



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

Appeal Number: HU/03824/2018

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 26<sup>th</sup> February 2019**

**Decision & Reasons Promulgated  
On 14 March 2019**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS**

**Between**

**MUHAMMAD [A]  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr J Plowright, Nasim & Co Solicitors

For the Respondent: Ms S Jones, Home Office Presenting Officer

**DECISION AND REASONS**

1. This matter originally came before me on 4<sup>th</sup> December 2018. I found that the findings of the First-tier Tribunal Judge, so far as they relate to the ETS issue and the finding that the Appellant had previously used deception by submitting a fraudulently obtained TOEIC certificate was maintained but that I found that the decision disclosed a material error of law so as to:
  - (i) the judge's failure to analyse and consider Section 117B(6) of the Nationality, Immigration and Asylum Act 2002;

- (ii) to undertake any analysis of the question as to whether it was reasonable to expect the Appellant's qualifying British children to leave the UK; and
- (iii) as to the relevance of nationality within the reasonableness assessment constituted material errors of law.

I consequently retained the matter reserved to myself within the Upper Tribunal and directed that the matter be relisted for hearing on the first available date 28 days hence at Field House.

- 2. It is that rehearing of the matter that comes before me. The Appellant appears by his instructed Counsel Mr Plowright. The Secretary of State appears by her Home Office Presenting Officer Ms Jones.

### **Documents and Evidence**

- 3. I had given previously directions that there be leave to either party to file an up-to-date bundle of evidence. The Appellant's instructing solicitors have provided a very detailed bundle extending to over 500 pages and attaching photographs. The principal documents therein are however a witness statement from the Appellant and a witness statement from his partner Ms [SA]. Both witness statements are signed and dated 19<sup>th</sup> February 2019. Both the Appellant and Ms [A] attend before me and give evidence and confirm and adopt their witness statements. I note that they were married under Islamic law back in 2014.
- 4. In addition, Ms Jones provides me with two authorities *SR (subsisting parental relationship – section 117B(6) Pakistan [2018] UKUT 334 (IAC)* and *KO (Nigeria) and others v the Secretary of State for the Home Department [2018] UKSC 53*. I am further provided with an up-to-date extract from the Home Office guidance as to whether it is reasonable to expect a child to leave the UK. The only other document that I am provided with, and I am asked to consider, is an up-to-date skeleton argument provided by Mr Plowright. I have read and considered all the principal documents to which I am referred.

### **The Issue**

- 5. It has been found that the First-tier Tribunal Judge did not err in law in finding that the Appellant had previously submitted a fraudulently obtained TOEIC certificate with a previous application. I note however that the Appellant both in all previous evidence and again in response to questions put to him by Ms Jones refutes that finding. In essence the issue that is before me is whether or not that finding is sufficient to make it reasonable for the Secretary of State in the circumstances of this particular case to remove the Appellant back to his home in Pakistan and to request either for the Appellant's partner and their children to go with him or to separate the Appellant from his children if they choose not to leave with him.

## Evidence

6. The Appellant confirms and adopts his witness statement of 19<sup>th</sup> February 2019. He accepts that he arrived in the UK on 18<sup>th</sup> April 2012 with valid leave on a Tier 4 (General) Student visa valid from 21<sup>st</sup> March 2012 until 26<sup>th</sup> August 2013. In 2014 he was married under Islamic law and he and Ms [A] have two children from their relationship born respectively on 9<sup>th</sup> January 2015 and 5<sup>th</sup> September 2017. Both children are British citizens. Further, the Appellant's partner is currently pregnant and is expected to give birth to their third child in May 2019.
7. The Appellant's case is that it would be a breach of his human rights to remove him from the UK having established a private and family life and also by contending that he is a well-known and respected member of his local community. His evidence is that he has a close relationship with his two children and his stepdaughter and that he plays a key role in their upbringing. Further, he contends that his eldest child suffers from autism spectrum disorder and requires constant supervision. He also provides evidence that he suffers from learning and speech difficulties and requires constant one to one support. He states that he regularly takes him to appointments and plays a key role in his upbringing. It is his contention that his son is actually more attached to him than his mother.
8. He further submits that with his partner and children being British citizens there are insurmountable obstacles for him being able to continue his family life if removed to Pakistan and that his partner is from Afghanistan and that she was initially granted refugee status in the UK. It is his evidence that his removal would lead to the complete breakdown of their family and would separate two innocent children from their father for no fault of their own. He further contends that since living in the UK he has become accustomed to British society and culture, that he volunteers at his local mosque and that he has tried to live his life as an exemplary citizen and never committed any criminal wrongdoing.
9. Under cross-examination from Ms Jones he rejects the finding that he had fraudulently obtained a TOEIC certificate and when taken to documents within the bundle relating to the taking and collection of his son from nursery and for medical appointments that he plays a substantial part in such activities and the support of his children. I am particularly referred to letters from the nursery manager and from the consultant paediatrician who treats the Appellant's elder son. He further advises that his partner works as a receptionist five hours a day, five days a week and that he believes that her maternity leave will start in April.
10. Ms [A] gave evidence confirming and adopting her witness statement and confirming the hours in which she works. There were no contradictions

between the evidence of her the Appellant. She confirmed that she sometimes takes her eldest son to nursery and endorses the view expressed by the nursery manager that both she and the Appellant pay close attention to all aspects of her son's development and learning and that they are supportive towards his education.

