



IAC-AH-KRL-V1

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

Appeal Number: HU/00692/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 13 July 2017**

**Decision & Reasons Promulgated
On 2 October 2017**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

**LA
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr B Singh, Counsel, instructed by Malik Law Chambers Solicitors
For the Respondent: Mr P Singh, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Pakistan, born in 1987. He made an application for leave to remain on human rights grounds but that application was refused by the respondent in a decision dated 22 December 2015.
2. The appellant appealed against that decision and his appeal came before First-tier Tribunal Judge Housego ("the FtJ") on 13 April 2017. He dismissed the appeal.

3. The further background to the appeal is that the appellant was granted entry clearance on 26 March 2010 (for what purpose is not clear), and entered into a religious marriage with a woman, NH, in April 2012. They married under UK law in October 2012. She now has indefinite leave to remain.
4. Previously, the appellant had applied for, and been refused, leave to remain as a student. After his marriage he made a human rights application which was refused. He appealed against that decision and that appeal was dismissed. He then applied in February 2014 for leave to remain as a spouse. That application was also refused, on 10 April 2014. He lodged an unsuccessful application for judicial review of that decision.
5. On 8 June 2015 the appellant and his wife had a son, AA. On 16 November 2015 the appellant made the human rights application which resulted in the decision of 22 December 2015.

The respondent's decision

6. The respondent's reasons for refusing the application for leave to remain on human rights grounds included that the appellant had used deception in relation to an English language test taken on 18 April 2012. It was therefore concluded that he did not meet the suitability requirements of the Rules.
7. The respondent decided that it would be reasonable for the appellant's child to leave the UK, paragraph EX.1(a) not being applicable. This was because it was concluded that it would be reasonable for the child to leave the UK, the child being only 6 months old, and being accompanied by his parents, both of whom have experience of living in Pakistan and who would be able to care for him and help him to become accustomed to life there.
8. Similarly, there were no insurmountable obstacles to his relationship with his wife continuing in Pakistan where she had previously lived, including during her formative years.
9. The respondent concluded that there were no very significant obstacles to the appellant's integration into Pakistan and therefore he could not meet the requirements of paragraph 276ADE(1)(vi).

The FtJ's decision

10. The FtJ heard evidence from the appellant and NH. He said that there was only one issue of fact that was in dispute and that was whether the appellant had used deception in the TOEIC test. He said that there was no specific evidence provided by the respondent, nor even generic evidence, on this issue. He noted that the appellant spoke in good English, and he found that there was no reason "from the hearing today" to find that he used a proxy test taker in 2012.

11. He found that the appellant had been an overstayer since 9 April 2012 and met his wife when he was here illegally. She knew at all times that he had no right to be in the UK and they married less than two weeks after, to her knowledge, he was ordered to leave the UK. Her reason for marrying was to try to enhance his chance of staying.
12. He found that both the appellant and his wife are fit and healthy and able to work, and both speak English. There was family support available in Pakistan from the family of the appellant, and the appellant has a management diploma. He concluded that there were no obstacles of any significance to his or their return to Pakistan. NH had been in the UK since she was about 17 but had familiarity with Pakistan. There were no health or other issues with their child, who at the time of hearing was 19 months old.
13. Nevertheless, he found that their child is entitled to British citizenship. He had been told, but had not been shown, his British passport. The appellant and his wife tried to speak to him in English but the mother tongue for both is Urdu and that is the language that they speak at home amongst themselves. The appellant has family in Pakistan, being his mother and two siblings whom he described as being "well set up" in life. The FtJ concluded that the appellant had not severed all connection with Pakistan because he is in contact with his family there. He found that his wife does not need his full-time assistance to look after a healthy child of 19 months.
14. He further found that there were no very significant obstacles to the appellant returning to Pakistan, referring to paragraph 276ADE(1)(vi). There were no insurmountable obstacles to the appellant and his wife continuing their family life in Pakistan, his wife being a citizen of Pakistan, speaking the language and being familiar with its culture.
15. So far as their child is concerned, he said that his primary need is to be cared for by his parents. Where the child is cared for "does not matter, so long as he is not in hardship". He found that the child is a citizen of Pakistan as both his parents are citizens of Pakistan. He concluded that it was reasonable for him to grow up in the country of his parents' birth, in the culture of which he will in any event be raised. He referred to the decision in *MA (Pakistan) & Ors* [2016] EWCA Civ 705, which he had previously recited in detail.
16. He also referred to s.55 of the Borders, Citizenship and Immigration Act 2009, referring to the child's best interests. He found that those best interests are not the only or primary consideration. He referred to the child's age, and stated that the child's best interests are to be with his parents, whether in the UK or Pakistan. He noted that the system of education may be better in the UK but he would nevertheless be able to be educated in Pakistan. His parents are fit and healthy and able to work.
17. In terms of proportionality, he took into account that the relationship between the appellant and his wife was formed at a time when the appellant's immigration status

