



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/01372/2016

THE IMMIGRATION ACTS

Heard at Birmingham Employment Tribunal
On the 29 August 2018

Decision & Reasons Promulgated
On 18 September 2018

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

GM
(ANONYMITY DIRECTON MADE)

Respondent

Representation:

For the Appellant: Miss H. Aboni, Senior Presenting Officer

For the Respondent: Mr Yusuf instructed on behalf of the Respondent

DECISION AND REASONS

Rule 14: 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 his family. This direction applies both to the Appellant and to the Respondent.

1. The Secretary of State with permission, appeals against the decision of the First-tier Tribunal (Judge Chohan) who, in a determination promulgated on the 20th October 2017 allowed his appeal against the decision of the Respondent to refuse his application for leave to remain and on human rights grounds (Article 8).
2. Whilst the Secretary of State is the Appellant, for the sake of convenience I intend to refer to the parties as they were before the First-tier Tribunal.
3. The Appellant is a national of Pakistan. His immigration history is set out within the determination at paragraphs 2-5 of the FtT determination and in the decision letter issued by the Secretary of State of the 3rd March 2016. It can be summarised briefly as follows. The Appellant entered the United Kingdom in January 2011 with leave to enter as a Tier 4 General student valid until 31 May 2012. Further extensions of stay were granted in October 2013 and until 29 March 2015.
4. On 27 March 2015 he applied for leave to remain as a partner. In the alternative he raised the issue that he had established a family life with a British partner and child in the UK and that he had family and friends in the UK, therefore could not return to Pakistan.
5. He was invited to an interview along with his partner on 25 February 2016. There is a copy of the interview template in the Tribunal papers before the First-tier Tribunal.
6. In a decision letter dated 3 March 2016 the Respondent refused that application. The decision letter can be summarised as follows. The Secretary of State considered whether the Appellant met the suitability requirements but considered that his presence in the UK was not conducive to the public good because his conduct made it undesirable to grant leave to remain and therefore S-LTR1.6 of Appendix FM applied. Essentially it was stated that he had used deception in his application to gain entry to the UK.
7. The decision letter went on to state that it failed to meet the eligibility requirements because it was not accepted that his relationship with his partner was genuine and subsisting.
8. As to EX1, the Respondent did not accept that he had a relationship that was genuine and subsisting with his partner in the UK. The application was made in March 2015 and the relevant child of the parties was not born until October 2015 and thus the decision letter did not consider the circumstances of the minor child born to the parties relating to EX1 but did do so later in the decision letter.
9. It is further not accepted that he met the requirements as to private life under paragraph 276ADE.
10. As to exceptional circumstances and whether there were any relevant matters outside of the Immigration Rules, the decision letter made reference to the need to safeguard and promote the welfare of children in the United Kingdom in accordance with the duty under section 55 of the 2009 Act and made reference to the child of the family

who was then aged five months. However the Respondent made reference to the Appellant having obtained an English language test fraudulently to remain in the United Kingdom and that whilst he had a parental relationship with the claimed child and was a British citizen, the Secretary of State would not be denying the child the rights of being a British citizen as it had been deemed reasonable to expect them to remain with the other parent in United Kingdom. The decision went on to again make reference to the fact that this was not a genuine and subsisting relationship as a result of the information given at the interview in February 2016. However, in the alternative, if the relationship was genuine and subsisting then it was open to his spouse to return to Pakistan. There was reference to his private life being established in the UK in the knowledge that his immigration status was not the settlement and that he had no legitimate expectation to remain in the UK indefinitely.

