



**Upper Tribunal  
(Immigration and Asylum Chamber)  
HU/10113/2015**

**Appeal Number:**

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 19<sup>th</sup> of December 2017**

**Decision & Reasons  
Promulgated**

**On 11<sup>th</sup> of January 2018**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT**

**Between**

**MS WATHSALA MADHUSHANI MIHINDUKULASOORIYA  
(ANONYMITY ORDER NOT MADE)**

Appellant

**And**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms A Harvey of Counsel

For the Respondent: Mr C Avery, Home Office Presenting Officer

**DECISION AND REASONS**

**The Appellant**

1. The Appellant is a citizen of Sri Lanka born on 14<sup>th</sup> of February 1989. She appeals against a decision of Judge of the First-tier Tribunal Khan sitting at Taylor House on 8th of December 2016 who dismissed the Appellant's appeal against a decision of the Respondent dated 23<sup>rd</sup> of October 2015. That decision was to refuse the Appellant's application for leave to remain under the Immigration Rules and Article 8 of the Human Rights Convention.
2. The Appellant entered the United Kingdom as a student on 23rd of September 2010 and remained with leave as a student until 28<sup>th</sup> of July

2014. She next made a further application for leave to remain as a student which was refused by the Respondent. On 13th of July 2015 her previous solicitors sent a letter to the Respondent enclosing an application for further leave to remain. It was the refusal of that application which gave rise to the present proceedings.

### **The Appellant's Case**

3. The Appellant's case was that she had established a private and family life in the United Kingdom and was in a relationship with a partner who was a British citizen. At the time of the application she was expecting her first child. She had spent over four years in the United Kingdom and would not be able to uproot herself and return to Sri Lanka. Her partner had never visited the country and was accustomed to the British way of life. The Appellant had built up social ties in the United Kingdom and had a close and caring relationship with her partner. The Appellant argued that she met the requirements of Appendix FM of the Immigration Rules for limited leave to remain as a partner under section R-LTRP and she met all of the eligibility requirements under section E-LTRP.
4. The Appellant began her relationship with her partner in July 2014 and they began living together in February 2015. She made her application for leave some five months later. The Appellant gave birth to a son on 10<sup>th</sup> of September 2015 who at the date of the hearing before the First-tier was not quite 15 months old.
5. The Respondent refused the application on suitability grounds under section S-LTR.1.6 stating that the Appellant's presence in the United Kingdom was not conducive to the public good because her conduct, character, associations or other reasons made it undesirable to allow her to remain in the United Kingdom. This was because when the Appellant had made an application for leave to remain as a student on 5<sup>th</sup> of April 2012 she had submitted a false TOEIC certificate from the Educational Testing Service (ETS). They had a record of her speaking test and using voice verification software ETS were able to detect when a single person was undertaking multiple tests. They checked the Appellant's test and confirmed that there was significant evidence to conclude that the Appellant's English language certificate was fraudulently obtained by the use of a proxy test taker. The Respondent was satisfied that the certificate was fraudulently obtained and that the Appellant had used deception in her application of 5<sup>th</sup> of April 2012.
6. The Respondent considered whether the Appellant's application could succeed under section EX.1 of Appendix FM but the fact that she failed to satisfy the suitability requirements outweighed that exception. By the time of the decision the Appellant had given birth and this was considered by the Respondent. The Appellant did not have sole parental responsibility for her child and again she could not meet section EX.1 for the same reasons as before.

7. The Appellant appealed against the Respondent's decision arguing that her certificate was genuine and there were insurmountable obstacles to family life continuing outside the United Kingdom.