## **Submission/Discussion**

11. Ms Jones relies on the Notice of Refusal and expanding on the cross-examination submits that the documents produced and referred to above along with evidence of attendance for medical appointments indicate that the Appellant is not the children's sole carer and it is not accepted by the Secretary of State that there is a particular dependency for the children upon their father. Further, she briefly submits that had the Appellant not received a fraudulent TOEIC certificate then family life would not have taken place as the Appellant would not have had grounds to remain in the UK and that that should be held against the Appellant, albeit that she agrees that that should not necessarily be held against the children.
12. In response, Mr Plowright starts by addressing that latter contention submitting that to indicate that there is a causal relationship between where we are now and the fraudulent TOEIC certificate is in his view too remote and that the reason that we are here today is because of the Appellant's relationship and his children. He refers to the case law and points out that the question that I have to ask myself is whether the public interest factors justify the removal of the Appellant and that it is a balancing exercise. He points out that the only issue which creates a stain on the Appellant's character is the finding with regard to the TOEIC certificate. He reminds me that to remove him would leave Ms [A] as a single parent with two children, one who has autism and that family life would quite simply be ruined. He asked me to allow the appeal.

## **The Law**

13. *KO* sets out general principles emanating from the Supreme Court, all of which I have considered. There are however two other authorities which have a bearing on this matter.
14. *SR (subsisting parental relationship - section 117B(6)) Pakistan [2018] UKUT 334 (IAC)* is authority for the following.
  - "1. If a parent ('P') is unable to demonstrate he / she has been taking an active role in a child's upbringing for the purposes of E-LTRPT.2.4 of the Immigration Rules, P may still be able to demonstrate a genuine and subsisting parental relationship with a qualifying child for the purposes of section 117B(6) of the Nationality Immigration and Asylum Act 2002 ('the 2002 Act'). The determination of both matters turns on the particular facts of the case.

2. The question of whether it would not be reasonable to expect a child to leave the United Kingdom ('UK') in section 117B(6) of the 2002 Act does not necessarily require a consideration of whether the child will in fact or practice leave the UK. Rather, it poses a straightforward question: would it be reasonable "to expect" the child to leave the UK?"

Further, the approach to Section 117B(6) where British children were involved was considered in *SF and others (Guidance - post-2014 Act) Albania [2017] UKUT 00120 (IAC)* which states:

"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, providing 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 the child could otherwise stay with another parent or alternative primary carer in the UK or in the EU.

The circumstances envisaged could cover amongst others:

- criminality falling below the thresholds set out in paragraph 398 of the Immigration Rules;
- a very poor immigration history, such as where the person has repeatedly and deliberately breached the Immigration Rules.

In considering whether refusal may be appropriate the decision maker must consider the impact on the child of any separation."

## Findings

15. The starting point is whether or not there is a genuine and subsisting parental relationship between the Appellant and Ms [A]. That is not challenged by the Secretary of State. I find that there is a subsisting relationship and that the parties live as a family unit and have done so since 2014. Ms [A] and the two children are, I understand, British citizens, and presumably so will the third child be when he or she is born in May 2019.
16. The next question is whether or not the Appellant is the primary carer. It is clear from the questions posed by Ms Jones in cross-examination that she seeks to maintain that the Appellant is not the primary carer. I am satisfied that there is effectively in this instant matter normal family care i.e. both the Appellant and Ms [A] care for the children. I also accept that due to her advanced stage of pregnancy a greater responsibility falls upon the Appellant and that that is likely to continue bearing in mind the ages of the children and the fact that from May onwards Ms [A] will have a baby

to look after. That is not to say that the Appellant will not carry out his normal and anticipated responsibilities in caring for his third child.

17. The question then arises as to the reasonableness of removal and the first issue I address is the special and exceptional circumstances relating to the elder child's autism. There is a considerable amount of documentation in the bundle relating to this condition and the considerable amount of time that is given by the Appellant to looking after and assisting his son. I consider that that is a factor I can take into account. It is appropriate to give due consideration to the relevant case law which clearly is supportive of the Appellant's position and poses the important question as to whether it would be reasonable to expect a child in this instance to leave the UK. I find that it would not.
18. The Appellant and Ms [A] have a close family relationship. That is not challenged by the Secretary of State. The Home Office guidelines indicate clearly that an assessment must take into account a child's best interests as a primary consideration. I am satisfied, looking at the factors considered that firstly there is a genuine and subsisting parental relationship. Secondly that the children are British citizens and thirdly that it would not be reasonable to expect the children to leave the UK. As has been mentioned to me by Mr Plowright in his submissions and skeleton arguments, the Supreme Court in *KO* found that reasonableness is to be considered in the real-world context in which the child finds themselves. Whilst accepting that the parents' immigration status is a relevant factor I find that there are as set out above special circumstances where it would be appropriate for the children to remain in the UK and for their parent to also remain.
19. I am not satisfied in this instant case that this is one of those cases where the Appellant should be required to leave. I do not consider that the threshold has been reached whereby the finding on the TOEIC certificate alone should be sufficient in this instant case to ask him to leave. He is in a settled relationship. He has two to three young children who are British citizens. He has considerable responsibility for the bringing up of those children. One of the children has autism and requires special attention which I am satisfied he provides a substantial amount of time and input into.
20. In all the circumstances I am consequently satisfied that it would be a disproportionate interference with the Appellant's family life to remove him from the UK and consequently the Appellant's appeal is allowed on human rights grounds.

### **Notice of Decision**

The Appellant's appeal is allowed on human rights grounds.

No anonymity direction is made.

Signed

Date 12 March 2019

Deputy Upper Tribunal Judge D N Harris

**TO THE RESPONDENT  
FEE AWARD**

No application is made for a fee award and none is made.

Signed

Date 12 March 2019

Deputy Upper Tribunal Judge D N Harris