11. The Appellant appealed that decision and the appeal came before the First- Tier Tribunal at a hearing on the 4th October 2017. In a determination promulgated on the 20th October 2017 he allowed the Appellant's appeal on human rights grounds. At paragraph 6-7 of the decision, the judge considered the "ETS issue" having considered the evidence before the Tribunal and reached the conclusion that the Respondent's case had no substance. In fact the judge made the following observation "I can state quite categorically that the Respondent's case has no substance." The judge made reference to the evidence relied upon by the Secretary of State at paragraph 6 and that there was no specific evidence which related to this Appellant to demonstrate that he had obtained fraudulently the TOIEC certificate. Consequently the judge made a finding that the Respondent had not discharged the burden of proof and therefore had not established that the Appellant's presence in United Kingdom was not conducive to the public good. The judge considered family and private life on the basis that it had been accepted by the Respondent that this was a genuine and subsisting relationship and that there was a child born to the parties. The judge found at [8] that there was family life United Kingdom and that paragraphs [9 - 10] the best interests of the child was to be with his parents. When considering EX1 on the basis of his relationship with his partner the judge found at paragraphs [12 and 13] that they could continue family life in Pakistan although they may experience hardship. When considering EX1 or S117B (6) in respect of his relationship with a British citizen child, the judge found that strong reasons would be required for the removal of a qualifying child (see paragraph [11]) and that at [14] the judge did not find that it would be reasonable for the child to leave the United Kingdom as no strong reasons had been put forward for such a course, in the light of the Respondent failing to discharge the burden of proof relating to the allegation of deception. In this paragraph the judge also made reference to the Appellant having entered the United Kingdom lawfully and subsequently obtained extensions of leave to remain. The judge found that he spoke English and that there was nothing to suggest that he was a burden on the taxpayer and thus the judge found that he met the requirements of section 117B of the 2002 Act. In addition at [15] the judge considered the submission made on behalf of the Respondent that the Appellant should leave the United Kingdom to make an application for entry clearance. However the judge reached the conclusion on the evidence that such a course would "serve no purpose" on the basis that he had been in the United Kingdom lawfully, he had abided

by the immigration rules and that his partner and child are British citizens and that any removal would be as a consequence disproportionate.

12. The Respondent sought permission to appeal that decision and permission was granted by the First-tier Tribunal on the 3rd April 2018.
13. The appeal was therefore listed before the Upper Tribunal. Miss Aboni relied upon the grounds. In her oral submissions she submitted that the judge dismissed the issue of deception without any consideration of the evidence and that there was more than the generic evidence of Rebecca Collings and Peter Millington. She made reference to the supplementary bundle which included also the evidence of Prof French. She submitted that evidence discharged the initial burden and that the Appellant was then required to give an innocent explanation. She submitted that the judge appeared to decide that there was no merit in the Respondent's case and that the Secretary of State referred to generic statements. Thus it was submitted that there was a material error as to whether deception was used.
14. In relation to the human rights aspect of the appeal, the Appellant could not meet the suitability requirements if he had used deception and that was also relevant to the proportionality of the decision. Ms Aboni referred to the grounds at paragraph 13 that the judge had erred in law by making reference to his leave as lawful when in fact it was precarious because he had only ever been granted limited leave to remain. But she submitted, the judge had made errors in assessing proportionality and had failed to consider the entry clearance option available to the Appellant and his partner. She invited the Tribunal to find that there were material errors of law and set aside the decision.
15. Mr Yusuf, who appeared before the First-tier Tribunal had not provided a rule 24 response but made the following oral submissions. He submitted that the decision was open to the judge to make. As regards the issue of deception, the Respondent had only provided generic evidence. He submitted the burden of proof is on the Respondent to show that the person to use a proxy to take the test and that the evidence did not refer to a specific person. He made reference to the decision in *Derry v Peek* concerning the burden and standard of proof in relation to issues of deception. He further made reference to the documentation before the Tribunal including the examination certificates and that at page 33 there was a city and Guilds certificate dated 13 September 2013 showing his command of the English language. He had also studied for a diploma in management in October 2012 (page 37 of the bundle). In his submissions he made reference to the test as "invalid" and that if the result was "invalid" the question was whether the Appellant had used a proxy to sit the exam for him but there was no evidence to suggest that there was any such proxy used and therefore the Respondent could not succeed. It was not entirely clear to me the basis upon which that submission was advanced.
16. As to the human rights aspect of the appeal, whilst the judge had found there were no insurmountable obstacles the judge took into account that there was a British citizen child whose right to be affected (applying Beouku-Betts) and that it was not reasonable

for the child to leave the United Kingdom who was two years old at the date of the hearing. He submitted that the judge properly considered the Article 8 issues at paragraph 15 and are taken into account the best interests of the child which was to be with his parents. He submitted that it was not right to separate families.

17. At the conclusion of the submissions I reserved my decision which I now give.

Decision:

18. The first issue relates to the issue of deception relating to the use of an English Language certificate to obtain leave. The allegation was set out in the decision letter in which it was stated that in an application made by the Appellant dated 26 May 2012 he had submitted a TOEIC certificate from ETS. The test scores were taken on 21 February 2012 at Alexander College but they had been cancelled by ETS.

