



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/26502/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 10 July 2018

Decision and Reasons Promulgated  
On 30 July 2018

Before

**DEPUTY UPPER TRIBUNAL JUDGE MURRAY**

Between

**MR SYEED ADREES MUSHTAQ**  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

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

Respondent

**Representation:**

For the Appellant: Mr Karim, Counsel for MA Consultants, London  
For the Respondent: Mr Kandola, Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant is a citizen of Pakistan born on 12 April 1987. He appealed against the decision of the respondent dated 18 November 2016 refusing his application for leave to remain in the United Kingdom, finding that the appellant did not meet the requirements of Appendix FM of the Immigration Rules and did not meet the requirements of paragraph 276ADE of the Immigration Rules. The respondent found there were no exceptional circumstances which might warrant a grant of leave to remain in the United Kingdom outside the Immigration Rules. His appeal was heard by Judge of the First-Tier Tribunal Morris on 13 March 2018 and was dismissed in a decision promulgated on 29 March 2018.

2. An application for permission to appeal was lodged and permission was granted by Judge of the First-Tier Tribunal Hollingworth on 3 May 2018. The permission states that the Judge may have attached insufficient weight to the guidance and criteria applicable in the circumstances where the question arises as to whether it would be reasonable to expect British children to relocate. The Judge referred to this at paragraph 20 of the decision but the permission states that it is arguable that she set out an insufficient analysis of the impact on the children, of separation. The ages of the children are six years, three and a half years and two years. The permission states that it is arguable that in taking account of the benchmark policy period of seven years in relation to integration across the social, cultural and educational spectrum, a more detailed analysis was required in relation to the level of integration of the six year old child. In the absence of such it was found to be arguable that the effects of deracination have not been fully weighed when considering the factors identified by the Judge in the context of the position in Pakistan.
3. There is a Rule 24 response on file dated 28 June 2018. This states that it is accepted that the Judge erred at paragraph 22 when she found it would be reasonable for the appellant's British children to go with him to live in Pakistan but this is not a material error. The response refers to SF (Albania) which was updated in February 2018 before the First-Tier Tribunal hearing and the response refers to pages 50 and 73 of the respondent's guidance in which it is stated that the SSHD policy is that the question of reasonableness only arises if the appellant's removal is likely to cause the qualifying child to actually leave the UK. The response states that the First-Tier Judge correctly applies this principle and finds that the children can remain in the United Kingdom with their mother.

### THE HEARING

4. Counsel for the appellant adopted his grounds and made reference to the three British citizen children. He submitted that what the respondent states is that if the children are not expected to leave the United Kingdom reasonableness does not arise. I was referred to Section 117B, Part 5 of the 2002 Act and Counsel referred to the children's family life with a parent. He submitted that reasonableness has to be considered.
5. I was referred to the first ground of application and the case of SF & Others (Albania) [2017] UKUT 120 (IAC). He submitted that the Judge refers to this at paragraph 21 of her decision and that the Judge failed to engage with the conclusion in the said case of SF & Others. He submitted that the appellant and his wife are the parents of three British citizen children and the Home Office guidance has to be taken into account. He submitted that although the respondent states that the guidance has changed, it has changed very little and I was referred to page 76 of the guidance headed "Where the child is a British citizen". He submitted that there is no difference in this to the previous guidance which was before the Judge but the Judge failed to engage with this guidance or the case of SF (Albania). I was then referred to the guidance in the case of MA & Others (Pakistan) [2016] EWCA Civ 705 and he submitted that in that case it is stated that it is rare to find that it would be reasonable to expect British citizens to leave the United Kingdom. He submitted that if the appellant goes back to his own country

on his own (the Judge states that this would be proportionate), the children will have no contact anymore with the appellant. He submitted that the appellant looks after the children at present and is their primary carer so that his wife can work. He submitted therefore that there will be serious consequences if the appellant has to leave the United Kingdom. Either the children will have to relocate with their mother and join the appellant in Pakistan, or the children will have no more contact with their father. He submitted that the best interests of the children are not being considered by the Judge and I was referred to the cases of ZH (Tanzania) and Zambrano.

6. I was asked to consider the guidance in detail. This states that it would not be reasonable to expect a British child to leave the United Kingdom and that if an appellant is going to be made to leave he should have something in his history that is either criminal or he should have repeatedly gone against the Immigration Rules and that is not the case here. He submitted that the Judge has not grappled with this.
7. I was referred to ground 6 of the grounds of application and Counsel submitted that the Judge should have looked at the consequences on the family if the appellant has to return to Pakistan. His wife will require to stop working. She will have to claim benefits. He submitted that this is a public interest consideration which the Judge has not looked at as the appellant if he is allowed to stay is likely to be able to find employment in the United Kingdom, or at least continue to care for the children to allow his wife to work. He submitted that this is a material error and I was referred to ground 2 of the grounds of application in which Counsel states that the best interests of the children should be that they maintain contact with their father and mother and that family life is not severed. He submitted that children aged six and three and a half do not have a choice and that the three children are entitled to all the privileges of being British. He submitted that two of the children are now in formal education and have their own private lives and I was asked to find that if the guidance had been properly considered this appeal would have been allowed.
8. The Presenting Officer submitted that the Judge has not considered the respondent's policy on family migration. He submitted that the Judge did have the said case of SF & Others before him and at paragraph 22 onwards he considers the facts of the case and takes them into account. He submitted that it was open to the Judge to dismiss the appeal in light of the guidance.
9. He submitted that these children do not require to leave the United Kingdom, they can remain here with their mother. He submitted that the Judge found that the appellant has a poor immigration history and took this into account and I was referred to paragraph 28 of the decision which refers to the appellant having a private life with his qualifying partner that was established at a time when he was in the United Kingdom unlawfully and little weight should be given to a private life established at a time when the person's immigration status is precarious. The Judge refers to the appellant never having had leave in the United Kingdom and always knowing that he is dependent on leave being granted to allow him to stay here. He submitted that this appellant has made applications, all of which have been refused, but he has remained in the United Kingdom and continued to overstay in breach of the Immigration Rules.

