



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/26554/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 19<sup>th</sup> June 2018

Decision & Reasons Promulgated  
On 4<sup>th</sup> July 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

MUHAMMAD [S]  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Miss D Revill of Counsel, instructed by M & K Solicitors

For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

**DECISION AND REASONS**

**Introduction and Background**

1. The Appellant is a citizen of Pakistan born 14<sup>th</sup> May 1990. He appeals against a decision of Judge Young-Harry (the judge) of the First-tier Tribunal (the FtT) promulgated on 2<sup>nd</sup> November 2017 following a hearing on 21<sup>st</sup> August 2017.
2. The Appellant entered the UK on 3<sup>rd</sup> March 2010 with leave as a student. His leave was subsequently extended until 30<sup>th</sup> October 2013, and he was then granted leave to

remain as a the spouse of a person settled in this country, which leave was valid until 5<sup>th</sup> June 2016.

3. On 27<sup>th</sup> July 2016 the Appellant applied for further leave to remain using form FLR(M). He had separated from his wife in respect of whom he had previously been granted a spousal visa, and this application was based upon his relationship with Samina Bibi (the Sponsor), a British citizen. The Appellant and Sponsor underwent an Islamic marriage on 19<sup>th</sup> March 2016 and had been living together since that date. At the date of application the Sponsor was pregnant.

### **The Refusal**

4. The application was refused on 24<sup>th</sup> November 2016. In brief summary the Respondent noted that the Appellant was in a relationship with the Sponsor who was due to give birth on 27<sup>th</sup> January 2017. However the Respondent did not accept that the Sponsor and Appellant were validly married as they had only undergone an Islamic marriage and not a civil marriage.
5. In addition the application was refused because the financial requirements of Appendix FM had not been satisfied. The Respondent considered paragraph 276ADE(1) in relation to the Appellant's private life, but did not accept that any of the requirements therein were satisfied. The Respondent did not accept that the application disclosed any exceptional circumstances which would justify granting leave to remain outside the Immigration Rules pursuant to Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention).

### **The First-tier Tribunal Hearing**

6. The judge heard evidence from the Appellant and Sponsor. It was accepted on behalf of the Appellant that he could not satisfy the requirements of the Immigration Rules and therefore reliance was placed only on Article 8 outside the Immigration Rules.
7. The judge found that Article 8 was engaged. The judge found that the Sponsor is a British citizen and that the Appellant and Sponsor had a child born 25<sup>th</sup> January 2017 who is a British citizen. The judge accepted the Appellant and Sponsor are in a genuine relationship.
8. The judge found as an adverse point against the Appellant that he had separated from his wife in March 2015 but failed to notify the Respondent of his change in circumstances.
9. In relation to the child the judge found that his best interests would be served by being brought up by both parents. The judge found that it was open to the Appellant and Sponsor to return to Pakistan as a family unit. Given the age of the child, he was unlikely to suffer any hardship if the family returned to Pakistan. With reference to the child's medical issues of acid reflux and asthma, there was nothing to show that treatment would not be available in Pakistan.

10. In the alternative if the Sponsor and child did not wish to leave the UK, the judge found the Appellant could return to Pakistan and make an entry clearance application. With reference to section 117B of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) the judge attached limited weight to the Appellant's private life as his leave had always been precarious. His visa expired on 5<sup>th</sup> June 2016 and he attempted to regularise his immigration status by submitting the application which has led to this appeal on 27<sup>th</sup> July 2016.
11. The judge dismissed the appeal concluding that the Respondent's decision did not amount to a disproportionate interference in the Appellant's Article 8 rights.

### **The Application for Permission to Appeal**

12. The Appellant applied for permission to appeal to the Upper Tribunal. In brief summary it was contended that the judge had failed to take into account SF and others Albania [2017] UKUT 00120 (IAC) and had failed to take into account the Respondent's guidance in relation to whether it was reasonable for a British child to leave the UK.
13. In addition the judge had failed to consider section 117B(6) of the 2002 Act.