19. The judge considered this issue in brief terms at paragraphs 6 and 7. The judge stated as follows:-

ETS issue

6. This issue must be considered first. I can state quite categorically that the Respondent's case has no substance. It is the Respondent's case that the Appellant undertook his test by proxy. Reliance is placed on witness statements from Rebecca Collings, Peter Millington and a report prepared by Prof Peter French. However, with respect, these are generic statements and nothing more. Mr Yusuf submitted that even on the day of the hearing the Respondent still relied on the generic evidence.

7. During his evidence, the Appellant stated that he had undertaken the test himself. The Appellant said that the test comprised of listening, writing, reading and speaking. The Appellant was adamant that he had not paid anyone to undertake the test for him and confirmed that he had undertaken it. Ms Rands submitted that the Appellant had attempted to cheat the system. There is no substance for that submission. I bear in mind the Tribunal decision in the case of *SM and Qadir v SSHD (ETS-Evidence-burden of proof)* [2016] UK UT 229. There is no specific evidence to establish that the Appellant had obtained fraudulently the TOEIC certificate. There is an evidential burden on the Respondent, which has not been discharged. Accordingly, I find the Respondent has not established that the Appellant's presence in the United Kingdom is not conducive to the public good."

20. It is submitted on behalf of the Respondent that the judge failed to correctly assess the burden of proof in line with the case that was cited and that the generic evidence combined with evidence particular to Appellant did, in fact, discharge the evidential burden of proving that a TOEIC certificate had been procured by dishonesty. Ms Aboni relied upon the written grounds where at paragraph 4 it had been stated that there was documentary evidence that the Appellant test result had been identified as "invalid" by the use of this method. In her submissions she made reference to the spreadsheet provided to demonstrate the necessary evidence to show that the Appellant did employ deception. In particular as the grounds set out, it was submitted that the Tribunal had misinterpreted the evidence and had failed to have regard to the ETS lookup tool attached to the Respondent's bundle at Annex I which was identified

as the evidence that was in fact specific to the Appellant. The grounds go on to state that had the judge properly considered the Respondent evidence, it would have been clear that the deception had been demonstrated to the standard of the balance of probabilities.

21. I have therefore considered the evidence that was before the judge as set out in the Tribunal papers before me. There is no dispute that the Respondent relied upon the witness statements from Rebecca Collings, Peter Millington and the report prepared by Prof Peter French. The significance of the expert report by Prof Peter French is that it countered the expert evidence of Dr Harrison which was adduced in the decision of SM and Qadir (as cited above) and which was the foundation of the Upper Tribunal's findings at [68]. In reaching that conclusion that the standard generic evidence only discharge the evidential burden by a narrow margin, the Tribunal attached weight to the expert evidence of Dr Harrison who was of the opinion that the ETS method of analysing the TOEIC test data was deeply flawed and capable of generating a very high number of false positives. Prof French's report is a direct riposte to the expert evidence of Dr Harrison.
22. Whilst the grounds relied upon by the Respondent make reference to there being more than the generic statements and evidence and specifically state that there was evidence that was specific to the Appellant in the form of an "invalid" result that is not supported by the evidence that was in fact before the Tribunal.
23. There were two bundles of evidence submitted on behalf of the Respondent. They contained the witness statements of Rebecca Collings, Peter Millington and the report of Prof Peter French. In addition there was a witness statement from Mr J. Singh. The witness statement was dated 21 September 2017 and expressly at paragraph 9 referred to the evidence of Rebecca Collings whose witness statement explained how the Home Office concluded on the basis of information provided by ETS that the Appellant exercised deception. The witness statement went on to state "by way of this process, the Home Office identified that the Appellant had a pending application for leave and in support, was seeking to rely upon the invalid certificate. As a result the Appellant fell to be considered for enforcement action set out in paragraph 35 to 38 of Rebecca Collings witness statement." The contents of that witness statement can properly be regarded as "generic evidence" in the sense that none of it was specific to the Appellant. It is right to state that in an additional paragraph following on from paragraph 9 it is stated "or: By way of this process, Home Office identified that the Appellant was relying upon the invalid certificate when seeking leave to enter to UK. As a result, the Appellant fell to be refused leave to enter". However as can be seen from its contents, this was a recitation of an alternative paragraph which did not relate to the Appellant's claim.
24. Attached to the witness statement was the ETS look up tool which related to Alexander College at the test centre with the test date of 21 February 2012. It referred to 106 total tests taken and that 57% were questionable and 43% were invalid. There then followed a number of sheets showing the certificate number and its status of either "invalid" or "questionable". The certificate that related to this particular Appellant was identified

