Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/07356/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25 August 2017	**On 4 September 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

MR RIZWAN ALI JANJUA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R Ahmed, Counsel instructed by Maher & Co Solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the remaking of the decision under appeal following an error of law ruling made by Upper Tribunal Judge Kamara on 24 April 2017, whereby she set aside the decision of the First-tier Tribunal.

2. The background to this case is that the appellant is a national of Pakistan, who entered the United Kingdom on 1 April 2007 in possession of a student visa which was valid until 31 October 2008. On 10 October 2008 he applied for leave to remain as a Highly Skilled Migrant. His application was refused on 15 January 2009, as he had attempted to use false documents as part of his application. The appellant appealed against the

refusal decision, and his appeal was dismissed by the First-tier Tribunal on 20 March 2009. The appellant sought judicial review, but permission was refused by the High Court on 15 April 2009 and his appeal rights were exhausted as of 3 July 2009.

3. On 4 April 2012, the appellant applied for indefinite leave to remain on the grounds that he had a British wife, Nazia Bibi, and a British child by her.

4. On 15 October 2012 the then Secretary of State made the following decision on the appellant's application:

> The Secretary of State is not satisfied that your application is being sought for a purpose covered by the Immigration Laws, therefore your application has been refused under paragraph 322(1).
>
> Your application has also been considered outside the Immigration Rules, however it is not believed that your circumstances are of a compellingly compassionate nature for a grant of indefinite leave to remain to be made.
>
> As a result of the changes to the Immigration Rules which came into effect on 9 July 2012, any family life claims will now be given consideration under Appendix FM. Consideration to your claim has therefore been given under the exceptions at paragraph EX.1(a). It has been accepted that you have a genuine and subsisting relationship with your child who is a British citizen under the age of 18. It is also considered that it would be unreasonable to expect the child to leave the United Kingdom. It is for this reason that the position has been taken to grant you limited leave to remain for a period of 30 months, thus entering a 10-year route to settlement.

5. On 10 April 2015, the appellant applied for further leave to remain on the same basis as before. On 21 September 2015, the Secretary of State gave her reasons for refusing the application. She began by rehearsing the appellant's immigration history, but did not make reference to the appellant's past dishonesty. The application was refused on two grounds. Firstly, it was refused under S-LTR.1.7 as without reasonable excuse he had failed to comply with a request to provide information with regard to his current application. Secondly, as a consequence of his failure to provide the requested information, she was not satisfied that he remained in a genuine and subsisting relationship with Nazia Bibi.

6. She noted that in support of his application he had raised the fact that he had two British national children, one of whom was aged 3 years and 2 months, and the other was aged 2 months, at the date of application. However, he had provided no evidence to support his claim that he had a genuine parental relationship with these two children. Furthermore, they would be able to continue to have family life in the UK as dependants of their mother. He had not provided any evidence to suggest that there was anything preventing Nazir Bibi from assuming full parental responsibility and care of his children, should he be removed from the UK.

7. The appellant's appeal came before Judge Barrowclough sitting at Columbus House, Newport on 8 September 2016. Both parties were

legally represented, and the Judge received oral evidence from the appellant and Mrs Nazir Bibi. In his subsequent decision, he found that the respondent had been right to refuse the application for non-compliance with the suitability requirements set out in S-LTR.1.7. However, he found that the suitability requirements were now met, and that it was now shown that the appellant was in a genuine and subsisting relationship with Mrs Bibi, and also in a genuine and subsisting parental relationship with the two children.

8. The Judge considered whether the appellant could bring himself with EX.1(b). He bore in mind that Mrs Bibi was a British citizen, now aged 34, and had come to the country at age 7. No evidence had been adduced concerning the possible difficulties involved in living outside the United Kingdom. He found that both the appellant and Mrs Bibi had been born and raised in Pakistan, both were of Pakistani ethnicity, and both spoke Urdu as their first language. He concluded that there were not insurmountable obstacles to their family life continuing outside the UK, and the appellant did not meet the requirements of the Rules for the grant of leave to remain under the Partner route.

9. With regard to EX.1(a), the Judge found that the appellant did not meet the relationship requirements set out in E-LTRPT.2.3, and so he could not take the benefit of EX.1(a) so as to qualify for leave to remain under the Parent route. (EX.1 provides an exception to the immigration status requirement set out in E-LTRP.3.2, but not an exception to the relationship requirements set out in E-LTRPT.2.3).

10. The Judge held that it was ultimately a question of choice for Mrs Bibi and her two young children. She had personal and cultural links in Pakistan to which she had returned for visits. It would not be unreasonable to expect Mrs Bibi to accompany her husband to Pakistan, together with their two young children, particularly since it was well established that the children's best interests were to be brought up by both their parents where possible.

