Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/08514/2016

THE IMMIGRATION ACTS

Heard at Field House
On 10 January 2018

Decision & Reasons Promulgated
On 23 March 2018

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

SN
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr G Davison, Counsel instructed by Adam Bernard Solicitors
For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This appeal comes back before me following a hearing on 13 July 2017 which resulted in my finding that the First-tier Tribunal Judge ("FtJ") erred in law in dismissing the appellant's appeal against the respondent's decision to refuse leave to remain on Article 8 grounds.

2. The error of law decision, described as a Decision and Directions, is included as an Annex to this decision and reference should be made to it for the full background to the appeal, and my reasons for finding that the FtJ erred in law.

3. The resumed hearing before me was for the re-making of the decision. An outline of aspects of the background to the appeal is as follows. The respondent refused the application for leave to remain on the basis that the appellant did not meet the suitability requirements of the Immigration Rules because he had used deception in obtaining an English language test certificate. This meant that he could not benefit from section EX.1. of Appendix FM in terms of his relationships with his wife and child in the UK, and the public interest made it undesirable to allow him to remain in the UK.

4. In my error of law decision I concluded that the FtJ did not err in her conclusion that the appellant had used deception and the conclusion that the respondent had correctly applied the suitability requirements of the Rules to the appellant's human rights claim. I found that other aspects of the grounds were not made out.

5. I did however, conclude that the FtJ had erred in law in terms of a failure to apply the respondent's guidance on the issue of reasonableness of expecting a British citizen child to leave the UK, as explained from [46] of the error of law decision. The guidance to which I referred was not drawn to the FtJ's attention by either party at the hearing before her.

6. For the resumed hearing, there was a further bundle of documents submitted on behalf of the appellant consisting of 53 pages (the pagination in the index to the bundle not reflecting the actual contents of the bundle in terms of the pages). I was also provided with a complete copy of the guidance entitled Immigration Directorate Instruction Family Migration: Appendix FM Section 1.0b, Family life (as a Partner or Parent) and Private life: 10-Year Routes, dated August 2015 ("the IDI's").

7. At the start of the hearing, Mr Jarvis was able to clarify a matter upon which I had sought clarification, namely the date of the appellant's application for leave to remain which resulted in the challenged decision. It was agreed between the parties that that date was 6 October 2015, the application being dated 2 October 2015 but being stamped as received on 6 October 2015. The date of 14 January 2016 in the respondent's decision was accepted as being in error.

8. Mr Davison raised an issue in relation to the lawfulness of any disclosure to the Tribunal in relation to Family Court documents. This issue was resolved by agreement between the parties and nothing more need be said about it.

9. Mr Jarvis having indicated that if the appellant were to be called to give evidence he would have no questions for him, he was not called to give evidence and his latest witness statement was relied on on his behalf. Mr Jarvis also indicated that he would not take any issue in relation to the appellant not having been called to give evidence, in the light of the fact that he had indicated that he would have had no questions for him.

Submissions

10. There was some ebb and flow in the submissions on behalf of the parties, but what follows is a summary of those submissions.

11. Mr Jarvis submitted that the FtJ had properly found that the appellant had failed to meet the suitability requirements of the Rules, thus meaning that he was excluded from the rest of Appendix FM, including EX.1. He also referred to GEN.3.2 of the Rules which was introduced via HC 290 on 10 August 2017 (and about which Mr Jarvis provided further detail and brief submissions post-hearing, with my agreement and with the consent of Mr Davison).

12. Mr Jarvis confirmed that it was not the respondent's position that the appellant's child or stepchild could be expected to leave the UK with him. He made it clear that this was a 'separation case'. Thus, it was submitted that s.117B(6) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") did not apply because the respondent did not "expect" any of the children to leave the UK. The public interest considerations, it was submitted, were such as to justify the appellant being removed and separated from his family. The appellant had used deception, the FtJ had commented on the appellant's lack of English language ability, and the appellant's family life was established in precarious circumstances in terms of his status in the UK. Separation would be proportionate, it was submitted. The appellant had been part of an overall flagrant disregard for immigration control.

13. Mr Jarvis submitted that this was not a *Chikwamba* case, given that it was not simply a question of the respondent requiring the appellant to leave the UK to make an application for entry clearance, although he could make such an application in due course.

14. Furthermore, if, in that context, in relation to a putative application for entry clearance, one had to look at the extent to which the appellant met the financial requirements of the Rules, it was clear that he could not do so, with reference to Appendix FM-SE.