### **Permission to Appeal**

14. Permission to appeal was granted by Judge Kelly on 10<sup>th</sup> April 2018. It was found arguable that the judge erred in failing to consider whether the Appellant had a genuine and subsisting parental relationship with his British child and whether it would be reasonable to expect the child to leave the UK with reference to section 117B(6) of the 2002 Act.
15. It was also found arguable that the judge took into account an immaterial matter, namely the possibility of the Appellant returning to Pakistan to make an entry clearance application despite having already found that the Appellant could not meet either the relationship or financial eligibility requirements for succeeding in such an application.

### **The Upper Tribunal Hearing – Error of Law**

16. In making oral submissions Miss Revill relied upon the grounds contained within the application for permission to appeal, and her skeleton argument dated 18<sup>th</sup> June 2018. In summary it was submitted that the judge had erred by failing to consider section 117B(6) of the 2002 Act, and in failing to consider the Respondent's guidance on whether it would be reasonable to expect a British child to leave the UK. The judge had failed to take into account and attach any weight to the fact that the Appellant has a British child.
17. Mr Kotas argued that the judge had not materially erred in law. SF could be distinguished on the basis that the Appellant in that case fell to be granted leave because there was nobody else to look after the child. In this case the child could

remain with the Sponsor if the Appellant left the UK. Mr Kotas pointed out that British citizenship is not a trump card. It was contended that the judge had adequately dealt with the issue of whether it would be reasonable for the child to leave the UK, by finding in paragraph 15, that the child was unlikely to suffer any hardship if he and his parents return to Pakistan as a family.

18. In response Miss Revill pointed out that the important factor that the judge had failed to take into account was the British citizenship of the child. No weight had been attached to his citizenship.
19. I found that the judge had materially erred in law in failing to consider section 117B(6) of the 2002 Act, and failed to consider the Respondent's guidance on this issue, although it would appear that the guidance was not drawn to the attention of the judge by the Respondent's Presenting Officer at the hearing. The Appellant did not have legal representation. It is clear that the Appellant's child is a qualifying child for the purposes of section 117B(6) as it is accepted that he is British, and the failure to consider British citizenship, section 117B(6) and the Respondent's guidance, amounts to a material error of law. Therefore the decision of the FtT was set aside.
20. Having set aside the FtT decision I was invited to re-make the decision without a further hearing, which I agreed was appropriate.

### **Re-Making the Decision**

21. No further evidence was called. I was asked to re-make the decision based upon the evidence that had been before the FtT.
22. I heard oral submissions from Miss Revill who relied upon her skeleton argument dated 18<sup>th</sup> June 2018. I was asked to note that it was accepted that the Appellant is in a genuine relationship with the Sponsor and has a genuine parental relationship with his son. It is accepted that the son is a British citizen. I was told, and a marriage certificate was produced, that the Appellant and Sponsor had entered into a civil marriage on 12<sup>th</sup> June 2018. This certificate indicates that the Appellant's previous marriage is dissolved. Miss Revill explained that it was not contended that the Appellant could satisfy Appendix FM, as he and the Sponsor did not satisfy the definition of a partner, when the application was made. I was asked to consider the appeal in relation to Article 8 outside the Immigration Rules.
23. It was submitted that the issue in the appeal related to whether or not it was reasonable to expect the Appellant's British child to leave the UK. I had been provided with pages 70 to 77 of the Respondent's policy on whether it was reasonable to expect a child to leave the UK, and this is the policy document published on 22<sup>nd</sup> February 2018. Reliance was placed upon page 76 which states that where a 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 unless the applicant parent or primary carer had committed significant or persistent criminal offences or had a very poor immigration history which was not the case in this appeal. Miss Revill submitted that the policy was incorrect at page 73 in stating that

if departure of the parent or primary carer would not result in the child being required to leave the UK because the child will or is likely to remain living in the UK with another parent or primary carer, the question of whether it is reasonable to expect the child to leave the UK will not arise. I was asked to note the wording in section 117B(6) is “would not be reasonable to expect the child to leave the United Kingdom.”

