Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/16722/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17 December 2018	**On 23 January 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

MR ABUBAKAR FIAZ
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Z Jafferji, Counsel, instructed by Mayfair Solicitors
For the Respondent: Ms K Pal, Home Office Presenting Officer

DECISION AND REASONS

The Appellant is a national of Pakistan born on 23 February 1993. He first arrived in the UK on 3 April 2011 and subsequently met and married a British citizen, who gave birth to a British child on 22 May 2017. On 14 November 2017 the Appellant applied for leave to remain on the basis of his family life. This application was refused in a decision dated 27 November 2017.

The Appellant appeals against that decision and his appeal came before First-tier Tribunal Judge Walker for hearing on 12 April 2018. In a Decision and Reasons promulgated on 5 June 2018, the judge dismissed the appeal both in respect of the Appellant's family life and also in relation to an allegation of deception in taking the English language test. Permission to appeal was

sought on the basis that the judge had erred both in relation to the failure to give adequate reasons in respect of the TOEIC issue and in the alternative in failing to engage with the best interests of the child.

Permission to appeal was granted by Dr Storey in a decision dated 7 November 2018 on the basis that there was no arguable merit in the challenge to the judge's findings relating to the deception in the TOEIC test but there was an arguable error of law in relation to the judge's assessment of the best interests of the child, as there is nothing to indicate that consideration was given to Home Office policy that it was not reasonable to expect a British citizen child to leave the UK and that the parents were entitled to remain absent significant criminal or immigration issues.

At the hearing before the Upper Tribunal, Mr Jafferji submitted that there had been a failure by the judge to take account of the best interests of the child and to address the reasonableness of expecting that child to leave the UK. He drew attention to [50] of the decision, where the judge held:

> "*The Appellant and the Sponsor are first cousins and it is reasonable to conclude that the wider family will give the Sponsor, her son and the Appellant considerable support in Pakistan and if necessary in the UK. Given the age of the Appellant's son he will be able to adapt to life in Pakistan with his parents. He is still only aged 1 year old and he will be able to absorb the local language in Pakistan with the assistance of both his parents. He has not started his schooling yet and his private life and family life are entirely dependent on his parents because of his age. It follows that it will be reasonable to expect the Appellant's son to leave the UK should his parents so wish it*."

Mr Jafferji submitted that the judge had materially erred in failing to consider all the relevant factors, for example, those set out in ZH (Tanzania) [2011] UKSC 4, that there was no reference whatsoever to the child being British or what he would lose if not brought up in the UK. There was no consideration of Section 117B(6) of the NIAA 2002 and the judge entirely failed to appreciate the question she was required to answer. Mr Jafferji submitted that when one looked at the refusal letter, this itself concedes at page 3 that it would not be reasonable when considering the appeal under the Rules for the child to leave the UK, albeit he accepted that as part of the consideration of exceptional circumstances at page 4 that the child could go to Pakistan.

Mr Jafferji acknowledged that although EX.1 would not result in a successful appeal under the Rules because the suitability requirements were not satisfied, section 117B(6) still needed to be addressed and applied by the First-tier Tribunal Judge. Although the judge at [10] had set out the text of Section 117B this had not been addressed at all in the findings, which was a fundamental error.

In her submissions, Ms Pal submitted there was no material error of law. The judge found at [49] that the Appellant's leave was precarious in that he chose to marry the Sponsor, knowing full well that he would require further leave to remain. The judge found at [50] that the Appellant's son was aged only 1 at

the time, that he was very young and would be returning to Pakistan with his parents. He was not in school and his private life was entirely dependent on his parents because of his age. The judge at [52] factored in that the Appellant had cheated in order to avoid leave to remain under the Rules and incorporated this into the balancing exercise and it was reasonable to expect the Appellant's son to leave the UK with his parents. There was no material error of law.

In reply, Mr Jafferji submitted that Ms Pal's points were all good ones. However, they were irrelevant in respect of this key issue that the judge had to grapple with. He submitted the difficulty with the judge's decision and reasoning is that it was freestanding and there was no reference to the nationality of the child, which was one of the most fundamental considerations that needed determining. He submitted there was no reference in the Decision and Reasons to the judgment in SF & others [2017] UKUT 120 (IAC) and the Respondent's own policy, which was that unless there was something exceptional the child should not be expected to leave.

Decision and Reasons

I find material errors of law in the Decision and Reasons of First-tier Tribunal Judge Walker for the reasons identified in the grant of permission to appeal. The Appellant's son is a British citizen, albeit he is still at a very young age. It was still incumbent upon the First-tier Tribunal Judge to consider the appeal in light of the Respondent's policy and the related jurisprudence. The position as set out in those policies is that very strong reasons are required to expect the child to leave. Thus, the task for the judge was to balance the fact that the Appellant had used deception in his English language test against the best interests of the child and the reasonableness of expecting him to leave. That was not done and it is required to be done.

I therefore remit the appeal back to the First-tier Tribunal for a hearing confined to consideration of that issue, essentially Article 8 outside the Rules. Given that the Appellant resides now in Manchester I remit the appeal to be heard in the First-tier Tribunal in Manchester. This should be listed for an hour and a half

Notice of Decision

The appeal is allowed to the extent of being remitted to the First tier Tribunal for a hearing *de novo* confined to consideration of Article 8 of ECHR.

No anonymity direction is made.

Signed Rebecca Chapman Date 10 January 2019

Deputy Upper Tribunal Judge Chapman