15. It was accepted on behalf of the respondent that the children's best interests were to remain with their parents, and that the children were not to blame for the appellant's actions. However, it was submitted that the public interest in this case was strong enough to justify overriding their best interests, likewise in relation to the appellant's relationship with his spouse, a relationship established in precarious immigration circumstances.

16. Mr Davison referred to the IDI's at section 5 which deals with the suitability requirements of the Rules, whereby it states that in addressing suitability criteria under Appendix FM decision makers must refer to the Criminality Guidance, and web links are given for the Criminality Guidance, both internal (to the Home Office) and external. However, he said that that guidance could not be accessed and therefore the basis upon which the suitability criteria are applied is not able to be established.

17. Thus, it was argued that although the respondent suggested that the appellant could not have 'access' to paragraph EX.1, the basis upon which the suitability criteria are applied could not be established. In that context I was also referred to page 56 of the IDI's. Where that refers to criminality, it was submitted that it did not apply in the appellant's case because there had been no criminal conviction and furthermore, the

standard of proof required in order to establish that he failed to meet the suitability requirements of the Rules was not the criminal standard. It was however, accepted that whether under EX.1, or under the newly-introduced GEN 3.2, or in an Article 8 assessment outside the Rules, the same considerations would apply.

18. In relation to s.117B(6), it was submitted that the respondent's interpretation of that section was incorrect. Once it is accepted that it would not be reasonable to expect a child to leave the UK, and there is a genuine and subsisting relationship with a parent, that indicates where the public interest lies in Article 8 terms.

19. In terms of the extent to which the appellant was able to meet the financial requirements of the Rules, I was referred to the financial information which, it was submitted, indicated that the appellant's spouse earned about £20,000 per annum. It was accepted however, that the specified evidence required by Appendix FM-SE had not been provided. On the other hand, the entry clearance point was not of particular relevance, it was submitted.

20. After the hearing I was provided on behalf of the respondent with a copy of the amended Rules under GEN.3.2, relating to the issue of "Exceptional circumstances" indicating a breach of Article 8 in circumstances where the individual does not meet the requirements of the Rules. It was initially suggested on behalf of the respondent in those post-hearing submissions that GEN.3.2 does not apply because the decision was made before that aspect of the Rules was introduced, on 10 August 2017. Subsequently however, it was stated that the respondent's "policy line" is that the Tribunal is able to consider and apply that newly-introduced aspect of the Rules, but that in any event the analysis would be the same whether under GEN.3.2, or outside the Rules under Article 8 proper.

Assessment

21. Mr Jarvis in submissions emphasised that it was not the respondent's case that either the appellant's biological child FI, or indeed his wife's child from her former relationship, AA, could be expected to leave the UK. It was agreed between the parties that the information now provided does reveal that AA does have contact with her father under a Child Arrangements Order. I would add that that contact is significant in terms of its frequency and duration.

22. In fairness, it must be said that the respondent's position in relation to the appellant's removal, and the question of the children remaining in the UK, has in fact been consistent. The decision letter makes the respondent's view clear that this was a case where it was in the public interest for the appellant to be separated from the children and from his spouse. Furthermore, although the FtJ concluded that it would be reasonable to expect both children, who are qualifying children within the meaning of s.117D of the 2002 Act, to leave the UK, it is not apparent that such was argued on behalf of the respondent before her.

23. The 'rule 24' response to the grounds of appeal also makes it clear that there is no decision by the respondent for the appellant's wife or the children to leave the UK. I should say that at the hearing before me on 13 July 2017 the respondent's position was not so clear, and I did not at that hearing seek clarification. Nevertheless, as I

have indicated, the respondent's position is to the effect that there is no expectation of the children leaving the UK. It is that issue of 'expectation' which was the lynchpin of the respondent's argument before me at the resumed hearing.

24. Before coming on to consider the application of s.117B(6) it is necessary to deal with the question raised by Mr Davison in terms of the extent to which the respondent had established that the suitability requirements of the Rules applied, thus excluding the appellant from having access to section EX.1 of the Rules, and indeed GEN.3.2(2), if it applies.

25. Mr Jarvis was understandably concerned about the fact that the argument about establishing the respondent's criteria for applying the suitability requirements of the Rules had not previously been raised in terms of the lack of accessibility of the applicable guidance to which I was referred. I make no criticism here of Mr Davison who, having come to the case rather late, very properly felt that he was bound to advance an argument which he considered had arguable merit, even though it had not been raised before.

