



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

Appeal Number: HU/16638/2016

THE IMMIGRATION ACTS

**Heard at Birmingham Civil Justice
Centre
On 15th April 2019**

**Decision & Reasons Promulgated
On 23rd April 2019**

Before

UPPER TRIBUNAL JUDGE COKER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

TANVEER [H]

Respondent

Representation:

For the Appellant: Ms H Aboni

For the Respondent: Mr R Martin

DETERMINATION AND REASONS

1. Mr [H], a Pakistani citizen, arrived in the UK in 2011 with a student visa. He was granted variations in his leave until 26 May 2016 as a spouse. On 5th May 2016 he sought further leave to remain as a spouse and referred to the birth of his child, 10th June 2014.
2. The SSHD refused Mr [H]'s human rights claim for reasons set out in a decision dated 20th June 2016: it was not accepted he met the eligibility requirements because of insufficient income.; it was not accepted he met the suitability requirements because of information received from ETS that he had

fraudulently obtained an English language test certificate in 2012 using a proxy test-taker and he had not provided evidence that he was the father of his claimed child.

3. By a decision promulgated on 16th February 2018, the First-tier Tribunal judge did not make a finding on financial eligibility. He did find that Mr [H] had fraudulently obtained a language test certificate and did not meet the suitability requirements of the Rules. He did seek permission to appeal that finding. The judge went on to allow the appeal in the following terms:

“13. However similar considerations apply when his situation is assessed outwith the immigration rules on article 8 grounds because in considering the appeal on this basis, the Tribunal must have regard to the factors set out at section 117B of the Nationality, Immigration and Asylum act 2002...

14. The DNA test has established that Mr [H] is the father of a British citizen child. The respondent did not provide any reasons, either in the refusal letter or at the hearing as to why it was reasonable to expect the appellant's child to leave the UK. The respondents own published guidance, set out at paragraph 14 of the appellant's skeleton argument and considered by the Upper Tribunal in *SF* shows that it will always be unreasonable to expect a British citizen child to leave the EU with that parent. The fact that Mr Hussein used deception in his application in 2012 is not a reason to conclude that it is reasonable for his son to leave the UK. Section 117B(6) is a complete answer to the balancing exercise between the right to a family life and the public interest in maintaining effective immigration control ...”

4. It is not and cannot be correct that will *always* be unreasonable to expect a British citizen child to leave the UK with a departing parent. The issue of whether it is or is not reasonable for a child to leave the UK is an issue to be determined on the evidence. If it is not reasonable for the child to leave, that is the end of the matter. The judge appears to have taken into account extraneous matters and failed to take into account the possibility of any separation being only temporary. The First-tier Tribunal judge erred in law and I set aside the decision to be remade.
5. Mr Martin submitted that the hearing should be adjourned so that further and up-to-date evidence could be obtained. There had been no application for further evidence to be filed. The matter had been adjourned since January; if further evidence was required it is reasonable to assume that the relevant application would have been made.
6. I heard oral submissions from Ms Aboni and Mr Martin.
7. In the absence of a child, Mr [H] would not be able to avoid being removed because, *inter alia*: he has obtained a fraudulent language certificate; his marriage took place whilst his immigration was precarious; it was not submitted that his language ability was such that he met s117B (he gave evidence before the First-tier Tribunal through an interpreter although I note that in his application form he states he and his wife speak English and Urdu); he did not meet the financial eligibility requirement; he has a brother in Pakistan and my attention was not drawn to evidence that he would be unable to assist the Mr [H] on his return. In his favour, his wife is a British Citizen of Pakistani origin who came to the UK in 2006 as a spouse, subsequently obtained settlement

and then citizenship. She divorced her first husband following domestic violence. The deception practiced by Mr [H] is of such gravity that he could not, despite his relationship, expect to be able to remain in the UK.

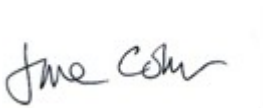
8. Nevertheless, the couple have a British Citizen child who is now nearly five years old. He has started school.
9. Ms Aboni did not submit that Mr [H] did not have a genuine and subsisting relationship with his son. The only question for determination by me is therefore whether it is reasonable to expect the child to leave the UK. Ms Aboni submitted that it was not expected that the child would leave but that he could and would remain in the UK with his mother; it was a matter of choice whether she left the UK with their child to be with her husband. This submission does not take into consideration the recent Court of Appeal decision in *AB and AO* [2019] EWCA Civ 661 or the Upper tribunal decision of *JG (s 117B(6): "reasonable to leave" UK) Turkey* [2019] UKUT 00072 (IAC). It is not in issue whether the child could remain with his mother in the UK and it becomes a matter of choice whether the family is split between two countries.
10. In this case, in the 'real world', although Mr [H] has no right to be in the UK and would not, on the evidence before me, succeed in a human rights appeal absent his child, the evidence here is that it would not be reasonable for this child to leave the UK: he is a British Citizen (an important factor but not determinative), he has started school, his mother is a British Citizen and my attention was not drawn to evidence that she had travelled to Pakistan regularly or at all since she came to the UK over 10 years ago. Even though it is possible for the child to travel to Pakistan on a temporary basis, with his mother and father, whilst Mr [H] obtains entry clearance, such travel and time away from school would be disruptive to his education. Such serious disruption is recognised by the imposition of fines upon parents who take their children out of school even a short holiday.
11. In the context of the evidence regarding this British child, it would be unreasonable for him to leave the UK.
12. It follows that Mr [H]'s appeal against the SSHD's decision falls to be allowed.

Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision and remake it allowing Mr [H]'s appeal against the decision of the SSHD to refuse his human rights claim.

Date 15th April 2019



Upper Tribunal Judge Coker