### **The Decision at First Instance**

8. At [17] of his determination the Judge held that the first issue to decide was whether the Appellant had genuinely taken the English language test herself or whether she had arranged for a proxy to take it for her. After reviewing the evidence at [18] the Judge concluded at [19] that there was a reasonable suspicion that the Appellant did not take her English language test herself. The Appellant's attempt at a plausible and innocent explanation was sadly lacking in supporting evidence. She was unable to remember the date of the tests and could not remember how much was paid in respect of the fee. She said she took the 2<sup>nd</sup> test a few days after the first test but there was in fact a gap of one month between the two tests. The Appellant had very little to say about taking the tests and the Judge found her evidence on the point to be very short on detail.
9. The Judge concluded at [20] that the Appellant did not meet the suitability requirements under Appendix FM. The Appellant did not meet the definition of a partner under section GEN.1.2. (iv) because she had not been living together with her partner in a relationship akin to marriage for at least two years prior to the date of the application. Even if she was in a genuine and subsisting relationship with her partner who was a British citizen she could not avail herself of the exception under section EX.1 (b) because of her failure to meet the suitability requirements.
10. The Appellant could not demonstrate insurmountable obstacles to family life with the partner continuing outside the United Kingdom. The Appellant had lived in Sri Lanka for most of her life and she had only been in the United Kingdom since 2010 when she had permission to come here as a student knowing that she would be expected to return to her own country once those studies had been completed. It would be a matter of choice for the British citizen partner whether he would wish to accompany the Appellant to Sri Lanka but there was no evidence of very significant difficulties to be faced by either of them in continuing their family life together in Sri Lanka.
11. In relation to the child the Appellant did not meet the requirements for limited leave to remain as a parent because she fell for refusal under the suitability requirements. She did not have sole parental responsibility. Whilst she had a genuine and subsisting parental relationship with a child who was under the age of 18, in the United Kingdom and was a British citizen, it would not be unreasonable to expect the child to leave the United Kingdom given the child's young age. The Judge considered at [23] whether there were any compelling circumstances which existed outside the Immigration Rules regarding either the Appellant's private or

her family life which might warrant a grant of leave to remain but found there was nothing which could show this.

12. At [26] the Judge considered section 55 of the Borders Citizenship and Immigration Act 2009 but found that the welfare of the child would not be prejudiced by going to Sri Lanka. The best interests of the child did not dictate that she should remain in the United Kingdom. They were a primary consideration but not the primary consideration. Looking at the evidence in the round the best interests of the child lay in accompanying his mother to Sri Lanka. The Judge dismissed the appeal.

### **The Onward Appeal**

13. The Appellant appealed against this decision arguing that there needed to be shown powerful reasons to depart from the starting point that it was not reasonable to expect a British citizen child to leave the United Kingdom. Reliance was placed on the Respondent's own guidance that save in cases involving criminality a decision-maker must not take a decision in relation to the parent of a British citizen child where the effect of that decision would be to force that British child to leave the European Union regardless of the age of the child. The case must always be assessed on the basis it would be unreasonable to expect British citizen child to leave the European Union.
14. In the Court of Appeal decision of **MA Pakistan [2016] EWCA Civ 705** it was said that powerful reasons were required to depart from the starting point that leave should be granted. It would be relatively rare for it to be reasonable to expect a child who was a British citizen to leave the United Kingdom. The Judge had erred in his assessment of section 117B (6) of the 2002 act. The sole basis for the Judge's conclusion that it would be reasonable to expect the child to leave the United Kingdom was the age of the child. This was a material error of law and breached the Respondent's own guidelines.
15. The application for permission to appeal came on the papers before Designated Judge of the First-tier Tribunal McClure on 22<sup>nd</sup> of September 2017. In granting permission to appeal he wrote that the issue appeared to be whether or not it was reasonable to expect a British citizen child to leave the United Kingdom with a parent. The Judge at [25] had made a specific finding that it was not unreasonable to expect the British citizen child to leave the United Kingdom. In the light of that approach to the issues and in light of the Respondent's own guidance it was arguable that the Judge had failed to take account of the Respondent's policy in assessing the proportionality issue.
16. The Respondent replied to the grant by letter dated 31<sup>st</sup> of October 2017 opposing the Appellant's appeal. The grounds were misconceived as the Respondent's guidance referred to her position in relation to the authority from the Court of Justice of the European Union of **Zambrano**. There was no question of the Appellant's child being forced to leave the

United Kingdom if the Appellant was removed. The only issue was whether it was reasonable to expect the child to leave.