26. Given that it was agreed on all sides that whether under the Rules or outside the Rules the assessment of the children's position would be the same, the argument about the application of the suitability requirements of the Rules is, in a sense, academic. However, as was indicated to the parties at the hearing, and indeed flagged up by Mr Jarvis, I had said in my error of law decision that there was no error in the FtJ's assessment of the extent to which the suitability requirements of the Rules applied. That is so. At [41] I said that the FtJ was entitled to find that the respondent correctly applied the suitability requirements of the Rules to the appellant's human rights claim. The argument sought to be advanced by Mr Davison was not previously advanced and I do not consider that it would be appropriate for me now to resile from the decision on the issue that I have already made.

27. I do not consider it necessary to examine in detail the application of GEN.3.2(2), although I note that the respondent's policy, as explained very briefly in written submissions post-hearing, is to the effect that notwithstanding the implementation date of that provision, it would apply to this appellant notwithstanding that the decision was made prior to 10 August 2017. For completeness however, I set out the relevant provisions as follows:

> "GEN.3.2.
>
> (1) Subject to sub-paragraph (4), where an application for entry clearance or leave to enter or remain made under this Appendix, or an application for leave to remain which has otherwise been considered under this Appendix, does not otherwise meet the requirements of this Appendix or Part 9 of the Rules, the decision-maker must consider whether the circumstances in sub-paragraph (2) apply.
>
> (2) Where sub-paragraph (1) above applies, the decision-maker must consider, on the basis of the information provided by the applicant, whether there are exceptional circumstances which would render refusal of entry clearance, or leave to enter or remain, a breach of Article 8 of the European Convention on Human Rights, because such refusal would result in unjustifiably harsh

consequences for the applicant, their partner, a relevant child or another family member whose Article 8 rights it is evident from that information would be affected by a decision to refuse the application."

28. It is clear from that newly-introduced aspect of the Rules that access, as it were, to Article 8 is accepted on behalf of the respondent in certain cases, where there are exceptional circumstances, a phrase which has been considered in other cases.

29. This is a case in which it is agreed by the parties that Article 8 outside the Rules does need to be considered. With that in mind, I set out s.117B(6) of the 2002 Act, which was the focus for the arguments before me. It states as follows:

> "**117B Article 8: public interest considerations applicable in all cases**:
>
> …
>
> (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."

30. Mr Jarvis referred to the decision in *MA (Pakistan) & Ors v Secretary of State for the Home Department* [2016] EWCA Civ 705. He suggested that strictly, the Secretary of State is not actually required to apply s.117B, although he also pointed out that in *MA (Pakistan)* it was said that the Secretary of State should have regard to it. I think it is worthwhile to set out in full what the Court of Appeal said in that context at [15]:

> "Section 117A states in terms that section 117B applies to courts and tribunals. Curiously the Secretary of State is not in terms bound by these rules but it would be bizarre for her to depart from Parliament's view of the public interest as reflected in the legislation, and if she were to do so in a manner prejudicial to the individual, it would simply invite appeals."

31. It is also important however, to refer to other paragraphs of that decision which are significant. Thus, the Court said as follows:

> "(17) Subsection (6) falls into a different category again. It does not simply identify factors which bear upon the public interest question. It resolves that question in the context of article 8 applications which satisfy the conditions in paragraphs (a) and (b). It does so by stipulating that once those conditions are satisfied, the public interest will not require the applicant's removal. Since the interference with the right to private or family life under article 8(1) can only be justified where there is a sufficiently strong countervailing public interest falling within article 8(2), if the public interest does not require removal, there is no other basis on which removal could be justified. It follows, in my judgment, that there can be no doubt that section 117B(6) must be read as a self-contained provision in the sense that Parliament has stipulated that where the conditions specified in the sub-section are satisfied, the public interest will not justify removal. It is not legitimate to have regard to public interest considerations

unless that is permitted, either explicitly or implicitly, by the subsection itself.

(18) Ms Giovannetti QC, counsel for the Secretary of State, argued otherwise. She contended that there may be circumstances where even though the provisions of paragraphs (a) and (b) are satisfied and the applicant is not liable for deportation, the Secretary of State may nonetheless refuse leave to remain on wider public interest grounds. But as she had to accept, that analysis requires adding words to subsection (6) to the effect that where the conditions are satisfied, the public interest will not *normally* require removal, because on her approach, sometimes it will. I see no warrant for distorting the unambiguous language of the section in that way.

