



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/12026/2018

**THE IMMIGRATION ACTS**

Heard at Glasgow  
On 26 September 2019

Decision & Reasons Promulgated  
On 11 October 2019

Before

UPPER TRIBUNAL JUDGE DAWSON

Between

M Z  
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr Caskie, instructed by Gray & Co Solicitors

For the Respondent: Mr Govan, Senior Presenting Officer

**DECISION AND REASONS**

1. I make an order for anonymity pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting disclosure of any matter that may lead to the identification of the appellant and other parties to these proceedings. Any breach may lead to contempt proceedings.
2. This is an appeal by a citizen of Pakistan who was born in August 1994. It is against the decision of First-tier Tribunal Judge McGavin who dismissed the appellant's appeal on human rights grounds against the Secretary of State's decision dated

19 May 2018, which had been made in response to the appellant's application under FLR(M) based on his marriage to a British citizen wife, who is also from Pakistan and who has lived in the United Kingdom since 2009. She had obtained settlement here on the basis of an earlier marriage. The appellant himself had been last granted permission to enter the United Kingdom as a spouse on 23 July 2015, having been previously here as a student from 24 November 2010. Extension of leave to remain as a student had been refused, and the appellant unsuccessfully appealed which had led to his voluntary departure on 2 June 2014. They had married in Pakistan on 22 October 2014.

3. The Secretary of State refused the application on the basis that in an application dated 20 December 2011 the appellant had submitted a TOEIC certificate from Educational Testing Services. However, the respondent had been informed that a proxy test taker had been used.
4. As a consequence, the Secretary of State did not consider the appellant met the suitability requirements of the relevant Immigration Rules to his application although he had met the eligibility relationship, immigration status, financial, and English language requirements. In applying paragraph EX.1 the Secretary of State contended that he had not seen any evidence that there were insurmountable obstacles, meaning the very significant difficulties the appellant and his partner would face in continuing their family life together outside the UK in Pakistan and therefore the requirements of EX.1.(b) of Appendix FM did not apply. Nor did paragraph EX.1.(a) of the same provision apply because of the failure to meet the suitability requirements under the Rules.
5. Further, the respondent did not consider the appellant came within the scope of paragraph 276ADE in respect of his private life nor that there were exceptional circumstances on the basis that the appellant's wife would be able to care for the child should she decide to stay in the United Kingdom and not return to Pakistan.
6. Judge McGavin found on the evidence that it was more probable than not the appellant or someone acting on his behalf had arranged for a proxy to take and pass the ETS English test which the appellant had not taken and passed. He was satisfied that the appellant had used the certificate issued which had been fraudulently obtained in order to obtain leave to remain. He upheld the Secretary of State's decision on suitability and in relation to paragraph 276ADE. As to the child's best interests, the judge considered the best interests were to remain in the care and custody of his mother.
7. Specifically in respect of section 117 of the Nationality, Immigration and Asylum Act 2002 the judge explained at [40]:
  - "40. Turning to section 117B(6) of the Nationality, Immigration and Asylum Act 2002, it is submitted for the appellant that the public interest does not require the appellant's removal where he has a genuine and subsisting parental relationship with a qualifying child and it would not be reasonable to expect the child to leave the UK. However, whilst the child is British and therefore it would not be reasonable to expect him to leave the

UK, the appellant has not shown that he is “not liable to deportation” (which is required by this provision) in the present circumstances where he has obtained leave to remain without any evidence of having passed the appropriate English language test, and in light of the evidence that a proxy took the language examination required by the appellant who fraudulently obtained leave to remain on the basis thereof.”

8. Further consideration of the case “outside the Immigration Rules” the judge concluded after some negative observations regarding the speed with which the appellant had met and become engaged to his current wife concluded at [49]:

“49. Considering all of the evidence and weighing the public interest in immigration control and the appellant’s private life rights, I find that there would be no unjustifiably harsh consequences for the appellant, his partner or their child, were he to be returned to Pakistan. There are no exceptional circumstances in this case which render the respondent’s decision not proportionate. The public interest prevails.”

9. Permission to appeal was granted by Upper Tribunal Judge Kamara in response to a renewed challenge based solely on error arising out of misapplication of the law regarding the appellant’s liability for deportation with reference to *Yussuf (meaning of “liable to deportation”)* [2018] UKUT 00117. This included reference to the observation in [40] that it would not be reasonable for the child to leave the UK.

10. In a Rule 24 response the Secretary of State explained that the appeal was not opposed, explained as follows:

“The respondent does not oppose the appellant’s application for permission to appeal and invites the Tribunal to determine the appeal with a fresh oral (continuance) hearing to consider whether the appellant meets the requirements of s117(6); given the Appellant is not subject to deportation action (it is conceded the FTTJ’s approach at **Para 40** discloses material error), and the FTTJ otherwise found the it was not reasonable to expect the qualifying child to leave the UK.”

11. Mr Govan and Mr Caskie explained at the outset of the hearing that the parties had agreed that the First-tier Tribunal had erred in law and that the decision by Judge McGavin should be set aside. They further agreed that as to the re-making to the decision: the appellant is to be granted leave to remain in the light of the requirements of section 117B(6) of the Nationality, Immigration and Asylum Act 2002 having been met. These matters are reflected in a consent order pursuant to Rule 39 of the Procedure Rules.

12. Accordingly the decision of the First-tier Tribunal is set aside. I re-make the decision based on the matters agreed between the parties and allow the appeal against the Secretary of State’s decision dated 19 May 2018.

Signed

Date 4 October 2019

*UTJ Dawson*

Upper Tribunal Judge Dawson