as xxxxxxxx34004044. However it is plain that the sheet it is not identified as “invalid” but identified as “questionable”. There is no other evidence in that bundle that demonstrates that there was any further evidence that was specific to this Appellant. The grounds referred to Annex H and I, however Annex H1 makes reference to the certificate number as set out above and Annex I again makes it plain that it was “questionable” not invalid.

25. In the papers before the Tribunal there was also an individual witness statement of Mr J. Singh on behalf of the Respondent which states that it was made on 2 May 2017 and therefore was earlier than the later statements relied upon by the Respondent and set out in the bundles dated September 2017. In that witness statement, at paragraph 7, it made reference to the Rebecca Collings witness statement and the process involved and at paragraph 8 made reference to the witness statement of Peter Millington; both in generic terms. However at paragraph 9 the witness statement set out as follows:

“9. As a result of the questionable result the Home Office invited the Appellant to interview. Following a review of the interview and consideration of the questionable result from ETS, it has been concluded the deception has been practised by the Appellant on the basis of the standard of English used during the interview, compared to the scores he claimed to have achieved from his English language test.”
26. Attached to that witness statement was a further document giving the certificate number that I have cited above which was found to be “questionable” but underneath it makes reference to a different certificate relating to Alexander College on 21 March 2012 which refers to “invalid”.
27. It had not been the Respondent’s case that the Appellant had attended a test on 21 March 2012 his certificate had been obtained as a result of attending a test on 21 February 2012. The certificate number, while stating the same name, was different from the original certificate number referred to in the documents. Neither representative made any submissions about the difference between the certificates. Nor was there any reference made by the judge to that evidence.
28. As set out above, the witness statement of Mr Singh gave details at paragraph 9 which made reference to the “questionable” test score which led to the Appellant being interviewed. There is a copy of the interview in the Tribunal papers. The interview took place on 25 February 2016 and it is plain that the interview was to cover two issues; firstly, the issue of whether this was a genuine and subsisting relationship and secondly the issue relating to deception. In respect of the first issue, the interviewer identified discrepancies or unsatisfactory answers which had been provided by the parties in response to the questions asked. The conclusion reached was that the discrepancies provided at the marriage interview cast significant doubt over the credibility of the marriage. However it is plain that the hearing before the judge, the Respondent did not seek to rely upon the parts of the decision letter which had relied upon the interview responses and that the judge was invited to consider the appeal on the basis that this was a genuine and subsisting marriage.

29. As to the second issue the Appellant was asked a number of questions relating to the test at questions 41 – 53. In those answers the Appellant stated that he had taken a test in 2011 (see question 46) and gave details of the test. In the recommendation section of the interview it stated “marriage of convenience” which related to the first issue. However in relation to the second issue of deception it stated “ETS/TOEIC: credible” and further stated “applicant stated that he took a TOEIC in 2011. Consequently I am not satisfied that the information obtained at interview links him to the test mention on the referral please see questions 41 – 53”.
30. Therefore on the face of that document, the reference made in the witness statement of Mr Singh is incorrect. Again neither advocate made any reference to that interview and there is no reference made by the judge. Has the judge approached the matter in the manner directed by the Court of Appeal in *SM & Qadir* [2016] EWCA Civ 1167? That involves considering, first, whether the Secretary of State has met the burden on her of identifying evidence that the TOEIC certificate was obtained by deception; second whether the claimant satisfies the evidential burden on her of raising an innocent explanation for the suggested deception; and third, if so, whether the Secretary of State can meet the legal burden of showing, on the balance of probabilities, that deception in fact took place.
31. I conclude from the evidence that was before the FtTJ that the only evidence that related to the Appellant and was identified as such was a “questionable” test and not an invalid one for the reasons set out above. The certificate number was different and related to a test taken on a date not relied upon by the Respondent and the interview, which was said to underpin the asserted invalid test, made no reference to his English language ability.
32. In this context I have considered the decision of the Court of Appeal (as cited above) in respect of the test results which are said to be “questionable”. What is set out at paragraph [25 – 30] is that a questionable designation means there may not have been deception because unlike where there has been an invalid designation, there was not a matched voice with the person who took a test using a different name. The Court of Appeal concluded that the Secretary of State would face difficulties in respect of the evidential burden if there is no individual evidence which shows that test results were invalid.
33. Whilst the judge did not make reference to that decision, the conclusions reached at paragraph 6 and 7 of his decision make it plain that his assessment of the evidence was to the effect that the only evidence before the Tribunal was in the form of generic statements and that there was no specific evidence to establish that the Appellant had obtained fraudulently the TOEIC certificate. The judge concluded that the evidential burden on the Respondent had not been discharged. Given the evidence that I have set out above, that was a decision that was open to the judge to reach. It would have been preferable for the judge to make reference to the inconsistent evidence advanced by the Respondent, but having considered the evidence that was before the Tribunal and in the light of the grounds which make reference to an invalid certificate when

