is also a British citizen. If the children follow the appellant to India they would be deprived of the right to grow up in a country of which they are citizens. They would also be deprived of the benefits of living in the UK. For these reasons, I find that it is not reasonable to expect the children to leave the UK. Therefore, in relation to the issue of

> proportionality the public interest does not require the appellant to be removed."

9. The First-tier Tribunal found that it was not reasonable for the children to leave the UK even after some adverse weight was placed on the appellant's deception in her TOEIC test.

10. The respondent appealed against the reasonableness assessment, the grounds maintaining:

> "3. The judge was wrong in law to find that the appellant did not have a poor immigration history given his finding that she had exercised deception to obtain leave to remain in the past by employing fraud. Accordingly there were powerful reasons that existed in this case that could have rendered it reasonable for family life to continue family (sic) abroad."

11. The grant of permission to appeal dated 13 June 2018 stated:

> "2. It is arguable that the judge misapplied the respondent's policy in respect of Section 117B(6) of the NIA Act 2002 in not considering the fact that the appellant had used deception as amounting to a 'very poor immigration history'. As a result, the judge arguably erred in law in applying Section 117B(6) and carrying out the balancing exercise under Art 8.2."

12. The respondent's case, therefore, was that the First-tier Tribunal had erred in not placing more weight on the appellant's use of deception

13. By the time of the hearing before me, the Supreme Court had handed down the decision in **KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53**. In that case the Supreme Court considered the proper approach to the "reasonableness" test in s.117B(6). The Supreme Court in **KO** set down that the conduct of the parent is not a factor to be weighed against the child in the s.117B(6) assessment. Paragraph 17 of KO, for example, states "there is nothing in the subsection to import a reference to the conduct of the parent".

14. There was no application before me from the respondent by way of an amendment to the grounds in light of the guidance in **KO**. Mr Kotas accepted that the respondent's case was in difficulty where that was so. The decision of the First-tier Tribunal cannot be in error in placing insufficient weight on the appellant's adverse conduct as this is not a factor that should be weighed at all in the reasonableness assessment. The respondent's grounds do not set out any other challenge to the reasons given for that it would not be reasonable for the two British children here to have to leave the UK. Where that is so, I do not find that the respondent's grounds can show an arguable error of law in the decision of the First-tier Tribunal.

15. For completeness sake I should indicate that, in line with her instructions, Ms Harvey made an application for an extension of time to allow the

appellant to renew a cross-appeal to the Upper Tribunal, the First-tier Tribunal having refused permission to appeal in a decision dated 15 March 2018. The explanation for the failure to renew the application for permission to appeal to the Upper Tribunal was that the legal representatives had followed, incorrectly, the indication in the refusal of permission that the appellant's cross appeal could not " be entertained". Nothing explained when the legal representatives had realised otherwise and why they had not applied in writing and prior to the hearing for an extension of time in order to renew an appeal to the Upper Tribunal. Professional legal representatives can be expected to be aware of the provisions of the Tribunal Procedure (Upper Tribunal) Rules 2008 and Upper Tribunal case law which allow for a cross-appeal even if a party is successful. The delay in seeking to renew the application and applying for an extension of time is over a year. This is extremely significant and the explanation for the delay is weak. In those circumstances, I did not find that it was in the interests of justice to extend time to admit such an application.

16. For all of these reasons, the grounds before me do not show that the decision of the First-tier Tribunal contains a material error on a point of law.

Notice of Decision

17. The decision of the First-tier Tribunal is not in error and shall stand.

Signed:  Date: 7 May 2019

Upper Tribunal Judge Pitt