(19) In my judgment, therefore, the only questions which courts and tribunals need to ask when applying section 117B(6) are the following:

(1) Is the applicant liable to deportation? If so, section 117B is inapplicable and instead the relevant code will usually be found in section 117C.

(2) Does the applicant have a genuine and subsisting parental relationship with the child?

(3) Is the child a qualifying child as defined in section 117D?

(4) Is it unreasonable to expect the child to leave the United Kingdom?

(20) If the answer to the first question is no, and to the other three questions is yes, the conclusion must be that article 8 is infringed. "

32. On behalf of the respondent it was accepted that if s.117B(6) applied, then leave would have to be granted. But Mr Jarvis alighted on the word "expect" in subparagraph (b) to suggest that if the Secretary of State does not *expect* the child to leave the UK then that provision does not bite.

33. It could be said, perhaps, that the argument has some superficial attraction. However, I have no hesitation in rejecting it. There are some immediately obvious reasons for doing so. To 'hive off' the phrase "to expect" from s.117B(6)(b) is to corrupt the meaning of that sub-section. It deprives it of what I consider to be the obvious intention of requiring an objective assessment of the reasonableness of a child leaving the UK. It is either reasonable or it is not reasonable to expect a child to leave. There is a wrong and a right answer. If the Secretary of State's argument were to hold good, it would mean that in a case where there is a genuine and subsisting relationship with a qualifying child where someone is not liable to deportation, the Secretary of State could simply bypass the import of s.117B(6) by stating that she does not expect a qualifying child to leave.

34. In addition, if the respondent's position is that she does not expect the children in this case to leave, one only needs to ask the question 'why not?' to see that the respondent's argument is circular. It can only be the case that the respondent does not expect the children to leave because it would not be reasonable to have that expectation. That being the case, the appellant is pulled back within the regime of s.117B(6).

35. In *MA (Pakistan)* at [19], it was stated that if the appellant is not liable to deportation, has a genuine and subsisting parental relationship with a qualifying child and it is not reasonable to expect the child to leave the UK, the conclusion must be that the appellant's Article 8 rights are infringed by his removal. As was stated at [17], where the conditions specified in the sub-section are satisfied, the public interest will not justify removal. There is no other basis upon which removal could be justified.

36. Applying that reasoning to the circumstances of this appeal, the appellant is not liable to deportation, does have a genuine and subsisting parental relationship with qualifying children and it would not be reasonable to expect the children to leave the UK. In those circumstances, his removal would amount to a breach of his Article 8 rights.

37. On the assumption then, that the appeal needs to be determined outside the Rules under Article 8 proper, his appeal must be allowed.

Decision

38. The decision of the First-tier Tribunal involved the making of an error on a point of law. Its decision having been set aside, I allow the appeal under Article 8 of the ECHR.

Upper Tribunal Judge Kopieczek 22/03/18

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

Because this decision involves minors, unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his 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.

Upper Tribunal Judge Kopieczek 22/03/18

ANNEX

DECISION AND DIRECTIONS

1. On 14 January 2016 he applied for leave to remain on Article 8 grounds. His application was refused in a decision dated 30 March 2016. The appellant appealed against that decision and his appeal came before First-tier Tribunal Judge E B Grant ("the FtJ") on 27 March 2017, resulting in the appeal being dismissed. The further background to the appeal is best illustrated with reference to the FtJ's decision.

The decision of the FtJ

2. The FtJ referred to the background to the appellant's claim, including that following his leave as a student, he was granted leave to remain as a Tier 1 (Entrepreneur), from 3 October 2012 to 3 October 2015. She also referred to the appellant being married to a British citizen, NH, and that they have a child FI, who at the time of the hearing was 18 months old. The appellant's wife also has a child, AA, aged seven, from another relationship.

3. Referring to the basis of the appellant's claim to be entitled to remain in the UK, amongst other things she referred to the appellant's contention that he did not use deception in taking an English language test, as asserted by the respondent. The appellant relied on his relationships in the community, the fact that his wife has never lived in Pakistan and nor have the children, and that he is settled in the UK. She referred to the studies that he had undertaken here.

4. The FtJ also summarised the evidence given by the appellant's wife. She said in evidence that all her friends and relatives are in the UK and that she has never lived in Pakistan. She had visited Pakistan on family visits. The evidence in relation to the contact that AA has with her father was to the effect that she does not see him much, maybe twice a month, and that he sometimes contributes towards the cost of her upkeep. She said that she and the appellant had been living together since 2013.