24. With reference to the Appellant’s failure to notify the Respondent that his marriage had broken down, it was submitted that there was no requirement in his visa that he must do this, and this was not a point taken against him by the Respondent in the refusal decision, and there was no breach of immigration law.
25. With reference to section 117B of the 2002 Act, the Appellant speaks English, and there was evidence within the Appellant’s bundle of his employment history.
26. Mr Kotas submitted that no evidence had been given as to whether the child would actually leave the UK if the Appellant left. I was asked to find that the Respondent’s policy was correct in considering whether in practical terms, the child would leave, and the question of reasonableness was not hypothetical.
27. Mr Kotas submitted that MA (Pakistan) [2016] EWCA Civ 705, was not exactly on point with this appeal because the child in MA had in excess of seven years’ residence and it was on that basis that the Court of Appeal found that there must be powerful reasons for not granting leave. In this appeal the child is a qualifying child by reason of being a British citizen, not having accrued in excess of seven years’ residence. Mr Kotas accepted that the Appellant had been financially independent and speaks English and the Respondent had not taken against him the point that he had not notified the Respondent that his marriage had broken down.
28. However significant weight must be attached to the fact that the Appellant cannot bring himself within the Immigration Rules in order to be granted leave to remain. In those circumstances it was submitted that it would be reasonable to expect a British child to leave the UK.
29. In response Miss Revill argued that the Tribunal must consider whether it would not be reasonable to expect the child to leave the United Kingdom. With reference to MA (Pakistan) it was submitted that a British citizen child must be in a stronger position than a foreign national child who had achieved qualifying status by virtue of seven years’ residence.
30. At the conclusion of oral submissions I reserved my decision.

### **My Conclusions and Reasons**

31. I am asked to consider this appeal with reference to Article 8 of the 1950 Convention outside the Immigration Rules, as it is conceded that the Appellant cannot succeed under the Immigration Rules. I find that Article 8 is engaged on the basis of the

family life that the Appellant has established with the Sponsor and their son, and also in relation to private life.

32. In considering Article 8 I adopt the balance sheet approach recommended at paragraph 83 of Hesham Ali v SSHD [2016] UKSC 60, and in so doing have regard to the guidance given at paragraphs 39 to 53.
33. The burden of proof lies on the Appellant to establish his personal circumstances in this country, and to establish why the decision to refuse his human rights claim interferes disproportionately in his private and family life rights in this country. It is for the Respondent to establish the public interest factors weighing against the Appellant. The standard of proof is a balance of probabilities throughout.
34. I must take into account that the Appellant cannot succeed under the Immigration Rules. At paragraph 48 of Agyarko [2017] UKSC 11 guidance was given that if an Appellant cannot satisfy the relevant test under the Immigration Rules but refusal of the application would result in unjustifiably harsh consequences, such that refusal would not be proportionate, then leave may be granted outside the rules on the basis that there are exceptional circumstances.
35. I am deciding this appeal on the factual matrix set out below.
36. The Appellant entered the UK lawfully. He remained lawfully having had leave extended initially as a student and thereafter as the spouse of a person settled in the UK. His marriage broke down. He started a new relationship with the Sponsor and they underwent a religious ceremony in March 2016. The couple have a child born 25<sup>th</sup> January 2017. The Appellant and Sponsor married on 12<sup>th</sup> June 2018. They live as a family unit. The Sponsor and the child are British citizens.
37. The best interests of a child must be considered as a primary consideration. I have no difficulty in finding that the best interests of the child in this case would be to be brought up by both parents in a family unit. As the child is British, I find that his best interests as a British citizen would be to be brought up in the UK. That does not however mean that the appeal must be allowed. I must consider any other relevant considerations.
38. I must have regard to the considerations contained in section 117B of the 2002 Act. Sub-section (1) confirms that the maintenance of effective immigration controls is in the public interest. I place significant weight upon the need to maintain effective immigration controls.
39. Sub-section (2) confirms that it is in the public interest that a person seeking leave to remain can speak English. I am satisfied that the Appellant can speak English, although this is a neutral factor in the balancing exercise.
40. Sub-section (3) confirms that it is in the public interest that a person seeking leave to remain is financially independent. I am satisfied that the Sponsor was financially

independent when he had permission to work. Again this is a neutral factor when considering the balancing exercise and proportionality.