was precarious. He referred to the provisions of s.117A-B and D of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). That the appellant has a good character and speaks English are neutral factors, the FtJ said. He found that there was no right for the appellant to choose the country in which to live his married life. He also referred to the importance of maintaining immigration control, and cited the decision in *Hesham Ali (Iraq) v Secretary of State for the Home Department* [2016] UKSC 60, again which he had quoted in detail earlier in his decision.

18. He found that the appellant's wife does not earn over £18,600 per annum, and concluded that *Chikwamba v Secretary of State for the Home Department* [2008] UKHL 40 did not apply. Although the appellant's child is entitled to British citizenship, the child is of dual nationality. He found that the respondent was entitled to decide that their family life, including that of the child, can be lived in the country of which all three are citizens. Alternatively, the child could remain in the UK with his mother and thus would not be compelled to leave the UK. The FtJ made reference to the decision in *Ruiz Zambrano (European citizenship)* [2011] EUECJ C-34/09, again which he had quoted earlier in his decision. He noted that it would not be ideal for there to be separation of the family, but that that was a matter for the child's parents to decide. He again referred to the knowledge of the appellant and his wife of the appellant's immigration status when they married, concluding that they had to accept the consequences.
19. He referred to the decision in *SF and others (Guidance, post-2014 Act) Albania* [2017] UKUT 00120 (IAC) and what was said at [11] about the Tribunal applying similar or identical processes in relation to matters such as "reasonableness" as those employed by the Secretary of State. However, he said that this was not a course followed by the Court of Appeal in *MA (Pakistan)*.
20. At [61] the FtJ said that the appellant's child is not required to leave the UK, as his mother could stay, and she has the right, but not the obligation, to remain in the UK. Referring to the respondent's guidance, he noted that it states that it would "usually" be appropriate to grant leave to an appellant in these circumstances, but not necessarily always. He referred to the appellant's immigration history as being a weighty matter, and the importance of maintaining effective immigration control. He concluded that the appellant had deliberately failed to leave the UK when required to do so and had married within two weeks of being served with notice that he should leave. He then made and lost a human rights application and despite his appeal being dismissed, he still did not leave the UK. He said that it does not become "a fait accompli" that someone in the appellant's situation should be allowed to remain "by the simple expedient of having a child". He concluded that the decision that the appellant's removal is proportionate, was in accordance with the respondent's guidance but alternatively, [12] of *SF and others* clearly envisaged a departure from the guidance.
21. He found that even if the decision that the appellant should leave the UK was not in accordance with Home Office guidance, on the facts the appellant's case is distinguishable from *SF and others* for two reasons. Firstly, the child in *SF and others*

was the youngest sibling but the only British citizen, and there was an issue of sibling separation that is absent from the appellant's case. Secondly, it was found in that case to be unreasonable for the child to leave the UK. In the case of this appellant's child, that child is still very young and it is reasonable for him to leave the UK as part of a nuclear family of three.

