



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/12403/2016

**THE IMMIGRATION ACTS**

Heard at Manchester Civil Justice  
Centre

Decision & Reasons Promulgated

On 3 May 2018

On 16 May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE BIRRELL

Between

TAHIR AYUB  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mrs Ali of Shehzad Law Chambers Ltd

For the Respondent: Mr Diwnycz Senior Home Office Presenting Officer

**DECISION AND REASONS**

### Introduction

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.
2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge V A Cox promulgated on 19 July 2017 against a refusal of leave under Appendix FM and paragraph 276ADE, which dismissed the Appellant's appeal on all grounds.

### Background

3. The Appellant was born on 21 January 1985 and is a national of Pakistan.
4. The Appellant entered the UK on 4.12.07 with valid leave as a Work Permit Holder from 1.11.07 to 1.11.12. On 5.5.14 the Appellant applied for further leave to remain and was refused with no right of appeal. On 1.10.15 the Appellant applied for leave to remain on the basis of his relationship with Mariam Jabeen.
5. On 27.4.16 the Secretary of State refused the Appellant's application. The refusal letter gave a number of reasons: the Appellant did not meet the suitability requirements as he used a proxy in a language test on 16.7.13 for Appendix FM; for the purpose of EX.1 there were no insurmountable obstacles preventing the Appellant and his partner continuing their relationship in Pakistan; there were no very significant obstacles that would prevent the Appellant returning to Pakistan; there were no exceptional circumstances.

### The Judge's Decision

6. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Cox ("the Judge") dismissed the appeal against the Respondent's decision.
7. Grounds of appeal were lodged arguing that the assessment of whether it was 'unreasonable' for the purpose of s 117B6 of the Nationality Immigration and Asylum Act 2002 for the Appellant British citizen child to leave the UK was flawed given the Respondent's own guidance that it is ordinarily unreasonable to require a British citizen child to leave the UK; the Judge failed to have regard to the other provisions of s117B; the Judge wrongly referred to suitability requirements for entry clearance when the Appellant is present in the UK; the Judge's assessment of the ETS evidence was flawed.
8. On 2 January 2018 First-tier Tribunal Judge Pullig gave permission to appeal.

9. At the hearing I heard submissions from Mrs Ali on behalf of the Appellant that
- (a) She relied on her skeleton argument.
  - (b) Her main argument was that the assessment of the child's best interests was inadequate.
  - (c) At paragraph 59 the Judge accepted that the best interests of the child were to remain with both parents.
  - (d) The Appellant had made a number of attempts to regularise his position.
  - (e) The balancing exercise was flawed in that the Judge laced too much weight on the public interests.
  - (f) She accepted that the decision in respect of reasonableness was not perverse but the Judge did not show anxious scrutiny.
  - (g) In relation to the ETS test the Respondent had relied on generic evidence and the Appellant had tried to get from ETS evidence relating to his won test but none had been forthcoming.
  - (h) She accepted that the Judge had the evidence from the look up tool before her. The certificate obtained had never been used.
10. On behalf of the Respondent Mr Diwnycz submitted that:
- (a) This was a thorough decision where all of the relevant facts had been addressed.
  - (b) The evidence in respect of Project Façade was found to be persuasive.
  - (c) The fact that the Appellant had not used the certificate was not determinative of the issue: it was participation in fraudulent activity.
  - (d) The emails from ETS take the matter no further.
  - (e) In relation to the claim that evidence in respect of the ETS aspect of the case was served late is not an error of law: the Appellant was represented by Mrs Ali

who did not ask for an adjournment on the basis that the Appellant was prejudiced by the later service of evidence and the case proceeded.

## **The Law**

11. Errors of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on facts or evaluation or giving legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

12. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue under argument. Disagreement with an Immigration Judge's factual conclusions, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence that was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible.

## **Finding on Material Error**

13. Having heard those submissions I reached the conclusion that the Tribunal made no material errors of law.

14. In a detailed and carefully reasoned decision the Judge was considering a refusal letter dated 27 April 2016 where it was asserted that the Appellant did not meet the suitability requirements because he had used a fraudulently obtained language certificate. The assertion that the Appellant had obtained a fraudulent language certificate was arguably a central feature of this case as it led to the refusal under the suitability requirements and his failure therefore to meet Appendix FM and was thereafter a factor taken into account in the Article 8 assessment.

15. It is asserted in the grounds at paragraph 16 that the Respondent produced a supplementary bundle that the Respondent had not had an adequate opportunity to consider. In relation to that I am satisfied that there was no procedural irregularity resulting in unfairness to the Appellant. I note firstly that no such submission was made before the first tier Tribunal. Therefore if the Judge concluded that Mrs Ali was ready and able to address any issues arising out of that supplementary bundle in the absence of any indication to the contrary by Mrs Ali this was a conclusion that was reasonably open to her. The fact that Mrs Ali may have changed her mind after the hearing as to how to advance her case is not a basis for finding an error of law. Also the fact that the Appellants language certificate was declared invalid on the basis of an allegation of cheating was always a central issue in the case and had been made clear in the refusal letter and the Appellant had been given a reasonable opportunity to advance whatever evidence he felt was appropriate to address that issue. The fact that the Judge gave limited weight to their unsuccessful attempts to secure further evidence from ETS was a matter for her and not unreasonable in the circumstances.
16. The Judge accepted at paragraph 39 having heard all the evidence that the Appellant had not *used* the disputed language certificate but makes clear that the gravamen of the Appellants behaviour was *participating* in a fraud at the test centre (paragraph 41) It is clear that in that paragraph the Judge cites the wrong version of the suitability requirements in that she cites the one for entry clearance when the Appellant was present in the UK but this can have had no material impact on her decision because other than the reference to where the applicant is (in the UK or outside ) the substance of the provision is the same: in essence the applicants presence in the UK is not conducive to public good because their conduct , character , associations or other reasons presence make their presence undesirable.
17. The adequacy of the Judges reasons for finding that the Appellant had participated in the fraud are challenged. The Judge set findings those out at paragraphs 43-54 and I am satisfied that the reasons given are adequate. The approach that should be taken in these cases is set out in SM and Qadir v Secretary of State for the Home Department (ETS – Evidence – Burden of Proof) [2016] UKUT 00229 (IAC).