that was not the case, I am not satisfied that the judge erred in law in reaching that decision.

34. I now turn to the second part of the grounds relied upon which relate to the Article 8 assessment. The grounds at paragraph 12 make reference to the suitability requirements of the Immigration Rules and that obtaining leave to remain by deception is evidence of criminality and therefore there are powerful reasons to render it reasonable for family life to continue abroad. However in the light of the judge's assessment that he was not satisfied that the Respondent had discharged the evidential burden of proof, and in the light of this Tribunal reaching the decision that that was a conclusion open to the judge on the evidence before the Tribunal, it must follow that the ground cannot succeed. Furthermore, the grounds at paragraph 14 cannot succeed where it was asserted that the proportionality assessment had been coloured by the judge's error in respect of his finding of the Appellant's use of deception.
35. However further grounds that are relied upon by the Respondent and set out in the submissions of Ms Aboni relate to the judge erring in law by finding that the Appellant's status in the UK was not precarious (see paragraph [18]) and that there was nothing to prevent the Appellant returning to Pakistan with or without his family members in order to apply for entry clearance. This was on the basis that any separation would be temporary and proportionate in the interests of an effective immigration control.
36. I have therefore considered those grounds.
37. Appendix FM, "Family Members", begins with a general statement which explains that it sets out the requirements to be met by those seeking to enter or remain in the UK on the basis of their family life with a person who is a British citizen, is settled in the UK, or is in the UK with limited leave as a refugee or person granted humanitarian protection (para GEN.1.1). It is said to reflect how, under Article 8, the balance will be struck between the right to respect for private and family life and the legitimate aims listed in Article 8(2). The Appendix nevertheless contemplates that the Rules will not cover all the circumstances in which a person may have a valid claim to enter or remain in the UK as a result of his or her Article 8 rights. Paragraphs GEN.1.10 and GEN.1.11 both make provision for situations "where an applicant does not meet the requirements of this Appendix as a partner or parent but the decision-maker grants entry clearance or leave to enter or remain outside the Rules on Article 8 grounds".
38. In this appeal, the judge made an Article 8 assessment which included consideration of the relevant Rules and outside of the Rules. It is not disputed that the Appellant has a wife and child in the UK who are both British citizens and that contrary to the decision letter, at the hearing before the FtTJ it was accepted by the Respondent that the Appellant was in a genuine and subsisting relationship with his partner (see paragraph 4). Since the application had been made, a child was born of the relationship which the judge did take into account.