The grounds of appeal and submissions

22. The grounds of appeal are not altogether coherent, but I shall attempt to summarise them. In essence, it is contended that the FtJ's conclusion that it was proportionate for the appellant's child to leave the UK was in error. It is suggested that the FtJ's analysis of *SF and others* was incorrect.
23. Reference is made in the grounds to the respondent's guidance in relation to whether it would be unreasonable to expect a British citizen child to leave the UK. It is contended that the FtJ's reasons for concluding that it would be reasonable are flawed. The decision in *PD and Others (Article 8-conjoined family claims) Sri Lanka* [2016] UKUT 108 (IAC) is relied on in terms of what the word "reasonable" means. It is argued that the word "reasonable" in paragraphs 276ADE, EX.1, and s.117B(6) of the 2002 Act is to be given its normal meaning and it does not import any sort of exceptionality threshold.
24. It is also argued that there has been "no consideration" of the best interests of the child. Various unfocused propositions are advanced in that respect in the grounds. It is suggested that the FtJ had failed to consider s.117 of the 2002 Act "properly".
25. In submissions on behalf of the appellant it was initially said that the grounds were relied on. However, my having pointed out that aspects of the grounds are rather unfocussed, it was then said that it was "Article 8" that was relied on. I indicated to Mr Singh on behalf of the appellant that I would assess the appeal on the basis of his submissions only, rather than in terms of the grounds generally, unless any aspect of the grounds was specifically relied on. Mr Singh accepted that as the basis of his submissions.
26. He relied on the respondent's guidance, reproduced in the decision in *SF and others*. It was submitted that the FtJ failed to apply that guidance, and the principle in that case. There were no strong reasons to depart from the guidance. Given that the appellant's child is a British citizen, it would be unreasonable to expect his parent to leave the UK. The FtJ's attempt to distinguish this case from *SF and others* was wrong.
27. Reference was made to [45] of the FtJ's decision, being the argument advanced on behalf of the appellant in reliance on *SF and others*. The respondent's decision that the suitability requirements were to be applied against the appellant was found to be incorrect, and therefore the respondent's guidance in terms of "reasonableness" meant that the appeal should have been allowed. The respondent's guidance had to be applied unless there were exceptional circumstances.

28. It was then suggested that the Secretary of State did not know at the time of the decision that the appellant's child was a British citizen. However, as I pointed out, that fact is referred to in the respondent's decision at [43] and [45].
29. On behalf of the respondent the 'rule 24' response was relied on. In effect, it was argued that the FtJ was entitled to dismiss the appeal having regard to the appellant's blatant disregard for the Immigration Rules. Alternatively, the child could remain in the UK with his mother, as the FtJ had suggested. The FtJ did take the respondent's guidance into account. Although a different judge may have come to a different conclusion, that does not establish an error of law.

Conclusions

30. At [15] of the decision letter it is said that it is accepted that if the appellant met the suitability requirements of the Rules, he would meet the eligibility requirements of paragraphs R-LTRP.1.1.(d)(ii). The FtJ resolved the suitability issue in the appellant's favour, that issue having arisen in relation to the allegation of deception in the obtaining of an English language qualification.
31. However, the respondent did not accept that paragraph EX.1 applied because it was concluded that it would be reasonable to expect the appellant's child to leave the UK. As already indicated, it is not the case, as was suggested on behalf of the appellant before me, that the respondent did not appear to recognise that the appellant's child was a British citizen. Recognition of that fact is evident from [43] and [45] of the respondent's decision.
32. In *SF and others*, the respondent's guidance, found in the Immigration Directorate Instruction - Family Migration - Appendix FM, Section 1.0(B) "Family Life as a Partner or Parent and Private Life - 10 year Routes" dated August 2015, is set out. That decision refers to the guidance document as being an "important" document containing important guidance about whether it would be unreasonable to expect a British citizen child to leave the UK. The relevant parts of the guidance, as set out in *SF and others*, are as follows:

"Save in cases involving criminality, the decision maker must not take a decision in relation to the parent or primary carer of a British Citizen child where the effect of that decision would be to force that British child to leave the EU, regardless of the age of that child. This reflects the European Court of Justice Judgment in Zambrano.

...

Where a decision to refuse the application would require a parent or primary carer to return to a country outside the EU, the case must always be assessed on the basis that it would be unreasonable to expect a British Citizen child to leave the EU with that parent or primary carer.

In such cases it will usually be appropriate to grant leave to the parent or primary carer, to enable them to remain in the UK with the child, provided that there is satisfactory evidence of a genuine and subsisting parental relationship.