10. The Presenting Officer submitted that it was open to the Judge to reach the decision she did. She applied the law correctly and I was asked to uphold the decision.
11. Counsel for the appellant submitted that the issue is not whether the conclusions the Judge made were open to her, what has to be considered is whether the Judge engaged with all the factors in the appeal.
12. He submitted that the Home Office guidance states that British children should not have to leave the United Kingdom. Their views are based on their parents' choice and whether they will be compelled to leave the United Kingdom. He submitted that that is why there is a policy in place and he submitted that to separate these British children from one of their parents could well force them to leave the United Kingdom, and that it would not be reasonable for these British children to leave with their parents.
13. He submitted that proportionality has to be taken into account and that family life is going to break down if the appellant has to go to Pakistan. Not only that but their mother will have to stop working and he submitted that the Zambrano case relating to whether children have to leave the United Kingdom applies here.
14. He submitted that the Judge did not engage in any way with the guidance and ignores the concession made in SF (Albania).
15. He submitted that if the children are separated from the appellant their mother will stop working, public funds will be claimed and the children's rights of having a meaningful relationship with their father, will be at an end. He submitted that none of these issues were considered by the Judge and that the Judge could have reached a different conclusion based on what was before her.
16. He submitted that in terms of the guidance, had the appellant been guilty of criminal offences or the like there would have been a reason for him to have to leave the United Kingdom but that is not the case. He submitted that the appellant has not complied with the Immigration Rules but what he has done is overstay after entering the United Kingdom illegally. He submitted that this is not sufficient to split his family and the guidance indicates that there is a very high threshold in a case like this and this appellant's situation does not meet this high threshold.
17. He submitted that had the Judge considered the guidance his decision would have been different and that because he did not consider the guidance his decision is unsafe and should be set aside.

### Decision

18. This is an appellant with three British children aged between six and two and a half years. If he has to leave the United Kingdom his wife will be unable to work and will have to claim benefits. Two of the children are at school. It is true that the appellant and his wife both have family in Pakistan and it is true that the appellant has

overstayed for a considerable time, even after applications made by him were rejected. His partner is also British and if he returns to Pakistan his partner and his three children can remain in the United Kingdom, but the family will be split and his relationship with his three children will be at an end.

19. I have carefully considered the First-Tier Judge's decision and note that she does not give weight to the Home Office guidance which has changed very little from the previous guidance. Under the heading "Where the Child is a British Citizen" it is stated that it will not be reasonable to expect British children to leave the United Kingdom with the applicant parent or primary carer facing removal.
20. The three British children and the British mother can all remain in the United Kingdom but this cannot be in the best interests of the children. In this case the appellant has not committed significant or persistent criminal offences reaching the threshold for deportation set out in paragraph 398 of the Immigration Rules, and he does not have a very poor immigration history of having repeatedly and deliberately breached the Immigration Rules. This is a high threshold and although the appellant is an overstayer he has not reached this threshold. If this appellant is returned to Pakistan then he will be separated from three British children and a British wife and the case law states that the best interests of the child are a primary consideration in cases like this.
21. The respondent has accepted that there is an error in the decision in that the Judge did not consider the family migration policy but the Presenting Officer stated that this is not a material error of law. I find however that had the Judge considered the respondent's guidance his decision would have been different. In the case of SF (Albania) a concession was granted by the respondent and I believe that if this appellant has to return to Pakistan his British children and British wife may well return with him and this cannot be in the best interests of the children who are entitled to their rights as British citizens. It would not be reasonable to expect these children to leave the United Kingdom and even if they stay with their mother it would not be proportionate to remove the appellant as it would make the family's situation in the United Kingdom much less sustainable than it is now, in that benefits would have to be claimed and the children would be separated from their father. This would have a severe impact on the three children. Separation should never be the result in a case like this.
22. I have considered the case of MA (Pakistan) and Others [2016] EWCA Civ 705 which deals with Section 117B(vi). The oldest child is not yet seven years old but soon will be and this is an important factor. It is true that the terms of the Immigration Rules cannot be satisfied but the children's best interests are to maintain contact with their father and stay with both of their parents. For this to happen it should be in the United Kingdom. For family life to continue as it is, the children should not be compelled to leave. I have taken into account Article 24 of The Rights of the Child and when the consequences of the appellant's removal are taken into account it must be proportionate to allow this appellant to remain in the United Kingdom with his British

wife and three British children and that public interest cannot succeed in the balancing act. This has not been properly considered by the Judge.

**Notice of Decision**

23. I find that there is a material error of law in the Judge's decision in that the respondent's guidance was not properly taken into account by her. I am going to remake the decision. The decision of the First-Tier Tribunal is set aside and I am allowing the appellant's appeal.
24. Anonymity has not been directed.

Signed

Date 20 July 2018

Deputy Upper Tribunal Judge Murray