39. It is plain that at paragraphs 8 -9 that the judge concluded that removal of the Appellant and as a consequence of the decision was likely to interfere with his family life in a sufficiently grave way to engage the operation of Article 8 (points (i) & (ii) of Lord Bingham's five stage approach in *Razgar v SSHD* [2004] INLR 349) and then considered the issues of EX1 in relation to both limbs – as a partner and as a parent of a qualifying child (also see S117B(6)).
40. The state can lawfully interfere with an Appellant's family life if it is pursuing a legitimate aim and it is necessary and proportionate in all the circumstances of the case.
41. In cases involving human rights issues under Article 8, the heart of the assessment is whether the decision strikes a fair balance between the due weight to be given to the public interest in maintaining an effective system of immigration control and the impact of the decision on the individual's private or family life. In assessing whether the decision strikes a fair balance a court or Tribunal should give appropriate weight to Parliament's and the Secretary of State's assessment of the strength of the general public interest as expressed in the relevant rules and statutes: see Hesham Ali v SSHD [2016] UKSC 60 and see R (MM and others) (Lebanon) v Secretary of State for the Home Department [2017] UKSC 10, the Supreme Court at [43].
42. In the assessment under Article 8, the best interests of the child must be a primary consideration. That means that they must be considered first. They could, of course, be outweighed by the cumulative effect of other considerations. In carrying out the balancing exercise and reaching a finding on proportionality, the Tribunal must “have regard” to the considerations set out in section 117B of the Nationality, immigration and Asylum Act 2002 (section 117A). Section 117A (2) of the 2002 Act provides that where a Tribunal is required to determine whether a decision made under the Immigration Acts would be unlawful under section 6 of the Human Rights Act 1998 it must, in considering 'the public interest question', have regard in all cases to the considerations listed in section 117B of the Nationality, Immigration and Asylum Act 2002 (as amended by the Immigration Act 2014). Section 117 (3) provides that the 'public interest question' means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).
43. S117B Article 8: public interest considerations applicable in all cases:
- (1) The maintenance of effective immigration controls is in the public interest.
 - (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English –
 - (a) are less of a burden on taxpayers, and
 - (b) are better able to integrate into society.

- (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons –
 - (a) are not a burden on taxpayers, and
 - (b) are better able to integrate into society.
- (4) Little weight should be given to –
 - (a) a private life, or
 - (b) a relationship formed with a qualifying partner,
 - that is established by a person at a time when the person is in the United Kingdom unlawfully.
- (5) Little weight should be given to a private life established by a person at a time when the person’s immigration status is precarious.
- (6) In the case of a person who is not liable to deportation, the public interest does not require the person’s removal where –
 - (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
 - (b) it would not be reasonable to expect the child to leave the United Kingdom.

- 44. Section 117B of the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002") sets out a number of public interest considerations that a court or Tribunal must take into account in assessing whether an interference with a person's right to respect for private and family life is justified and proportionate.
- 45. When assessing the proportionality of the removal decision the judge was obliged to consider the best interest of the child, who would be affected by the decision (see paragraph 10).
- 46. On the evidence that was before the Tribunal the only aspect of the Appellant’s immigration history that gives weight to public interest issue is the asserted deception. However as the judge found at paragraphs [6-7] and at [11] the deception was not made out by the Respondent. The FtT Judge observed at paragraph [14] that he entered lawfully and had subsequently obtained extensions to his leave to remain and that “there was nothing to suggest at any time he has been in the UK without leave” and that “ his relationship with the partner was formed at a time when he was in the United Kingdom lawfully”. Whilst that was correct, the grounds are also right in stating that his status whilst lawful was “precarious” because his leave was time limited and of a temporary nature (see grounds at paragraph 13).
- 47. In assessing whether the public interest considerations are sufficiently serious to outweigh the best interests of the child the judge took into account the statutory provisions contained in section 117B (6), which states that the public interest will not require the person's removal where he has a genuine and subsisting relationship with

a 'qualifying child' and it would not be reasonable to expect the child to leave the United Kingdom.

48. As the judge recognised, as a British citizen the relevant child is a 'qualifying child' for the purpose of section 117B (6). It is not disputed that the Appellant has a genuine and subsisting parental relationship with the child. The issue identified by the FtTJ was whether it would be 'reasonable' to expect the child to leave the UK within the meaning of section 117B (6). In *MA (Pakistan) v SSHD* [2016] EWCA Civ 705 the Court of Appeal expressed some doubt as to whether the 'reasonableness' test should include consideration of public interest factors, but declined to depart from the earlier decision in *MM (Uganda) v SSHD* [2016] EWCA Civ 450, which concluded that it did. In *MA (Pakistan)* Lord Justice Elias emphasised that significant weight should still be given to the interests of a child, especially with reference to the Respondent's published policy guidance which has since been updated in February 2018. The FFTJ made no reference to the guidance: Immigration Directorate Instructions "Family Migration Appendix FM Section 1.0b Family Life (as a Partner or Parent) and Private Life: 10 Year Routes" February 2018).

49. The guidance at page 35 begins with a heading "EX1(a) -reasonable to expect" and states;

"First, the decision maker must assess whether refusal of the application will mean that the child will have to leave the UK or is likely to have to do so. Where the decision maker decides that the answer to this first stage is yes, then they must go on to consider secondly, whether, taking into account their best interests as a primary consideration, it is reasonable to expect the child to leave the UK..."