11. The Judge turned to consider the appellant's Article 8 claim outside the Rules. He could speak English, if not fluently; and it seemed that he was employed by Tesco and he had some savings, although it also appeared that he could not meet the financial requirements of Appendix FM. The only possible potentially compelling reason why an Article 8 assessment was required was if Mrs Bibi decided to remain in the UK with the couple's small children. If so, the family unit would be broken up, and unless the appellant was subsequently able to apply successfully for leave, his children would be brought up without their father's presence - and he would be deprived of their company and of helping and seeing them grow up in his role as their father. Thus, returning the appellant to Pakistan might penalise his children as well as himself. So, on balance, he accepted that there were compelling reasons why and Article 8 assessment was required.

12. The Judge went on to conduct a proportionality assessment, having regard to section 117B of the Nationality, Immigration and Asylum Act 2002. At the time that Mrs Bibi embarked on the relationship with the appellant, and also when she married him, the appellant was in the country illegally, whether or not Mrs Bibi was aware of that fact. The appellant had attempted to obtain leave to stay in the United Kingdom on the basis of documentary evidence which the Tribunal found not to be genuine or reliable, and this counted against him. They were not very significant obstacles to the appellant's reintegration into Pakistan, as he had lived most of his life there. Finally, it would not be unreasonable or unduly arduous for Mrs Bibi and the couple's small children to choose to return to Pakistan with the appellant. So, he concluded that removing the appellant to Pakistan would not be disproportionate when set against the public interest in the maintenance of effective immigration controls.

13. Following an error of law hearing at Field House on 20 April 2017, Upper Tribunal Judge Kamara gave her reasons for finding that the decision of the First-tier Tribunal was vitiated by a material error of law, such that it should be set aside and remade. For present purposes, it is convenient to quote paragraph [15] of her decision:

> Turning to the grounds, it is the case that the Judge addressed the legitimate expectation point at [13], however he did not proceed to weigh the previous grant of leave to remain outside the Rules, made in full knowledge of the appellant's unimpressive immigration history, in the balance in assessing the Article 8 claim outside the Rules. It is especially important, given the Judge's positive findings as to the existence of a genuine and subsisting relationship between the appellant, his partner and the children. There was, therefore, no adverse change in the appellant's situation since the grant of leave in September 2012 and the date of the hearing in September 2016, other than that his private and family life is more entrenched and a further child has come along. This is a matter which was deserving of some consideration in a balancing exercise, whereas there was none.

14. In paragraph [16] of her decision, Judge Kamara concluded that the First-tier Tribunal Judge's assessment of the proportionality of the appellant's removal was flawed. As there was no error in relation to the Judge's findings in respect of the Rules or in his findings of fact, these were to be preserved. Judge Kamara made the following directions:

> 1. The appellant and respondent are to prepare detailed skeleton arguments which address all relevant matters as well as the basis upon which leave to remain outside the Rules was granted to the appellant.
>
> 2. The said skeleton arguments must be served on the Upper Tribunal no later than 10 working days prior to the resumed hearing date.

The Resumed Hearing in the Upper Tribunal

15. At the hearing before me, to remake the decision, Mr Tufan handed up some written submissions dated 15 June 2017 which his colleague, Mr Singh, had prepared in compliance with Judge Kamara's directions. The

thrust of the submissions was that, even giving due weight to the previous grant of leave in October 2012, the interference with the appellant's private and family life was not disproportionate when set against the public interest, which in this case involved an appellant with a very poor immigration history.

16. Mr Ahmed appeared before me without a skeleton argument, and he apologised for the fact that no skeleton argument had been served in compliance with Judge Kamara's directions. He had not appeared at the hearing before Judge Kamara, and he indicated that he had only been recently instructed to appear at the hearing before me. He submitted that the present case was 'on all fours' with the case of **SF & Others (Guidance, post-2014 act) Albania 27 UKUT 00120 (IAC)**, a decision of Vice-President Ockelton and Upper Tribunal Judge Kamara, promulgated on 16 February 2017. Accordingly, he submitted, there could be only one outcome, which was that the appellant's appeal should be allowed.

17. Although Mr Ahmed had not brought along a copy of this decision, Mr Tufan was aware of it and he addressed me briefly on its implications. He did not formally concede the point taken by Mr Ahmed, but he also did not seek to distinguish **SF**.

Discussion and Findings

18. The favourable immigration decision of October 2012 is puzzling, as the appellant's highly adverse immigration history at that juncture provided a very good reason as to why it would have been reasonable to expect the appellant's then only child (who was still a baby) to leave the UK with the appellant and Mrs Bibi, notwithstanding his status as a British citizen.

19. The direction made by Judge Kamara gave the respondent the opportunity to provide some further insight into the rationale for the decision of October 2012. But this opportunity has not been grasped by the respondent, and as a result the respondent is unable to explain why the appellant should be treated less favourably now than he was in October 2012. It is not an adequate answer that the appellant has "a very poor immigration history", as submitted by Mr Singh, as this very poor immigration history was presumably taken into account by the respondent when making the decision in October 2012 to grant the appellant 30 months' leave to remain, rather than compelling him to return to Pakistan.