41. Sub-section (4) confirms that little weight should be given to a private life or relationship formed with a qualifying partner established when a person is in the UK unlawfully. Sub-section (5) confirms that little weight should be given to a private life established by a person at a time when the person's immigration status is precarious. The Appellant has always had a precarious immigration status as he has always had limited leave to remain. I do attach little weight to the private life that he has established while he has had a precarious immigration status, although this appeal does not rely upon the Appellant's private life.
42. I set out below section 117B(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.
43. I find the Appellant has a genuine and subsisting parental relationship with his son, who is a qualifying child by virtue of his British citizenship. I have to consider whether it would not be reasonable to expect the child to leave the UK. I therefore have to consider whether it would be reasonable to expect the child to live in Pakistan with his father.
44. In considering whether it would be reasonable for the child to leave the UK I follow the guidance given in MA (Pakistan) in that the Tribunal must not focus on the position of the child alone but must have regard to the wider public interest, including the immigration history of the parent. The fact that the child is British is a weighty consideration and was described in ZH (Tanzania) [2011] UKSC 4 as being of particular importance although not a trump card.
45. At paragraph 49 of MA (Pakistan) it is stated that when considering section 117B(6) the fact that a child has been in the UK for seven years would need to be given significant weight in the proportionality exercise for two related reasons, first because of its relevance to determining the nature and strength of the child's best interests, and second, because it establishes the starting point that leave should be granted unless there are powerful reasons to the contrary. I find that a child who is a qualifying child by reason of British citizenship, is analogous to a foreign national child who has accrued seven years' residence. I therefore find that leave should be granted so that a British child can remain in the UK unless there are powerful reasons to the contrary.
46. In considering powerful reasons I have taken into account the guidance in MT and ET Nigeria [2018] UKUT 00088 (IAC). At paragraph 34 the Upper Tribunal found in

that case that the parent of a child had received a community sentence for using a false document to obtain employment and was described as abusing the immigration laws of the UK. The parent in that case had overstayed following entry clearance as a visitor, made a claim for asylum that was found to be false, and then pursued various legal means of remaining in the UK. The behaviour was described as unlawful, but the immigration history was found to be not so bad as to constitute the kind of powerful reason that would render reasonable the removal of the child from the UK.

47. I also apply the guidance in SF and others which confirms that the Tribunal ought to take the Respondent's guidance into account if it points clearly to a particular outcome in the instant case. The Respondent's guidance at page 76 indicates that where a 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 unless the conduct of the parent or primary carer gives rise to public interest considerations of such weight as to justify their removal and the British citizen child could remain in the UK with another parent or alternative primary carer. The circumstances envisaged include an individual who has committed significant or persistent criminal offences falling below the threshold 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.
48. In considering the public interest, I do not find that the Appellant has a very poor immigration history and it cannot be said that he has repeatedly and deliberately breached the Immigration Rules. The Appellant has no criminal convictions.
49. This is not a case involving any deception, and based upon the factual matrix set out earlier, and the law as summarised above, I find that it would not be reasonable to expect the Appellant's British son to leave the UK. Therefore the appeal falls to be allowed with reference to section 117B(6) and Article 8 of the 1950 Convention.

### **Notice of Decision**

The decision of the First-tier Tribunal contained an error of law and was set aside. I substitute a fresh decision.

The appeal is allowed on human rights grounds with reference to Article 8 of the 1950 Convention.

No anonymity direction was made by the FtT. There has been no request made to the Upper Tribunal for anonymity and I see no need to make an anonymity direction.

Signed

Date 28<sup>th</sup> June 2018

Deputy Upper Tribunal Judge M A Hall



**TO THE RESPONDENT  
FEE AWARD**

As I have allowed the appeal, I have considered whether to make a fee award. I make no fee award. The appeal has been allowed because of evidence considered by the Tribunal that was not before the initial decision maker.

Signed

Date 28<sup>th</sup> June 2018

Deputy Upper Tribunal Judge M A Hall