



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

Appeal Number: HU/18027/2016

**THE IMMIGRATION ACTS**

**Heard at Bradford  
On 13 August 2018**

**Decision & Reasons Promulgated  
On 28 September 2018**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE DAVEY**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**and**

Appellant

**ZEESHAN [B]  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: (For 13 August 2018) Ms R Pettersen, Senior Presenting Officer

For the Respondent: Mr C Harris Solicitor of UK Immigration Solicitors

**DECISION AND REASONS**

1. In this decision the Appellant is referred to as the Secretary of State and the Respondent is referred to as the Claimant.
2. The Claimant, a national of Pakistan, date of birth 1 January 1989, appealed against the Secretary of State's decision to refuse further leave

to remain on 11 July 2016. The appeal came before First-tier Tribunal Judge G R J Robson (the Judge) who on 15 January 2018 dismissed the appeal under the Immigration Rules but allowed the appeal with reference to Article 8 ECHR. The decision was challenged by the Secretary of State and permission to appeal was given in February 2018.

3. On 20 March 2018 with Mr A McVeety, Senior Presenting Officer appearing for the Secretary of State and Mr R Harris appearing for the Claimant I decided that the Original Tribunal decision contained an error of law in that the Judge had failed to properly address, in the light of the case law, the issue of the best interests of the children and the significance of the fact that the Appellant's wife Mrs [T], their two children [Z] date of birth 13 March 2014 and [A], date of birth 10 December 2015, were all British nationals. The Judge failed therefore to consider the issue of the reasonableness of expecting the children to leave and the failure to assess the best interests of the children as well as the issue of the impact of the Claimant being required to leave the United Kingdom to return to Pakistan and make an out of country application for leave to enter. Before the Judge the Claimant had relied upon a statement by himself and his wife.
4. The factual position had to a degree really not changed save insofar as the Claimant's standing in the UK was affected by an adverse immigration decision raising the issue that the Claimant had relied upon an English language test certificate which had not been genuinely obtained. The Claimant in his witness statement relied upon his relationship with his wife, family and his relationship which was subsisting between himself, his wife, and their two children. It was said that the Claimant had developed a very strong bond between himself, his son and daughter. Equally the Claimant claimed to support his wife and help in bringing up the children. The Claimant indicated that he could not expect his wife and children to return to Pakistan with him because his wife had health problems of a significant nature as did, it seemed, likely, the second child. It was said to be too early to know exactly what would happen in relation to her. The

position has slightly moved on in that in respect of their daughter [A] medical examinations were in train, now that she was 2 years of age, to see what if anything could be done about the renal problems that she faced: Those have yet to be fully investigated. Other arguments were put in relation to why the Claimant's wife and children could not accompany him back to Pakistan. The Claimant expressed his anxieties in terms of the health and wellbeing of his children and his wife on a return to Pakistan. The Claimant's son is settled in schooling in the UK and it was said that they were waiting for a further medical investigation of the combination of kidney and asthma problems of the Claimant's daughter.

5. There was no substantive challenge to the evidence of the health including some additional information provided relating to the medical background of the Claimant's wife and daughter. The Claimant's wife gave similar evidence of her concerns as to the impact of the family's removal to Pakistan and its impact on her bearing in mind that she is not of Pakistani origin and was not part of life in Pakistan with connections thereto.
6. Ultimately Ms Pettersen did not argue that the Claimant's wife or children who are all British nationals should go to Pakistan. Essentially she sought to argue that the Claimant could go and make an out of country application and seek to return on that basis. Ms Pettersen did not argue that the best interests of the children would lie in removing with their parents to Pakistan. Therefore applying the well-known case law of *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4 and that which followed there was clear evidence that the best interests of the children lay in remaining in the UK with the family unit as a whole. The children as British nationals in a subsisting parental relationship of mother and father it may be argued by the Secretary of State are not being required to leave the UK and therefore Section 117B(6) is not engaged. Be that as it may if it is engaged then there is really no substantive argument that it would be reasonable for them to leave the UK. It cannot be proportionate or in the public interest for them to leave.

7. So far as proportionality is concerned essentially the argument, by reference to Chikwamba [2008] UKHL 40, was not in issue that the Claimant has had a family life with his wife and children and continued to do so. It therefore seemed to me clear that the effect of the decision is an interference and arguably it is lawful and properly served immigration purposes. Of itself it was not said that the Claimant's involvement in using an inappropriate test certificate was a factor of such strength and power as to weigh against him being allowed to remain to enter the UK and it was not said it would form a clear basis to refuse him if he made an out of country application.
8. In Chikwamba the House of Lords was having particular regard to an Asylum Policy Instruction in connection with Article 8 family life claims and in particular to the issue of whether a person might be in a better position who is in the United Kingdom as opposed to someone who was seeking entry clearance. The House of Lords noted the policy and the question of proportionality but Chikwamba was cited for the proposition as to whether or not a policy was legitimate and proportionate. In assessing that issue one considered what the benefits of it really are and if it was necessary for the maintenance of and enforcement of immigration control; an indisputable legitimate aim. In its own context the issue of requiring someone to make an out of country application was often justified by the need to avoid sending out a message that people should not be allowed to exploit and gain advantage by illegal presence in the UK. In this case the Appellant was lawfully here but he engaged in the dishonest practice to obtain his English language test certificate.
9. It seemed to me in assessing proportionality there was plainly a significant public interest in persons who abuse and misuse immigration controls should not be allowed to profit from it. However this was not an entry clearance case nor was it deportation. I find when there was a genuine marriage, a genuine relationship between family members, the best

interests of the children are to remain as a family unit and it was accepted they cannot be removed, it is not proportionate to interfere into that established family relationship simply to require an out of country application. I do not see an interference as justified. There was no suggestion that an entry clearance application would be processed in under six months and nothing to indicate the likelihood of it being refused.

10. Accordingly I take the view that this was a case where there are children who are affected by the issue of the Claimant's leave and that unlike most cases this was one where the public interest was outweighed. There was no suggestion that the Claimant was a burden on the tax payer and cannot, if he remains in the United Kingdom, support his family. I find therefore as a judgment the decision of the Secretary of State is not proportionate. This is one of those few cases where the public interest is outweighed by the best interests of the children and the family unit being maintained in the UK.

#### **ANONYMITY**

No anonymity order was made nor is one required.

Signed

Dated 10 September 2018

Deputy Upper Tribunal Judge Davey

#### **TO THE RESPONDENT**

##### **FEE AWARD**

The appeal has succeeded but on the strength of much after arising evidence and the submissions made not least reflecting the realities of the situation. In these circumstances I do not find a fee award is appropriate.

Signed

Dated 10 September 2018

Deputy Upper Tribunal Judge Davey