Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/00545/2018

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre	**Decision & Reasons Promulgated**
On 31st October 2018	**On 26th November 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

[M N]
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr N Reyaz (Solicitor)
For the Respondent: Mr C Bates (Senior HOPO)

DECISION AND REASONS

1. This was an appeal against the determination of First-tier Tribunal Judge J L Bristow promulgated on 27th June 2018, following a hearing at Birmingham on 5th June 2018. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a citizen of Pakistan, is a male, and was born on 5th May 1992. He appeals against the decision of the Respondent dated 5th December 2017, refusing his human rights claim to remain in the UK on the basis of his family life with his partner, [SR], and their child [MA]. The child is a British citizen. He was born on 20th September 2016 and was at the date of the hearing 21 months of age.

3. The decision to refuse was on the basis that the Appellant did not meet the suitability requirements under Section S-LTR to remain in the UK because he had used deception in his application of 23rd April 2013 by using a fraudulently obtained TOEIC certificate. The Appellant had taken four tests on 6th February 2013 at the Manchester Learning Academy. Two of the results had questionable status. The other two were declared invalid.

The Judge's Findings

4. The judge found, in relation to the evidence produced, and assessed at the civil standard, that the allegation of deception having been used by the Appellant was proven (see paragraph 32) and that the Appellant's own evidence in response was "unsatisfactory and lacking in detail" (paragraph 33). The judge then went on to consider the position of his British citizen child.

5. He observed that the Appellant had not proved that the child would be expected to leave the UK. He can remain with Mrs [SR], a British citizen, in the UK, who was his mother. The child was in any event very young. He would adapt to the absence of the Appellant and to life with Mrs [SR] alone.

6. The judge went on to say that

> "Children can be and are separated from a parent for various reasons. They cope and succeed in life nonetheless. Even though I have found that it would be in his best interests to remain with both parents is not a 'trump card' and the Appellant has not proved that [MA] would be expected to leave the UK if he was removed" (paragraph 37).

The appeal was dismissed.

Grounds of Application

7. The grounds of application state that the judge fundamentally erred in his approach to Section 117B(6) which has a two tier approach. First, it is necessary to show that the person has a genuine and subsisting parental relationship with a qualifying child (which was the case here); but secondly, it was also necessary to show that "it would not be reasonable to expect the child to leave the United Kingdom." In this case, the judge, having accepted that there was a qualifying child (at paragraph 54), and having also accepted that the best interests of the child were to remain in

the UK with both parents (paragraph 36), then it did not make a finding as to reasonableness. There was a direct failure on his part to do so. Instead, what the judge did was to say that the Appellant had to prove to a civil standard that the child was "expected" to leave the United Kingdom (see paragraphs 37, 38 and 54).

8. Second, the approach was also contrary to the favourable Home Office policy as highlighted by the Tribunal decision of **SF and Others (Guidance post-2014 Act) Albania [2017] UKUT 120**, which was to the effect that,

> "The Tribunal ought to take the Secretary of State's guidance into account if it points clearly to a particular Article in the instant case. Only in that way can consistency be obtained between those cases that do, and those cases that do not, come before the Tribunal".

9. Moreover, the Immigration Directorate Instruction – Family Migration: Appendix FM Section 1.0B – paragraph 11.2.3, is clear that

> "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".

10. Third, it was submitted that the judge's failure to make a finding on reasonableness, in turn also led to a failure to consider the wording of Section 117B(6) and to properly assess the public interest in removal. The test in Section 117B(6) is met in cases where an Appellant is not liable to deportation and there is no public interest in removal in this case.

11. On 28th August 2018, permission to appeal was granted by the Tribunal on the basis that it was arguable that the judge had erred in failing to make a finding as to whether it is reasonable to expect the Appellant and British child to leave the United Kingdom.

12. On 8th October 2018 a Rule 24 response was entered to the effect that the judge accepted that the British child was a qualifying child under Section 117B(6) but gave adequate reasons for finding that the child could remain in the UK with his mother and would not be required to leave the UK if the Appellant were removed.

