



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/21731/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 2 August 2018

Decision & Reasons Promulgated  
29 August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR ASIF MUHAMMAD  
(ANONYMITY DIRECTION NOT MADE)

Respondent

**Representation:**

For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer

For the Respondent: Mr A Khan, Counsel, instructed by Thompson and Co

**DECISION AND REASONS**

1. I shall refer to the parties as they were before the First-tier Tribunal. Therefore, the Secretary of State is once more the Respondent and Mr Muhammad is the Appellant.
2. This is a challenge by the Respondent to the decision of First-tier Tribunal Judge S Taylor (the judge), promulgated on 2 February 2018, in which he allowed the Appellant's appeal against the Respondent's decision of 31 August 2016, refusing his human rights claim. The Appellant had arrived in the United Kingdom in 2004 as a

result of his relationship with a British citizen and the couple's British citizen child (born in 2009), the Appellant being granted discretionary leave between 2010 and 2016.

### **The judge's decision**

3. There was no Presenting Officer at the hearing before the judge. One of the issues in the appeal was whether or not the Appellant had fraudulently obtained an English language test certificate in 2012 (the not uncommon "ETS issue"). Having regard to the evidence as a whole and the explanation put forward by the Appellant, the judge found at [15] that the Appellant had indeed obtained the certificate in question on a fraudulent basis. That said, the judge also found that this certificate had not been used by the Appellant in respect of any application to the Respondent. In light of this the judge concluded that paragraph 322(5) of the rules applied.
4. The judge then went on to consider other issues in respect of the article 8 claim. He noted the nationality of the Appellant's partner and in particular that of their child. He makes reference to section 117B(6) of the NIAA 2002 and the leading authority of MA (Pakistan) [2016] EWCA Civ 705. At [16] the judge says as follows:

"The judgment advised that under section 117B(6) reasonableness did not include an assessment of the conduct and immigration history of the parents. MA was authority that in the case of children, seven years' residence should be taken as the starting point that leave should be granted unless there were powerful reasons to the contrary."
5. The judge goes on to conclude that it would not be reasonable for the Appellant and child to leave the United Kingdom the appeal was duly allowed.

### **The grounds of appeal and grant of permission**

6. The grounds contend that the judge misdirected himself in relation to MA (Pakistan). It is said that the judge "failed to adequately consider that the Appellant has a poor immigration history", particularly in light of the alleged finding that "deception had been used". It is then said that:

"Obtaining leave to remain by deception is a criminal offence and there is evidence of criminality, even if there is no conviction as yet. Accordingly, there are powerful reasons in this case to render it reasonable for family life to continue abroad. Had the judge not misdirected himself in law, he would have come to a different conclusion."
7. It is then said that the judge failed to consider the possibility of the Appellant being able to return to Pakistan alone and make an entry clearance application.
8. Permission to appeal was granted by First-tier Tribunal Judge Pickup on 21 May 2018.

### **The hearing before me**

9. A brief rule 24 reply from the Appellant was provided.
10. At the outset Mr Melvin accepted that whilst the judge had found the Appellant had obtained the English language certificate fraudulently, he had also found that the Appellant had not in fact used deception to obtain any grant of leave. Mr Melvin submitted that notwithstanding this, the Appellant had still committed fraud and this

was significant. Whether the alleged misdirection as to MA (Pakistan) was material or not was a matter for me.

11. I raised a couple of points with Mr Melvin in relation to the way in which the Respondent's case was being put in this appeal. I referred Mr Melvin to the Respondent's own guidance of February 2018 on the question of whether it was reasonable to expect British citizen children to leave the United Kingdom and the relevance of such guidance to decision-making by the Tribunal as confirmed in SF and others (Guidance, post-2014 Act) Albania [2017] UKUT 00120 (IAC). Mr Melvin seemed to suggest that the question of whether the child would leave the United Kingdom was a matter of "choice" for his parents and he referred me to the Court of Appeal judgments in FZ (China) [2015] EWCA Civ 550 and VM (Jamaica) [2017] EWCA Civ 255. He indicated that although these cases were concerned with the Zambrano principle and EU law, the Respondent's guidance was predicated upon this and therefore these two judgments were relevant.
12. I then asked Mr Melvin whether the issue of an entry clearance application even arose given that MA (Pakistan) indicated that an appellant would succeed in their article 8 claim if the provisions of section 117B(6) were met. He did not provide a response to this point.
13. In relation to any potential entry clearance application, I also highlighted the judgment of the Court of Appeal judgment in Tikka [2018] EWCA Civ 642. That case, also involving an individual to whom paragraph 322(5) applied, suggested that any application from abroad would be refused on the very same grounds as it had been refused in-country and therefore it would be futile for the Appellant to go abroad and seek entry clearance. In response Mr Melvin submitted that paragraph 320(7C) of the rules would assist any entry clearance application. On reflection, Mr Melvin then accepted that he was wrong about that as this provision has been deleted from the rules.
14. Mr Khan submitted that even taking into account the fraud, the fact that the Appellant had a British citizen child outweighed this misconduct.
15. Mr Melvin had nothing further to add.

### **Decision on error of law**

16. I conclude that whilst the judge erred in respect of this statement of the reasonableness test to be applied under MA (Pakistan), this was not a material error and I should not exercise my discretion to set the decision aside under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.
17. It is obvious from the judge's decision and the evidence in general that the Appellant had a genuine and subsisting parental relationship with his child. It is equally clear that the child was at all material times a qualifying child, being a British Citizen. The judge was clearly wrong to have said that MA (Pakistan) stipulates that the reasonableness assessment does *not* include an assessment of the conduct and immigration history of the parents of a qualifying child: this assessment does indeed

include wider public interest considerations. The issue that is to be assessed in isolation of such considerations is that of the child's best interests.