5. The FtJ summarised the respondent's case, including in terms of the detail of the allegation of deception in the obtaining of an English language certificate, setting out verbatim the details from the decision letter. She noted that the respondent concluded that the appellant did not meet the suitability requirements of the Article 8 Rules.

6. In her findings she referred at [17] to a respondent's bundle and supplementary bundle containing various items of evidence in relation to the allegation of deception in the English language test.

7. At [18] she found that having heard the appellant give evidence, it was fair to say that he could communicate in English but his English language skills were poor and she had to ask him to repeat his answers many times during the hearing because she could not understand his English. She said that the respondent's evidence and the appellant's "demonstrably poor English language ability" at the hearing, led her to conclude that the respondent had discharged the burden of proof in showing that the

appellant had obtained the English language test result fraudulently. Thus, she concluded that the appellant did not meet the suitability requirements of the Rules and could not therefore, meet the requirements of Appendix FM, or paragraph 276ADE.

8. She concluded that the appellant and his wife have a genuine and subsisting relationship and that family life exists between the appellant, the sponsor and the two children.

9. She said at [21] that the respondent's decision was justified in the interests of the prevention of crime and disorder, the maintenance of effective immigration control and the wider requirement that immigrants should not use false documents to obtain status in the UK thereby breaching the UK's immigration laws. She determined that the only real issue to be resolved was whether it was proportionate for the appellant to be returned to Pakistan.

10. She referred to the various factors contained in s.117B of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), finding that the appellant could speak some English, but that there was no evidence that he was financially independent. In relation to s.117B(4), she concluded that little weight should be attached to the appellant's private life or his relationship with his wife, formed at a time when the appellant was in the UK unlawfully. In this she referred to his visa having expired several months before he made his human rights application, at a time when he was in the UK unlawfully. Furthermore, she found that the appellant knew he had obtained his status by fraud, having used a proxy to take the English language test, thus rendering the grant of the visa in October 2012 vitiated by fraud. She concluded that even if the respondent was unaware of the appellant's dishonest conduct at that stage, the appellant certainly knew when he entered into the relationship with his wife that his status in the UK was unlawful. Similarly, his private life attracted little weight on the basis that his immigration status was precarious.

11. The FtJ went on however, to refer to s.117B(6) in terms of the public interest not requiring the appellant's removal where he has a genuine and subsisting relationship with a qualifying child and where it would not be reasonable to expect the child to leave the UK. The appellant, she accepted, has a genuine and subsisting relationship with two qualifying children. Thus, she identified the question as being whether it would be reasonable to expect the children to leave the UK.

12. Ultimately, she concluded that it would not be unreasonable to expect either of the children to leave the UK, citing a number of factors in her assessment, including the best interests of the children. She concluded that there was a paucity of information about the child AA's relationship with her father, referring to the appellant's wife's witness statement. At [30] she concluded that there was "no evidence" before her that the eldest child's father has any contact with his child, or as to his whereabouts, or whether he objects to his daughter going to live in Pakistan.

13. In the following paragraph she said that there was no "credible evidence" that that child has contact with her natural father. She referred to the fact that he did not give

any evidence before the Tribunal, and stated that the appellant's wife was hesitant when giving evidence as to her eldest child's natural father's involvement in her life. She noted that that was something about which her witness statement was "entirely silent", as was the appellant's.

14. She referred to the appellant's wife's background in the Pakistani community and the contact she has with the appellant's family in Pakistan through Skype, also referring to her being able to speak Urdu.

15. She concluded that the eldest child is young enough to adapt to a change of school and continue her education in Pakistan, finding that there was no evidence that it would not be in her best interests to change schools at her young age. She concluded that the family as a whole could relocate as an intact family unit.

16. In coming to that view she said that she took into account that the eldest child is 7 years old, but in the absence of any evidence about her (and there was none in the appellant's bundle, she said) it was not unreasonable for her to remain with her mother, stepfather and younger half-sibling in Pakistan.

17. Referring to the proportionality balancing exercise, she said that it was relevant that the appellant did not meet the requirements of the Rules, either on suitability grounds, or with reference to paragraph 276ADE, for the reasons set out in the refusal letter, with which she agreed. It was also the case that it was not claimed that the family met the financial requirements of the Rules. She referred to the financial evidence that was before her.

18. There was no evidence that the appellant's wife was in employment, but the appellant was almost a fully qualified accountant and would be able to complete the remaining modules online. She referred to his previous work in an accountancy role in Pakistan. She concluded that he had the skills and ability to support his family on return to Pakistan.