### **The Hearing Before Me**

17. The matter came before me to decide in the first place whether there was a material error of law in the decision of the First-tier such that it fell to be set aside and the decision remade. If there was not then the decision would stand. For the Appellant, counsel argued that the Respondent's guidance had been held to be unlawful by the Supreme Court in **MM** because it paid insufficient attention to the best interests of children. Even so under that guidance the Appellant ought to have been allowed to stay. The Immigration Rules had been amended in response to **MM** but only for decisions taken on or after 10<sup>th</sup> of August 2017. The decision in this case was taken before that date and not a great deal therefore turned on that point.
18. The First-tier Judge had failed to take into account the Respondent's own guidelines and therefore the decision should be remade today. There had been an unjustified interference with the Appellant's right to stay. The Appellant could not meet the suitability requirements of the rules but she was not a foreign criminal therefore the case turned on the provisions of section 117B only. The child was now 2 years old. There was a requirement when considering the child's best interests under section 55 of the 2009 Act to give practical effect to the duty to consider. The child would be forced to leave the United Kingdom if the Appellant were removed because the child was very young and therefore needed his mother. The Appellant had sought to withdraw her student application but was not permitted to do so by the Respondent.
19. If the Appellant were to return to Sri Lanka to make an application for entry clearance from there, the child's father would have to stay at home to look after the child. He would then be unable to work and would be unable to meet the financial requirements of the Immigration Rules. An application for entry clearance would be refused in those circumstances. The parties would face a very lengthy separation of a small child from his mother. To avoid that the whole family would have to leave and that brought in the authority of Zambrano.
20. For the Respondent the Presenting Officer argued that there might be no problem in allowing this appeal if it was not for the Appellant's fraudulent behaviour in using a proxy test taker. The Appellant had willingly taken part in an attempt to defraud the Respondent and others. It was appropriate and in accordance with the guidance that her application was refused. She had engaged in activity said to be criminal therefore the Respondent was permitted to refuse this case. The Judge had considered the best interests of the child see [26]. He had applied the relevant case law including **MA Pakistan**. He could have said more but one could say that about a large number of determinations. The failure to mention the guidance was not a relevant matter as the Judge was applying Article 8 outside the Rules. His findings were sustainable. The weight to be given

to the Appellant's behaviour in the proportionality exercise against the Appellant's family life in The United Kingdom was a matter for the Judge. The Appellant's argument in the end came down to a disagreement with the Judge's decision.

21. In conclusion counsel responded that the grounds did not say the Judge had failed to engage with the issues but that he had got it wrong in his understanding of what the authorities were saying. He gave too much weight to the issue of the English language test and paid insufficient attention to the remainder of the other evidence. The Judge did not mention the Respondent's guidance where the Zambrano point was taken. His approach went against the law as well as that guidance.

## **Findings**

22. The first issue the Judge had to decide was whether the Appellant could succeed in her appeal under the Immigration Rules. That meant the Judge had to make a finding on the issue of whether the Appellant had employed a proxy test taker and thus had sought to deceive the Respondent by submitting an English language test certificate to which she was not entitled. The Judge considered this issue at some length, quite rightly since it was a key part of the case. On it depended an important factor in the eventual balancing act that the Judge was required to carry out when considering the best interests of the children and the weight to be given to those best interests in the proportionality exercise. The Judge's conclusion was that the Appellant had employed a proxy test taker and the Respondent had established that fact to the appropriate standard. That part of the Judge's decision was not appealed.
23. As a result of the finding there were a number of important consequences. Firstly, the Appellant could not meet the Immigration Rules since she fell for refusal under the suitability requirements. The exception to the eligibility requirements set out in section EX.1 did not apply because of the failure to meet the suitability requirements. As has been pointed out by the Upper Tribunal if that is not the case and section EX.1 applies regardless of both eligibility and suitability requirements then it is effectively a freestanding ground of application and that is not the intention of Appendix FM.
24. Section EX.1 does raise two issues which would eventually have to be considered under Article 8 in any event. The first is whether it is reasonable to expect a British citizen child to leave the United Kingdom consequent upon the removal of that child's non-citizen parent. The 2<sup>nd</sup> issue is whether there are insurmountable obstacles to family life with a partner continuing outside the United Kingdom. Even if those 2 points do not fall for consideration at the Immigration Rules stage they nevertheless fall for consideration under the general provisions of Article 8. What is important is whether the Judge has correctly considered the issues.