It may, however, be appropriate to refuse to grant leave where the conduct of the parent or primary carer gives rise to considerations of such weight as to justify separation, if the child could otherwise stay with another parent or alternative primary carer in the UK or in the EU.

The circumstances envisaged could cover amongst others:

- criminality falling below the thresholds set out in paragraph 398 of the Immigration Rules;
- a very poor immigration history, such as where the person has repeatedly and deliberately breached the Immigration Rules.

In considering whether refusal may be appropriate the decision maker must consider the impact on the child of any separation. If the decision maker is minded to refuse, in circumstances where separation would be the result, this decision should normally be discussed with a senior caseworker and, where appropriate, advice may be sought from the Office of the Children's Champion on the implications for the welfare of the child, in order to inform the decision."

33. The contention on behalf of the appellant before me in submissions, that the FtJ's decision fails to engage with that guidance, is not correct. The FtJ referred to it in detail at [60]-[64]. Whether the FtJ's decision was taken in conformity with the guidance, is another matter.
34. The respondent's decision to refuse leave to remain, in fact, does not itself refer to the guidance. Formerly, this could have resulted in the FtJ deciding that the respondent's decision was not in accordance with the law. That is no longer a permissible ground of appeal. What *SF and others* decides however, is that the Secretary of State's guidance should be taken into account by a tribunal, where it applies. Although I note the headnote to that decision, it is worth quoting [12] from which the headnote is drawn. There it is said as follows:
- "12. On occasion, perhaps where it has more information than the Secretary of State had or might have had, or perhaps if a case is exceptional, the Tribunal may find a reason for departing from such guidance. But where there is clear guidance which covers a case where an assessment has to be made, and where the guidance clearly demonstrates what the outcome of the assessment would have been made by the Secretary of State, it would, we think, be the normal practice for the Tribunal to take such guidance into account and to apply it in assessing the same consideration in a case that came before it."
35. I do not propose to attempt to summarise the respondent's guidance, for such a summary would inevitably fail to reflect all the elements of the guidance. Suffice to say, it is clear that the British citizen status of a child is of great significance. In addition, the conduct of a parent or primary carer is also to be taken into account, in the way set out in the guidance.
36. It is apparent that the FtJ was well aware of the content of the guidance, albeit that he did not quote it verbatim. He was fully aware that the appellant's child is a British

citizen, with all that that entails. None of the submissions on behalf of the appellant indicate that any material fact was left out of account by the FtJ when he considered whether it would be reasonable to expect the child to leave the UK, or indeed whether it would be reasonable for him to be separated from the appellant. Similarly, no extraneous factor is identified as having been taken into account by the FtJ.

37. The FtJ quite properly referred to the appellant's immigration history, which the guidance allows for. He was entitled to conclude as he did at [61] that the immigration history of the appellant was a weighty matter. He found that the appellant "deliberately flouted" the direction for his removal by failing to leave the UK in July 2012 when his application for leave to remain as a student was refused. Not only did he not leave, he had married within two weeks of being served with that notice to leave, and despite having had a human rights appeal refused, he still did not leave (in 2014).
38. He referred to the fact that the appellant's relationship with his spouse, and the birth of his son, occurred "in the certain knowledge" that he had no right to be in the UK and had been ordered to leave. He referred at [47] to the appellant's wife's reason for their having married two weeks after he was ordered to leave, as being to try to enhance his chance of staying in the UK.
39. Finally, the FtJ did not in fact regard it as necessary for the appellant's British citizen child to leave the UK because he pointed out that he could stay in the UK with his mother. As he said at [59] it was for the parents to consider what was the better choice for their son. He plainly referred to, and had regard to, the child's best interests.
40. The contention that the FtJ failed to engage with the respondent's guidance is manifestly not made out.
41. I am not satisfied that there is any error of law on the part of the FtJ, whose decision was taken in full conformity with relevant authority and applicable guidance. His decision to dismiss the appeal therefore stands.

Decision

The decision of the First-tier Tribunal did not involve the making of an error on a of law. Its decision to dismiss the appeal therefore stands.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

In order to protect the anonymity of the child referred to in this decision, unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Upper Tribunal Judge Kopieczek

29/09/17