The grounds of appeal and submissions

19. The appellant's grounds contend that the FtJ had failed to consider that the appellant had remained lawfully in the UK, and had not remained beyond the period of his permitted leave.

20. In relation to the English language deception issue, it is contended that the FtJ made a subjective assessment of the appellant's English language ability, failing to take into account that the issues surrounding his appeal and the stress of the hearing might have affected his ability to express himself. Furthermore, it is argued that the English language test result in spoken English that was relied on in terms of the allegation of fraud, actually only indicated a score of 120/200, or level 5, which it is said was at a level which means that numerous errors were likely. It is suggested that the appellant's ability in English at the hearing was a wholly unreliable guide to the level of English language ability in 2012.

21. Further, the FtJ had not identified what she assessed as "credible evidence" in the respondent's bundle in terms of the fraud used in the English language test.

22. In addition, it is asserted that the FtJ made no reference to the evidence put forward by the appellant about the taking of the test or about his ability in English. Thus, it was unclear whether she had taken that evidence into account at all, or if she had, whether she had rejected it. If she had rejected it, she had failed to explain her reasons for so doing.

23. The further contention is that the FtJ had erred in apparently accepting that deception in a prior application was more serious, and justified a mandatory refusal under the suitability requirement S-LTR1.6.

24. In relation to the weight to be given to the appellant's family life, it is asserted that the FtJ failed to consider that the appellant's relationship with his wife began in 2013, and their child was born in September 2015, throughout which time he had leave to stay in the UK. Even if the FtJ was right to conclude that the appellant's stay could be regarded as having been unlawful, there was no suggestion that his wife was aware of any defect in his last period of leave.

25. It is further contended that the FtJ failed to attach weight to the fact that the children concerned are British citizens, and the importance of citizenship. Furthermore, she failed to consider that both children are female and she was being invited by the respondent to find that it was reasonable for them to go to live in a country where their gender would make them members of a particular social group under the Refugee Convention.

26. In submissions on behalf of the appellant before me it was suggested that there was no proper consideration given to the situation for each of the children separately. Further, the conclusion at [30] that there was no evidence that the eldest child's father had any contact with his child, or that he objected to her going to live in Pakistan, was a significant finding made without any evidence to support it. It was suggested that the FtJ could have asked questions about this at the hearing, but did not do so.

27. A further, new, point was advanced in terms of s.1 of the Child Abduction Act 1984 to the effect that it would be a criminal offence for the appellant to take AA out of the UK.

28. It was further submitted that the FtJ had failed to take into account the British citizenship of the children, and there had been no analysis of the children's best interests. No information had been obtained from the school for example, in relation to the older child.

29. The same arguments as advanced in the grounds in relation to the allegation of deception in the English language test were advanced. It was said that there was no consideration by the FtJ of the appellant's evidence, although the argument seems only to be in relation to the oral evidence that he gave.

30. The decision in *SF and others (Guidance, post-2014 Act) Albania* [2017] UKUT 00120 (IAC) was relied on, although the argument in that respect was not fully developed.

31. Mr Singh relied on the 'rule 24' response. he submitted that at [30]-[31] the FtJ had made findings in relation to the eldest child's contact with her father. The FtJ referred to the appellant's wife as having been hesitant when giving evidence as to her eldest child's natural father's involvement in her life. There was no evidence of any objection by him to his daughter going to Pakistan.

32. In relation to the appellant's English language ability, consistently with the decision in *Majumder & Qadir v Secretary of State for the Home Department* [2016] EWCA Civ 1167, the FtJ was entitled to take into account the appellant's English language ability, as it appeared to her at the hearing. Furthermore, it is clear from [18] that she considered the respondent's evidence in the supplementary bundle in relation to the allegation of the fraudulent obtaining of the English language test certificate.

33. In relation to *SF and others*, the issue raised is not one that is apparent from the grounds of appeal. In any event, it can be seen from [21] of her decision that the FtJ made her decision in line with the guidance.

Conclusions

34. In submissions, Mr Cogan sought to persuade me that the FtJ erred in law by failing to have regard to s.1 of the Child Abduction Act 1984. The basis of the argument is, in effect, that it would be a criminal offence for the appellant to take his stepdaughter, AA, out of the UK.