25. The reasonableness test in the Immigration Rules in relation to a child leaving the United Kingdom is reproduced in the 2002 Act by virtue of section 117B (6). The Judge specifically directed himself to the subsection at [25]. **MA Pakistan** makes clear that powerful reasons are required before it can be shown to be reasonable that a British citizen child should be expected to leave. What however the Appellant did not take into account in that submission in the grounds is that that is not the only guidance that **MA Pakistan** gives. What the case also makes clear is that when assessing the question of reasonableness of a child leaving the United Kingdom, all of the surrounding facts need to be taken into account and these include the conduct of the parent. Whilst it is correct that the Appellant is not a foreign criminal as defined in the 2002 Act, she has nevertheless committed a fraudulent act in seeking to deceive the Respondent with an English language test certificate to which she was not entitled. Her conduct could therefore be taken into account in assessing the reasonableness or otherwise of expecting her child to leave the United Kingdom with her in the event of her removal.
26. This was an issue which the Judge was clearly aware of as can be demonstrated by a careful reading of the determination. There was nothing wrong in law with the Judge's approach to this issue. As the Presenting Officer fairly conceded before me if there was no issue as to the Appellant's fraudulent behaviour, the outcome of the case might have been different but the Judge had to deal with the case on the basis of the facts as they were. One of those facts was the behaviour of the Appellant which her grounds of onward appeal did not adequately address. The age of the child was also a relevant consideration in this case in the proportionality exercise. At that age a child's interests would be focussed on his parents.
27. The best interests of the child were to remain in the care of his parents but if the Appellant were removed the child could accompany her as could the Appellant's partner and those best interests, the Judge found, would be satisfied. The best interests would lie in accompanying the Appellant to Sri Lanka. That was a conclusion which was open to him on the evidence. The child was young and with the help of his mother would be able to adapt to life in Sri Lanka. As a British citizen, he would be entitled return to this country at any time he chose in the future. Ultimately the assessment of reasonableness was a matter for the Judge.
28. The Respondent's guidance dealt with the issue of **Zambrano**. The difficulty for the Appellant in arguing that the Judge had failed to follow the Respondent's guidance was that the case of **Zambrano** was not of great relevance in this case. **Zambrano** has recently been explained by the Court of Appeal in the case of **Patel [2017] EWCA Civ 2028** which considered the issue of whether a European Union citizen child would be forced to leave the United Kingdom in the event that one parent was removed. The Court of Appeal made clear that consideration of the respect for family life although a relevant factor could not be a trump card enabling the Tribunal to conclude that the child would be compelled to leave because Article 8 was engaged and family life would be

diminished by the departure of one parent. The question to be considered was whether the departure of the parent would mean the child would be compelled to follow.

29. In this case if the Appellant were removed and then sought to make an application for entry clearance from Sri Lanka, the child could remain in this country in the care of his British citizen father. It is by no means inevitable that the child's father would have to give up work, there are many single working parents in this country. The threshold to show that the child would be compelled to leave the country if the Appellant were removed is not met in this case. The Judge found that due to the very young age of the child at the date of hearing before him there was no reason why the child could not go to Sri Lanka with the Appellant. Even if that was not the result the case of Zambrano would still not apply in this case for the reasons I have given. The issue of whether the Judge did or did not take heed of the Respondent's guidance which concentrates on the Zambrano point is irrelevant.
30. The question of what weight to attach to the Appellant's poor immigration history in the balancing exercise of the public interest against the right to a family life was a matter for the Judge. Another Judge might weigh the issues differently and yet neither be wrong in law. The issue is whether the Judge adequately reasoned his findings in relation to the child and I conclude that he did.
31. Whilst the Appellant's partner might not wish to relocate to Sri Lanka, that would not be a very significant factor in the proportionality exercise, see the authority of Agyarko. The Judge at [23] noted that the Appellant's partner was a British citizen, was established in the United Kingdom and ran an off-licence but did not find that compelling circumstances existed such that the Appellant could succeed outside the Rules under Article 8. Again, that was a matter for the Judge on the basis of the facts before him and the Appellant's objections to those findings are a mere disagreement with them. They do not thereby demonstrate any material error of law.
32. The Appellant's leave to be here meant her status was precarious and any private life she built up could be given little weight in the proportionality exercise. The Judge had that in mind see [24]. The Appellant could not succeed in this case under the Immigration Rules but there was a British citizen child and the Judge was therefore required to consider that child's best interests and the reasonableness or otherwise of expecting that child to leave the United Kingdom with his parent. The Judge did that and gave cogent reasons for his findings. There is no material error of law in this determination and I dismiss the onward appeal. I make no anonymity order as there is no public policy reason for so doing.

### **Notice of Decision**

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to dismiss the Appellant's appeal



Appellant's appeal dismissed

Judge Woodcraft  
Deputy Upper Tribunal Judge  
2018

Signed this 5th of January

**TO THE RESPONDENT**  
**FEE AWARD**

No fee was payable and I have dismissed the appeal and therefore there can be no fee award.

Judge Woodcraft  
Deputy Upper Tribunal Judge  
2018

Signed this 5<sup>th</sup> of January