20. The effect of the decision to grant leave in October 2012 was to wipe the slate clean, so far as the appellant's past immigration offending was concerned. Since October 2012 the appellant has been present in the United Kingdom lawfully.

21. In **SF**, Mr Wilding drew the attention of the Upper Tribunal to the Immigration Directorate Instruction on "Family life as a partner or parent and private life, 10-year routes" (August 2015 edition) at paragraph 11.2.3. The Tribunal characterised this paragraph as containing important

guidance on the topic of *"Would it be unreasonable to expect a British citizen child to leave the UK?"*

22. The guidance provides, inter alia, as follows:

> Save in cases involving criminality, the decision-maker must not take a decision in relation to the parent or primary carer of a British citizen child where the effect of that decision would be to force that British citizen to leave the EU, regardless of the age of that child. This reflects the European Court of Justice Judgment in **Zambrano** …
>
> Where a decision to refuse the application would require a parent or primary carer to return to a country outside the EU, the case must always be assessed on the basis that it would be unreasonable to expect a British citizen child to leave the EU with that parent or primary carer.
>
> In such cases it will usually be appropriate to grant leave to the parent or primary carer, to enable them to remain in the UK with the child, provided that there is satisfactory evidence of a genuine and subsisting parental relationship.
>
> It may, however, be appropriate to refuse to grant leave where the conduct of the parent or primary carer gives rise to considerations of such weight as to justify separation, if a child could otherwise stay with another parent or alternative primary carer in the UK or in the EU.

23. The Tribunal in **SF** held:

> 10. It is clear that the appellants do not have available to them a ground of appeal on the basis that the decision is not in accordance with the Law, such as before the amendments made to the 2002 Act by the 2014 Act they might have had. Nevertheless it appears to us that the terms of the Guidance are an important source of the Secretary of State's view of what is to be regarded as reasonable in the circumstances, and it is important in our judgment of the Tribunal of both levels to make decisions which are, as far as possible, consistent with decisions made in other areas of the process of Immigration control.
>
> 11. The Secretary of State makes a decision in a person's favour on the basis of guidance of this sort, there can of course be no appeal, and the result would be that the decision falls below the radar of consideration by a Tribunal. It is only possible for Tribunals to make decisions on matters such as reasonableness consistently with those that have been made in favour of individuals by the Secretary of State, if the Tribunal applies similar or identical processes to those employed by the Secretary of State.
>
> 12. On occasion, perhaps where it has more information than the Secretary of State had or might have had, or perhaps if the case is exceptional, the Tribunal may find a reason for departing from such guidance. Where there is clear guidance which covers a case where an assessment has to be made, and where the Guidance clearly demonstrates what the outcome of the assessment would have been made by the Secretary of State, it would, we think, be the normal practice of a Tribunal to take such Guidance into account and to apply it in assessing the same consideration in a case that came

before it.

24. In the decision under appeal, the Respondent did not rely on the appellant's "*very poor immigration history"* prior to October 2012 as a reason for refusing him Article 8 relief. In any event, since the slate has been wiped clean, the appellant cannot now be treated as being guilty of conduct which would, under the Guidance, justify separation.

25. However, although Mr Tufan did not seek to distinguish **SF**, the facts of that case were very different from the facts of this case and I am not persuaded that the policy guidance in paragraph 11.2.3 has a material bearing on a case such as this, where the Respondent has made it clear in the decision under appeal that the British national children are not expected to follow their father to the country of return; but are expected to stay with their mother in the UK. If they were to go with their parents to Pakistan, it would be because their parents had freely chosen this course, not because they or their parents were expected to leave the UK. This critical distinction between *"choice "*and *"expectation"* was also rightly recognised and applied by Judge Barrowclough, and his decision does not run counter to the guidance.

26. The crucial factor in this case is not the existence of the policy guidance, which I find does not avail the appellant. It is the simple fact that the respondent has previously accepted that it would not be reasonable to expect the oldest British national child to leave the UK, *and hence that the appellant should also not be required to leave the UK*. If it was unreasonable in October 2012, it is even more unreasonable now, when the oldest child has reached the age of six, and is in full-time education. So, having particular regard to section 117B(6) of the 2002 Act, I find that on the highly unusual and exceptional facts of this case – namely, the concession in 2012 that it was unreasonable for the Appellant's first-born child to leave the UK, and that the Appellant should be granted leave to remain as a result, irrespective of his highly adverse immigration history or of any other relevant public interest consideration apparently – the decision appealed against is disproportionate.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision is substituted:

The appellant's appeal against the decision to refuse to grant him further leave to remain is allowed on Article 8 grounds outside the Rules.

I make no anonymity direction.

Signed Date 28 August 2017

Judge Monson
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

As I have allowed this appeal, I have given consideration as to whether to make a fee award in respect of any fee which has been paid or is payable, and I have decided to make no fee award as the application was rightly refused under the Rules, and the appellant needed to bring forward evidence by way of appeal in order to succeed in his appeal.

Signed Date 28 August 2017

Judge Monson
Deputy Upper Tribunal Judge