



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/04845/2016

THE IMMIGRATION ACTS

Heard at Field House

On 6 December 2017

**Decision & Reasons
Promulgated**

On 10 January 2018

Before

UPPER TRIBUNAL JUDGE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**BABAR KHAN
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Ms Fijiwalla, Senior Home Office Presenting Officer

For the Respondent: Mr Sharma, instructed by Bedfords Solicitors

DECISION AND REASONS

1. I shall refer to the appellant as the respondent and the respondent as the appellant (as they appeared respectively before the First-tier Tribunal). The appellant, Babar Khan, was born on 17 May 1982 and is a male citizen

of Pakistan. The appellant appealed to the First-tier Tribunal (Judge Juss) against the decision of the respondent dated 5 February 2016 refusing him leave to remain in the United Kingdom under the ten year partner and private life routes (Appendix FM and paragraph 276ADE of HC 395 (as amended)). The First-tier Tribunal, in a decision promulgated on 8 March 2017, allowed the appeal. The Secretary of State now appeals, with permission, to the Upper Tribunal.

2. The First-tier Tribunal's decision is problematic. This was a case in which the appellant's application under HC 395 had, in part, failed on eligibility grounds the Secretary of State taking the view that the appellant had cheated in an English language test. The judge acknowledged that he had a supplementary bundle before him [4] which contained evidence adduced by the Secretary of State in respect of the allegations of cheating in an ETS test. However, other than stating [13] that he had "given careful consideration to all the documents" the judge moved (without any intervening analysis or reasoning) to his conclusion at [17]:

Finally, I did not believe there was anything in the unsubstantiated allegation of cheating in the ETS test and so the appellant does meet the eligibility and suitability Rules in paragraphs R-LTRP1.1(d)(i) and (ii).

3. The judge has conducted no analysis whatever of the evidence adduced by the Secretary of State in respect of the alleged cheating. It is not enough that he has simply referred to having considered all the documents; if the judge considered the allegation of cheating to be "unsubstantiated" then it was necessary for him to provide his reasons for reaching that finding. The Upper Tribunal should hesitate before concluding that the First-tier Tribunal (charged with the difficult task of making robust findings of fact) has provided insufficient reasons for its decision but this is a case in which total absence of appropriate analysis vitiates the decision.
4. The question remains as to whether the Upper Tribunal should refrain from setting aside the decision. Mr Sharma, who appeared for the appellant, submitted that it should so refrain. The respondent's refusal letter of 5 February 2016 contains the following paragraph:

Although it is accepted that you meet the requirements of EX.1 due to the fact you have a genuine and subsisting parental relationship with your British child, you fail to meet the eligibility and suitability Rules as required by paragraphs R-LTRP1.1(d)(i) and (ii) as stated above.

5. Mr Sharma submitted that the appellant was bound to win, notwithstanding any finding as regards the alleged cheating, because the respondent accepted that he had a genuine and subsisting parental relationship with a British child. In addition to satisfying EX.1, the appellant also satisfied the requirements of Section 117B(6) of the 2002 Act (as amended) and also the requirements of the Secretary of State's policy (see *SF and others* (Guidance, post-2014 Act) Albania [2017] UKUT 120(IAC)).

6. I do not agree with Mr Sharma's submissions. First, Section 117B(6), while stating that the public interest does not require the removal of a person who has a genuine and subsisting parental relationship with a qualifying child also requires that it should be "not reasonable to expect the child to leave the United Kingdom." The Secretary of State's policy (which does not require a British child to leave the United Kingdom where such a relationship exists) may not apply in circumstances where the Secretary of State considers that there are countervailing factors, such as a very poor immigration history or poor conduct on behalf of the applicant. In the present appeal, it is not possible to state to what extent, if at all, any findings regarding the appellant's alleged cheating might have had upon the analysis. The "reasonableness" test imposed by Section 117B(6) is wide-ranging and may potentially be influenced by findings regarding the conduct of the applicant father. Moreover, since there are no satisfactory findings in this case in respect of the allegations of cheating, it cannot be assumed that the appellant would necessarily meet the requirements of the respondent's policy. I do not accept, as Mr Sharma submitted, that the passage from the refusal letter which I have quoted above amounts to an acceptance by the Secretary of State that it would be unreasonable for the British children of the appellant to leave the United Kingdom. The statement made in the refusal letter does no more than indicate that the Secretary of State's acceptance of the appellant has a genuine and subsisting parental relationship with British children.
7. In the circumstances, therefore, I have decided to set aside the First-tier Tribunal's decision. None of the findings of fact shall stand. The evidence will need to be considered again with appropriate findings of fact made, including findings in respect of the reasonableness of the children leaving the United Kingdom. That task is better undertaken by the First-tier Tribunal to which this appeal is now returned.

Notice of Decision

8. The decision of the First-tier Tribunal which was promulgated on 8 March 2017 is set aside. None of the findings of fact shall stand. The appeal is returned to the First-tier Tribunal (not Judge Juss) for that Tribunal to remake the decision.
9. No anonymity direction is made.

Signed

Date 3 January 2018

Upper Tribunal Judge Lane