



**Upper Tribunal  
(Immigration and Asylum Chamber)**  
HU/16800/2018

Appeal Numbers:

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 28 March 2019**

**Decision & Reasons  
Promulgated  
On 4 April 2019**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE SHAERF**

**Between**

**PK  
(ANONYMITY DIRECTION MADE)**

Appellants

**And**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr P Jorro of Counsel instructed by Visa Expert Ltd  
For the Respondent: Mr L Tarlow of the Specialist Appeals Team

**Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure  
(Upper Tribunal) Rules 2008**

**Unless and until a Tribunal or Court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify the Appellant or any member of the Appellant's family. This direction applies both to the Appellant and to the**

**Respondent. Failure to comply with this direction could lead to contempt of court proceedings.**

### **DECISION AND REASONS**

#### **The Appellant**

1. The Appellant is married. She and her husband are citizens of India. He has leave for a period of 30 months. The date upon which his leave expires is not evident from the Tribunal file. They have a child born in 2013 who is now a naturalised British citizen and a second child born in 2018, some 11 months after the Appellant's appeal rights last became exhausted.
2. On 27 January 2011 the Appellant entered with leave as a Tier 4 (General) student migrant which leave was extended in the same capacity to expire on 18 November 2014. She then applied in time for further leave on the basis of her private and family life in the United Kingdom. On 11 February 2015 the Respondent (the SSHD) refused the application. The Appellant appealed and her appeal rights became exhausted on 7 July 2017. More than a year later, on 06 August 2018 she made a further claim based on her family life and in particular with her child who had some three weeks earlier become a naturalised British citizen.

#### **The SSHD's decision**

3. On 06 August 2019, a year later to the day, the SSHD refused it. The Appellant was not considered to meet the suitability requirements because the SSHD asserted she had used a proxy test taker for a TOEIC speaking test on 16 May 2012 with Educational Testing Service (ETS) at Elizabeth College.
4. The SSHD accepted that Section EX1 of Appendix FM to the Immigration Rules was applicable but made no further analysis of its applicability to the circumstances of the Appellant or her child. The Appellant failed to meet any of the time critical requirements of paragraph 276ADE(1) of the Immigration Rules. The SSHD noted the Appellant's parents resided in India where the Appellant had spent the majority of her life and so concluded that there were no insurmountable obstacles to her read-integration on return. Further, there were no exceptional circumstances which warranted consideration of the grant of leave to remain outside the Immigration Rules. Additionally, the SSHD considered it would not be justifiably harsh for the Appellant's child to live in India. The reasons for refusal did not include a consideration of any specific circumstances of the Appellant or her child.

#### **Proceedings in the First-tier Tribunal**

5. On 14 August 2018 the Appellant lodged notice of appeal challenging the part of the refusal based on the SSHD's claim she had used a proxy test taker and on the basis that the decision in respect of her child, a British citizen was perverse. The SSHD had not considered the best interests of

the child and the decision was contrary to the SSHD's then current Immigration Directorate Instruction Family Migration: Appendix FM Section 1.0b of 22 February 2018 and finally that it was disproportionate to her rights protected by Article 8 of the European Convention.

6. By a decision promulgated on 29 January 2019 Judge of the First-tier Tribunal NJ Osborne dismissed the appeal on all grounds. On 11 February 2019 the Appellant lodged notice of appeal.
7. On 22 February 2019 Judge of the First-tier Tribunal EM Simpson granted permission because it was arguable the Judge had erred in relation to his treatment of the apparent facility or lack of facility of the Appellant in the English language in which she chose to give evidence although an interpreter was available. Particularly so, in the light of what the Judge recorded at paragraph 40 of his decision that the Appellant relied on the interpreter when it came to submissions. Further criticisms were made of the Judge's reasons for his adverse credibility findings. Additionally, Judge EM Simpson referred to difficulties that arguably now arose in the light of the Judge's assessment of the proportionality of the decision to return to India the

### **The Upper Tribunal Hearing**

8. The Appellant attended the hearing. I explained the purpose of and procedure to be followed at an Error of Law hearing. She confirmed her address but otherwise took no active part in the proceedings.
9. At the start of the hearing the likely issues in the appeal were canvassed, particularly in the light that the Appellant's husband has limited discretionary leave. The Judge had noted that this was on account of the British citizenship status of the eldest child of the family.
10. Both parties properly agreed without the making of full submissions that the Judge's assessment of the Appellant's claim based on her private and family life contained an error of law, particularly in the light of the Presidential panel decision subsequently reported on 15 March 2019 in *JG (s 117B(6): "reasonable to leave" UK) Turkey [2019] UKUT 00072 (IAC)* and his failure adequately to address the fact the Appellant's elder child is a British citizen in the context of the jurisprudence in *ZH (Tanzania) v SSHD [2011] UKSC 4*. The failure may have originated from the proposition of law at paragraph 8 of his decision that he had to consider the facts as at the date of the Appellant's application, at which time the eldest child had not been naturalised. This is an error of law because it failed to reflect the provisions of s.85(4) Nationality, Immigration and Asylum Act 2002 as amended. The Judge made no reference to whether the naturalisation constituted a new matter for the purpose of s.85(5).
11. The parties proposed that the substantive appeal be settled immediately on the basis that it be allowed so that the Appellant might be granted discretionary leave in line with that of her husband. There was no

explanation why the appeals of the Appellant and her husband had not been linked. Given the apparent reason why the Appellant's husband has been granted limited leave, and the presence of the second child who at the date of the Upper Tribunal hearing was less than 12 months old, I do not find the Respondent's decision to refuse the Appellant leave, at least in line with her husband, to be proportionate. This finding is made but without any finding being made in relation to the deceit alleged by the SSHD to have been used by the Appellant in the claimed employment of a proxy TOEIC test taker. This is a matter which is not disposed of by this decision and will remain a potential issue to be addressed in any future application by the Appellant or decision by the SSHD.

### **Anonymity**

12. The First-tier Tribunal made an anonymity direction and there were no submissions made why it should not be continued. There are two minor children involved and in the circumstances the anonymity direction is continued.

### **SUMMARY OF DECISION**

**The decision of the First-tier Tribunal contains an error of law and is set aside.**

**The appeal the Appellant is allowed.**

**Anonymity direction continued.**

Signed/Official Crest

Date 01.04. 2019

Designated Judge Shaerf  
A Deputy Judge of the Upper Tribunal

### **TO THE RESPONDENT: FEE AWARD**

I have allowed the appeal in circumstances in which I do not consider it appropriate to make any fee award.

Signed/Official Crest

Date 01. 04. 2019

Designated Judge Shaerf  
A Deputy Judge of the Upper Tribunal