35. Aside from the fact that that it is not a matter upon which permission to appeal was sought or was granted, I do not consider that there is any merit in the argument. In the first place, it is doubtful whether the appellant comes within the definition of a person "connected with a child" within the meaning of s.1. Within the definition, to be a guardian he would need to come within the definition of a guardian under the Children Act 1989. Likewise, he is not a person who would be treated as having custody of the child within the meaning of that section. Furthermore, I cannot see that the term "appropriate consent" applies in connection with AA's natural father, having regard to the definitions of "appropriate consent" within s.1(3). Under s.1(3)(a)(ii) the child's father could not, on the facts, be described as someone who has parental responsibility for the child.

36. So far as the written grounds are concerned, I am not satisfied that there is any error of law in the FtJ's conclusions in terms of the appellant's use of deception in obtaining an English language test certificate. It is said in the grounds that the FtJ failed to explain what evidence she relied on in terms of evidence in the respondent's bundle as to the use of deception. However, at [17] and [18] she referred to a supplementary bundle of documents provided by the respondent which included witness statements and an expert's report. At [14] she set out verbatim the respondent's decision letter in terms of the detail of the test taken.

37. The matters advanced in the grounds in relation to the stress that the appellant might have been under in expressing himself at a hearing, and the relatively low level 'spoken test' score, are all just points of disagreement with the FtJ's decision. Although it is said that because the test score was low the appellant would have been unlikely to have used a proxy test taker, there may be a number of reasons why a

proxy test taker obtained a low score. It may be that a proxy test taker was in fact not as proficient in English as may have been represented to the person who wanted someone else to take the test for him. It may be that a relatively low score might simply be part of the deception. There are a number of possibilities.

38. Although the grounds suggest that the FtJ made no reference to the evidence put forward by the appellant about the taking of the test, or about his ability in English, the appellant's case in this respect is set out from [3] of the FtJ's decision. The appellant's witness statement, in effect, amounts to a denial of deception, and not much else. There is nothing to indicate that the FtJ failed to take into account the appellant's evidence on the issue.

39. It was not just the appellant's poor English language ability at the hearing that the FtJ took into account, but the evidence in the respondent's bundle. She expressly said as much at [18] where she referred to the respondent's evidence "coupled with the appellant['s] demonstrably poor English language ability at the Tribunal hearing".

40. The FtJ was entitled to find that the respondent correctly applied the suitability requirements of the Rules to the appellant's human rights claim.

41. Similarly, I do not consider that there is any merit in the contention that the FtJ failed to take into account the British citizenship of the children. It is plain that she did, for example at [19], and at [26] referring to them as "qualifying children". It is self-evidently a feature of s.117B of the 2002 Act that the issue of 'reasonableness' in terms of a child having to leave the UK only applies where the child is a qualifying child. In this case that qualifying status was on the basis that they are British citizens.

42. Furthermore, the contention in the grounds that the FtJ failed to take into account that the British citizen children being girls would be returning to a country, Pakistan, where they would constitute a member of a particular social group takes the challenge to the FtJ's decision no further. It does not appear that any particular disadvantage to them as females in Pakistan was advanced in argument before the FtJ. Certainly no background material is evident in the appellant's bundle, and there is nothing to indicate that any submissions in that respect were put before the FtJ.

43. I do not consider that the FtJ erred in law in her assessment of the extent to which AA's father has any contact with her. It is true that the appellant's wife said that AA's father does not see her much, but maybe twice a month and sometimes contributes towards the costs of her upkeep [11]. At [31] the FtJ said that there was "no credible evidence" that the eldest child has contact with her natural father and that no evidence had been adduced as to his whereabouts. There, she was not stating that there was *no* evidence of his contact with her, only that the evidence was not credible. The FtJ stated that AA's father did not give evidence before the Tribunal and the appellant's wife was hesitant when giving evidence as to her eldest child's natural father's involvement in her life. She also remarked on the fact that this was an issue about which there was nothing in the appellant's wife's witness statement, and that of the appellant. She quoted the witness statement of the appellant's wife at [29].

44. Although at [30] the FtJ said that there was "no evidence before her that AA's father has any contact with her", that conclusion must be seen in the context of her conclusion that there was no credible evidence of his involvement. She was further entitled to conclude that there was no evidence as to his whereabouts or as to whether he objected to his daughter going to live in Pakistan. This was not a matter that needed specifically to be put to the appellant or his wife. The FtJ was entitled to conclude that if he had any objection to her going to Pakistan, there would have been some evidence about it.