50. That interpretation of the provision whether it is reasonable to expect the child to leave also appears in the section of the Guidance which is headed "Reasonable to expect a child to leave the UK?" (see page 74) which begins with the following statement:

"If the effect of the refusal of the application would be, or is likely to be, that the child would have to leave the UK, the decision maker must go on to consider whether it would be reasonable to expect the child to leave the UK."

51. The Guidance sets out at (page 7):

"Where the child is a British citizen

Where the child is a British citizen, it will not be reasonable to expect them to leave the UK with the applicant parent or primary carer facing removal. Accordingly, where this means that the child would have to leave to the UK because, in practice, the child will not, or is not likely to continue to live in the UK with another parent or primary carer, EX.1 (a) is likely to apply.

In particular circumstances it may be appropriate to refuse to grant leave to a parent or primary carer where their conduct gives rise to public interest considerations of such weight as to justify their removal, where the British citizen child could remain in the UK with another parent or alternative primary carer, who is a British citizen or settled in the UK or who has or is being granted leave

to remain. The circumstances envisaged include those in which to grant leave could undermine our immigration controls, for example the applicant has committed significant or persistent criminal offences falling below the thresholds for deportation set out in paragraph 398 of the Immigration Rules or has a very poor immigration history, having repeatedly and deliberately breached the Immigration Rules.”

52. The Guidance appears to reflect matters set out in MA (Pakistan). It accepts that the usual presumption where a British Citizen child’s rights are at issue is that it is not reasonable to expect that child to leave and it is only where there are strong reasons of public interest for removal that a parent in a genuine and subsisting relationship with such a child should be removed. In such circumstances the guidance recognises that the British Citizen parent and child cannot be forcibly removed and the Guidance suggests therefore that the public interest might outweigh the child’s best interests in appropriate cases if the child can remain with the parent who is entitled to be in the UK.
53. The present guidance is different from that which was before the Court in *MA (Pakistan)* and appears to require consideration of whether the relevant child will or is likely to be required to leave the UK with the Appellant and his mother or whether it is more likely that the child will remain here with his mother. However that is not what is set out or required in the statute in Section 117B (6). That only requires that there be a genuine and subsisting parental relationship with the qualifying child which both parties in this appeal agree is the position here, and an assessment of whether it is reasonable to expect the child to leave the UK. The consideration therefore is not whether it is reasonable to expect the child to remain in the UK without one parent. That is not the wording of the legislation and guidance can be viewed as providing for a “gloss “ on the wording of the statute itself.
54. The guidance goes on to recognise that, even if another parent would be able to remain in the UK with the child, weighty public interest considerations would be needed to justify the separation of a British child from a parent. The circumstances outlined in the policy guidance are not exhaustive, but indicate that significant public interest considerations such as criminality or a very poor immigration history might be sufficient to justify a decision that would lead to a British child being separated from a parent.
55. As I have set out earlier, the FtTJ properly had regard to the fact that the Appellant was in the UK lawfully and had obtained subsequent extensions to his leave but the findings of the First-tier Tribunal did not find that there was any deception practised in his applications as a student. However the FtTJ did not properly characterise his leave as “precarious” as the Respondent’s grounds assert. However that was not a material error because having considered the public interest considerations identified, the judge concluded that there were no strong reasons identified or to put it another way, any weighty public interest considerations of a sufficiently serious nature to outweigh the interests of the relevant child on the facts of this particular appeal. The judge had also found that he could speak English and that there was no evidence that

he had been a burden on the State. Whilst the judge at paragraph [15] also found that his relationship with his British partner and child was a “compelling circumstance” that has to be seen in the context of the decision as a whole.

56. It was therefore open to the FtTJ to find against that background that it would not be reasonable to expect the relevant child to leave the UK within the meaning given to the phrase contained in section 117B(6). It was against that background that it was also open to the Judge to find that to require the Appellant to leave the United Kingdom to make an application for entry clearance would serve no purpose. It would have been preferable if the FtTJ had made reference to the guidance when reaching the decision which underscored the overall conclusions reached. However I am satisfied that the overall decision reached was one that was open to the Judge on the material before him and that sufficient reasons were given.
57. Consequently the appeal of the Secretary of State is dismissed; the decision of the FtTJ shall stand.

Signed:
Upper Tribunal Judge Reeds

Date: 16/9/2018