Submissions

13. At the hearing before me on 31st October 2018, Mr Reyaz, appearing on behalf of the Appellant, went through the grounds of application and emphasised the fact that it was for the judge to deal properly with the second tier of Section 117B(6) and to actually make a finding as to why it would not be reasonable to expect the child to leave the United Kingdom, which he had not done. What the judge had done was to repeatedly phrase the question in terms of whether the child is expected to leave the UK at paragraphs 37, 38 and 54. Moreover, the Home Office's policy in

question here was clear that barring a case where deportation was clearly in the public interest for a committed criminal, the existence of a British citizen child was a telling factor to allowing a parent to remain in this country.

14. For his part, Mr Bates submitted that the 2018 policy of 22nd February is to the effect that it is not unreasonable to expect a child to leave where the child can live with another parent in this country. Indeed, the recent case of **KO (Nigeria)** of the Supreme Court also asks the question as to what the position is in the real world. If the Appellant is expected to leave the UK then that is the context in which the child's position should be assessed. The judge in this case properly approached the matter at paragraph 53 by observing that "the starting point is that the maintenance of effective immigration controls is in the public interest." The judge then went on to say that although there was a genuine and subsisting parental relationship of the child with the Appellant, "[MA] will not be required to leave the UK if the Appellant is removed" (paragraph 54). This was a finding that was entirely open to the judge.

15. In reply, Mr Reyaz submitted that he would also place reliance upon a recent case of **SR (subsisting parental relationship, s.117B(6)) [2018] UKUT 334**, where the Tribunal had stated that

> "The question of whether it would not be reasonable to expect the child to leave the United Kingdom in Section 117B(6) of the 2002 Act does not necessarily require a consideration of whether the child would in fact or practise leave the UK. Rather, it poses a straightforward question: would it be reasonable 'to expect' the child to leave the UK?".

Error of Law

16. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. My reasons are as follows.

17. First, in this case the judge did ask the wrong question at paragraphs 37, 38 and 54 by enquiring into whether the child is expected to leave the UK. As UTJ Plimmer makes it clear in **SR [2018] UKUT 334**, the question is a straightforward question, namely, whether it would be reasonable "to expect" the child to leave the UK. In this case it would not be reasonable to expect [MA], the child, to leave the UK. He is a British citizen. And born of a British citizen mother, and is entitled to live in this country.

18. Second, however, the Tribunal is required to take into account the existing Home Office policy and what was made clear in **SF [2017] UKUT 00120,** in relation to the IDI on family migration was that if the Appellant is not liable to deportation then provided that it is not reasonable to expect the British citizen child to leave the UK the Appellant succeeds in the appeal: **CMA (Pakistan) [2016] EWCA Civ 705** (at paragraph 48 per Elias LJ). That case drew upon **EV (Philippines)** at paragraphs 34 to 37). Clarke LJ

had made it clear that if it is overwhelmingly in the child's best interest to remain, the need to maintain immigration control may well not tip the balance.

19. Third, the Immigration Directorate Instruction Family Migration: Appendix FM Section 1.0B Family Life (as a Partner or Parent) and Private Life: ten year route August 2015", makes it clear in that guidance that

> "The requirement that a non-British citizen child has lived in the UK for a continuous period of at least seven years immediately preceding the date of the application, recognises that over time children start to put down roots and integrate into life in the UK…".

20. In this case, of course, the child has not lived in the UK for seven years. He is in fact a British citizen. Lord Bingham made it clear a decade ago that,

> "It will rarely be proportionate to uphold an order for removal of a spouse if there is a close and genuine bond with the other spouse and that spouse cannot reasonably be expected to follow the removed spouse to the country of removal, or if the effect of the order is to sever a genuine and subsisting relationship between parent and child" (see **EB (Kosovo) [2008] UKHF 41** at paragraph 12).

21. In the circumstances, the question of whether it would not be reasonable to expect the child to leave the United Kingdom was one that had to be addressed in the terms of the provision as expressed, and the failure of the judge to do so, amounts to an error of law. What the judge has done is to require the Appellant to prove that the child is expected to leave the UK. This is not the test. The judge has failed to make a finding on whether it was reasonable to expect the child to leave. For these reasons, the matter is remitted back to the First-tier Tribunal, to be determined by a judge other than Judge Bristow at the next available hearing pursuant to Practice Statement 7.2(a) of the Procedure Rules.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is remitted back to the First-tier Tribunal, to be determined by a judge other than Judge Bristow pursuant to Practice Statement 7.2(a). An anonymity order is made.

The appeal is allowed.

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

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 their 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.

Signed Dated

Deputy Upper Tribunal Judge Juss 23rd November 2018