The case makes clear that the initial evidential burden of establishing deception was on the Secretary of State and it was held that a screenshot of the results which stated that that was the position and included the “ETS Lookup Tool” which showed the tests that were categorised as “invalid” sufficed to discharge the initial burden and it was then for the Appellant to provide an innocent explanation. Mrs Ali did not before me dispute that the Judge had before her the results of the ‘look up tool’ which entitled her to conclude met the initial evidential burden of furnishing proof of deception. The Judge recognised that there was an initial burden at paragraph 53 and found the evidence satisfied this. The Judge thereafter focused on the Appellants explanation as to the circumstances in which he took the test. The Judge made findings about this account and the findings were reasonably open to her: thus at paragraph 43 she found it incredible that that he was living with his partner yet did not tell her why he travelled from Manchester to London nor did they have any discussion after as to what he had done this when its sole purpose was to advance an application enabling him to remain in the UK with her; she found it incredible that viewing the documents as important as he did he nevertheless did not discuss the matter with his wife. There is no error of law in this aspect of the decision.

18. In relation to the Judges consideration of the best interests I am satisfied that the reasons given for her conclusions are adequate. She identifies at paragraph 59 that it is in the best interests of this young child to be brought up by both of her parents. She nevertheless identifies those other issues relevant to this consideration as set out in cases such as Azimi-Moayed and others (decisions affecting children; onward appeals) [2013] UKUT 197(IAC); that this was a baby whose focus was on her mother; she found no evidence to support the assertion that the child could not adapt to the hotter weather there; while she heard the wife’s assertion that the education was not as good in Pakistan at paragraph 64 she noted that there was no evidence as the availability of private education.
19. In assessing reasonableness under s 117B 6 the adequacy of her reasons are challenged in the grounds. The Judge identified that having a British child was not a trump card and therefore not determinative of the appeal. While the Judge did not refer specifically to caselaw it would have been open to her to note that MA

makes clear that citizenship is not determinative of the issue albeit it is a eighty factor and that the assessment of the reasonableness of return must not focus on the position of the children : R (on the application of MA (Pakistan) and Others) v UT (IAC) & Anor [2016] EWCA Civ 705 and in AM (Pakistan) [2017] EWCA Civ 180 . Mrs Ali relies on the Home Office Policy found in the Immigration Directorate Instructions entitled “Family Life (as a partner or parent) and Private Life: 10 Year Routes August 2015 but the skeleton argument quotes selectively referring only to refusals based on criminality whereas the guidance makes clear that

*“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.”*

20. The Judge acknowledged that the Appellant had made attempts to regularise his status but I am satisfied that the Judge made tolerably clear at paragraph 68 that the finding that the Appellant had participated in a fraudulent language test weighed ‘heavily’ against him and was therefore she was entitled to conclude that such conduct could justify removal given that such behaviour strikes at the integrity of the system. Also of course the Judge found that this was a matter of choice for the parties: the Appellants wife was of Pakistani origin herself and her family had property there (paragraph 63); they both speak languages used there; they married at a time when they knew he had no right to remain in the UK and could only do so if he met the requirements of the Rules and while she expressed a preference to remain in the UK there had been no evidence what she would refuse to relocate. Therefore the removal of the Appellant would not inevitably lead to a break up of this family.

21. As to the duty to give reasons I take into account what was said by the Court of Appeal in MD (Turkey) [2017] EWCA Civ 1958 at paragraph 26:

*“The duty to give reasons requires that reasons must be proper, intelligible and adequate: see the classic authority of this court in Re Poyser and Mills’ Arbitration [1964] 2 QB 467. The only dispute in the present case relates to the last of those elements, that is the adequacy of the reasons given by the FtT for its decision allowing the appellant’s appeal. It is important to appreciate that adequacy in this context is precisely that, no more and no less. It is not a counsel*

*of perfection. Still less should it provide an opportunity to undertake a qualitative assessment of the reasons to see if they are wanting, perhaps even surprising, on their merits. The purpose of the duty to give reasons is, in part, to enable the losing party to know why she has lost. It is also to enable an appellate court or tribunal to see what the reasons for the decision are so that they can be examined in case some error of approach has been committed.”*

22. I am therefore satisfied that the Judge’s determination when read as a whole set out findings that were sustainable and sufficiently detailed and based on cogent reasoning.

### **CONCLUSION**

**23. I therefore found that no errors of law have been established and that the Judge’s determination should stand.**

### **DECISION**

**24. The appeal is dismissed.**

Signed

Date 8.5.2018

Deputy Upper Tribunal Judge Birrell