45. There is however, a matter which I do consider to be of significance and which has caused me to conclude that the FtJ's decision must be set aside for error of law. That relates to the application of the respondent's guidance in terms of the reasonableness of expecting a British citizen child to leave the UK. Its significance is apparent from the decision in *SF and others*. The guidance is entitled Immigration Directorate Instruction – Family Migration – Appendix FM, Section 1.0(B) "Family Life as a Partner or Parent and Private Life, 10 year Routes". It is set out at [7] of *SF and others* 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 child 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 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. If the decision maker is minded to refuse, in circumstances where separation would be the result, this decision should normally be discussed with a senior caseworker and, where appropriate, advice may be sought from the Office of the Children's Champion on the implications for the welfare of the child, in order to inform the decision."

46. It was rightly pointed out on behalf of the respondent before me that this is not an issue upon which permission was sought or granted. However, it seems to me that the situation is here different from that in relation to the new argument advanced in terms of the Child Abduction Act 1984, apart from the fact that the point actually has some merit, unlike that in relation to the Child Abduction Act.

47. In *SF and others* the guidance was similarly not a matter that was apparently relied on on behalf of the appellant in argument. It was drawn to the Tribunal's attention by the Presenting Officer. The Vice President plainly considered it a matter of importance because it was the Secretary of State's policy and needed to be taken into account in terms of the issue of the reasonableness of expecting a child who is a British citizen to leave the UK.

48. This guidance was not drawn to the FtJ's attention by either party in the case of the appeal before me. Unsurprisingly therefore, she did not hear argument in relation to it and evidently did not take it into account. Furthermore, it is not referred to in the respondent's decision.

49. Whereas in the past a decision by the respondent which failed to take into account an applicable policy could have resulted in an appeal being allowed on the basis that that the respondent's decision was not in accordance with the law, that is no longer a permissible ground of appeal. What *SF and others* decides however, is that the Secretary of State's guidance should be taken into account by a tribunal, where it applies. At [12] of that decision the following was said:

> "12. On occasion, perhaps where it has more information than the Secretary of State had or might have had, or perhaps if a case is exceptional, the Tribunal may find a reason for departing from such guidance. But 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 for the Tribunal to take such guidance into account and to apply it in assessing the same consideration in a case that came before it."

50. What is clear therefore, is that not only is the British citizen status of a child of great importance, the conduct of a parent or primary carer is also to be taken into account in the way set out in the guidance. The difficulty in relation to the FtJ's decision is that whilst at [21] she quite rightly referred to the unacceptability of the use of false documents, she did not, because it was not drawn to her attention, apply those considerations to the respondent's guidance, and thus did not determine whether the extent of the appellant's conduct was such as to mean either his separation from the children (his child in particular) and his spouse, or whether it was appropriate for the British citizen children to leave the UK.

51. In those circumstances, I am satisfied that the FtJ did err in law, albeit that she was entitled to have had drawn to her attention the guidance to which I have referred. That error of law is such as to require the decision to be set aside. This is not a case in which, on the basis of the submissions and evidence presently before me, it is possible to re-make the decision without a further hearing. At the very least, it will

be necessary to hear further submissions from the parties in terms of the impact of the respondent's guidance on the outcome of the appeal. Accordingly, there will need to be a further hearing in the Upper Tribunal.

52. At that further hearing, the parties should also be in a position to clarify when in fact it was that the appellant made his application for leave to remain, which resulted in the decision under appeal. The FtJ at [2] stated that it was on 6 October 2015. The respondent's decision however, states that it was 14 January 2016. The application form itself has a date stamp of 6 October 2015. Given that it appears that the appellant's leave expired on 3 October 2015, the date of this application is of some significance. The FtJ stated at [24] that the appellant's last visa expired several months before he made his human rights application, at a time when he was in the UK unlawfully. If the application was made on 6 October 2015, and his leave had expired on 3 October 2015, this would appear not to be correct. It is a matter that the parties need to clarify at the next hearing.

53. The parties are to have careful regard to the directions set out below in relation to the resumed hearing.

DIRECTIONS

(a) In relation to any further evidence relied on on behalf of either party, this must be contained within a further supplementary, paginated and indexed bundle.

(b) In relation to any person whom it is proposed to call to give oral evidence, there must be a witness statement drawn in sufficient detail to stand as evidence-in-chief, such that there is no need for any further examination-in-chief.

(c) Where I have concluded that there is no error of law in the FtJ's decision, those matters will not be revisited at the resumed hearing.

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

Because these proceedings involve children, unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their 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.

Upper Tribunal Judge Kopieczek 13/10/17