18. I conclude that the judge's misdirection is not material to the outcome of the appeal. It is quite clear, as indeed the judge correctly states at [16], that once the threshold questions in relation to section 117B(6) are answered in the Appellant's favour (namely whether he had parental relationship with the child and the child was qualified), "powerful reasons" are required to be shown in order to outweigh the significant factor of the child's status (see paragraph 46 of MA (Pakistan)) and the recent decision of the president in MT and ET (child's best interests; ex tempore pilot) Nigeria [2018] UKUT 00088 (IAC), at paragraph 33).
19. Mr Melvin has suggested that the Appellant has a sufficiently bad immigration history as to constitute a powerful reason. In my view the judge was entitled to conclude, at least implicitly, that this was not the case. Although it had been found that the Appellant had fraudulently obtained the English language test certificate, he had not used it in any application. To this extent the Respondent's grounds of appeal are inaccurate: deception had not been "used" in respect of the Appellant's interaction with the Respondent. It is also the case that not only were there no convictions against the Appellant, but no suggestion whatsoever that criminal proceedings had ever been envisaged. Therefore, on the undisputed facts of the case, it is very difficult indeed to see that the Appellant's own history was particularly poor, and was in no way describable as appalling. Whatever my own view of the history, the point is that the judge was certainly not bound to conclude that the immigration background was so bad as to outweigh the child's status, as is asserted in the grounds.
20. There is then the issue of the Respondent's guidance, both in its current form but more importantly as it stood as the date of the hearing. Three points arise out of this. First, we know that the contents of the guidance is a relevant factor for consideration by the tribunal (see SF (Albania)). Second, I disagree with Mr Melvin's suggestion that this guidance relates to the Zambrano principle and nothing more. The guidance is specifically addressing the issue of reasonableness in the context of Appendix FM. Appendix FM is of course concerned, in essence, with article 8, not EU law. It is also the case that the reasonableness test is the same whether it be applied within the context of the rules (including Appendix FM) or without. Therefore, the Respondent's guidance *was* relevant. I conclude that Mr Melvin's reliance upon the judgments in FZ and VM was misconceived given that these two cases related specifically to the Zambrano principle and not article 8. Third, it does not appear as though the guidance was brought to the judge's attention, as it should have been by the Respondent, if not the Appellant's representatives. The guidance, at least in its previous version, was in existence at the date of the hearing before the judge. As I read the guidance, the Respondent has taken the view over the course of time (including within the previous version of the guidance) that it would not be reasonable to expect a British citizen child to leave the United Kingdom. Certainly, in respect of the current version of the guidance, as I read relevant passages in pages 73 and 76 of the document, where the Appellant lives with a British citizen child in a single family unit, there would be an expectation that the child would leave, if that initial threshold question exists at all (and I have my doubts about this: I see no reason to place such a gloss upon the

wording of either the rules or, more importantly, the statutory provision, and nothing whatsoever is said about such an additional factor in MA (Pakistan).

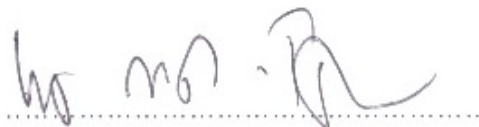
21. Therefore, whilst the guidance (in its previous incarnation) did not feature in the judge's analysis, it was a relevant factor which in fact counted firmly in the Appellant's favour rather than against.
22. In light of the British nationality of the child and the facts as found, the judge was entitled to conclude that it would not be reasonable for that child to leave this country. The Appellant's own immigration history and wider considerations were simply insufficient to outweigh that very significant factor. The legal misdirection was, ultimately, immaterial to the outcome.
23. Finally, I conclude that the judge was not required to go on to consider whether or not an entry clearance application could be made by the Appellant from Pakistan. Section 117B says what it says: in light of paragraphs 17-21 of MA (Pakistan), it is a self-contained provision and if an individual can satisfy each criterion, they will succeed in their appeal. They do not then need to go on and show that they could not *also* make an entry clearance application.
24. Even if I am wrong about that and the issue of an entry clearance application was live before the judge, there is no error in his failure to address the point. This Appellant had had paragraph 322(5) applied to him by the Respondent and in turn the judge. It seems to me abundantly clear that if he went back to Pakistan and made an entry clearance application it would have been refused on precisely the same grounds, namely the relevant suitability provisions. In this respect the present case is analogous to the scenario considered by the Court of Appeal in Tikka. As mentioned earlier, Mr Melvin has accepted that there are no other provisions in the rules that would have allowed the Appellant to, as it were, get round the 322(5) issue in respect of any putative entry clearance application.
25. In light of the above the decision of the First-tier Tribunal stands.

**Notice of Decision**

**The decision of the First-tier Tribunal does not contain material errors of law.**

**The decision of the First-tier Tribunal shall stand.**

No anonymity direction is made.



Signed

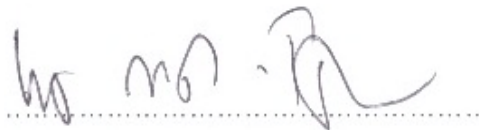
Date: 19 August 2018

Deputy Upper Tribunal Judge Norton-Taylor

**TO THE RESPONDENT**

**FEE AWARD**

I maintain the decision of the First-tier Tribunal not to make an award in all the circumstances.

A handwritten signature in black ink, appearing to read 'Norton-Taylor', is written over a horizontal dotted line.

Signed

Date: 19 August 2018

Deputy Upper Tribunal Judge Norton-Taylor