



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/13528/2016

THE IMMIGRATION ACTS

Heard at: Manchester  
On: 18<sup>th</sup> April 2018

Decision Promulgated:  
On: 3<sup>rd</sup> July 2018

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

MK  
(anonymity direction made)

Appellant

And

Secretary of State for the Home Department

Respondent

For the Appellants: Mr Holt, Counsel instructed by Sabz Solicitors  
For the Respondent: Mr Bates, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a male born in 1983, who is believed by the Respondent to be a national of Pakistan. He appeals with permission the decision of the First-tier Tribunal (Judge Lever) to dismiss his human rights appeal.

**Anonymity Order**

2. There is no reason why the identity of the Appellant should be protected. The case does however turn on the presence in the United Kingdom of the

Appellant's British stepson. I have had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders. I am concerned that identification of the Appellant could lead to identification of child involved and I therefore consider it appropriate to make an order in the following terms:

"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 to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings"

### **Background and Decision of the First-tier Tribunal**

3. The Appellant came to the United Kingdom in November 2007 with leave to enter as a student. He subsequently varied that leave in various capacities under the Points Based System but became an overstayer on the 29<sup>th</sup> September 2011. He then made a number of applications for a family permit under the Immigration (European Economic Area) Regulations 2006. None were successful. He then applied for leave to remain on human rights grounds, and when that was refused, claimed asylum. Finally, he made the application which became the subject of this appeal: he applied for leave to remain on Article 8 grounds on the basis of his relationship with a British woman, 'Ms S', and her children. Particular reliance was placed on his paternal relationship with his stepson 'D', who was aged 8 at the date of application.
4. The Respondent refused the application by way of letter dated 17<sup>th</sup> May 2016. The Appellant met the 'suitability' requirements under Appendix FM. He could not however hope to qualify under any of the provisions therein because 'Ms S' did not meet the definition of 'partner' under GEN.1.2. The Respondent moved on to consider the Appellant's private life but found he could not meet any of the alternative requirements in paragraph 276ADE(1). The relevance of the relationship with D arose only in the context of considering Article 8 'outside of the rules'. The reasoning is succinct:

"It is submitted that you do not have parental responsibility for [D] since he resides in the United Kingdom with his biological parent. It is therefore noted that if you were to have to leave the United Kingdom, they could continue to reside here. The refusal of your application does not separate any children from their biological parent and does not obligate [D] to leave the United Kingdom".

5. When the matter came before Judge Lever he had the benefit of hearing oral evidence from the Appellant and Ms S. Having done so he was satisfied that there was a 'family life' between the Appellant, Ms S and D and that Article 8

was engaged. There does not appear to have been any issue that the next three *Razgar* questions were answered in the affirmative and so the determination proceeds directly to consideration of proportionality. Having directed itself to consider the public interest factors in s117B the Tribunal noted that the Appellant may have some English, is not financially independent and embarked on his relationship with Ms S when he was living here unlawfully. His entire stay in the UK has been precarious and so little weight could be attached to his private life. The determination then addresses s117B(6) in the following terms:

“23. Finally, I look at section 117B(6) of the 2002 Act. I accept the Appellant does have a genuine and subsisting parental relationship at the present time with a qualifying child, namely [D], who is a British citizen. I do not find it would be reasonable to expect a British citizen child to relocate to Pakistan.

24. The Court of Appeal has determined, however, that section 117B(6) of the 2002 Act is not a ‘stand-alone’ provision either in deportation or non-deportation cases and must be looked at together with all other factors. It is equally the case, that additional to an examination of section 117B, in this case I need to consider section 55 of the Borders Act 2007 which places real significance upon the best interests of a child affected by an immigration decision. However, again case law indicates that the children’s best interest is not a ‘trump card’, and other facts can cumulatively outweigh that interest”.

6. The determination goes on to identify two further factors adverse to the Appellant: the limited duration of the family life in question, which has only existed since October 2015, and the fact that the Appellant’s immigration history is not only poor, but gives the overwhelming impression that this is an individual who has attempted to remain in the UK by using any mechanism available to him. Whilst recognising that D’s best interests are an important factor, the Tribunal concludes that on balance, the removal of the Appellant is proportionate. The appeal was thereby dismissed.

### **Error of Law**

7. I need not set out the grounds in any great detail since before me the parties were in agreement that the First-tier Tribunal erred in its approach. Whilst Mr Bates endorsed ultimate the findings of the determination, he accepted that the Tribunal had adopted a rather unorthodox structure. The determination had not on its face followed the guidance in MA (Pakistan) [2016] EWCA Civ 705.
8. The statutory provision at the heart of this appeal is section 117B of the Nationality, Immigration and Asylum Act 2002:

Article 8: public interest considerations applicable in all cases:

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English –

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons –

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to –

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

**(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.**

9. The First-tier Tribunal expressly finds that s117B(6) is not a 'stand alone' provision. It treats it as just one amongst the six factors set out in that section and finds, even though it weighs in the Appellant's favour, that it is outweighed by the public interest as reflected, *inter alia*, in sub-sections (1)-(5). Thus the finding at §23, that it would not be reasonable to expect D to leave the UK, is not determinative. That is just one factor to be weighed in the balance in considering proportionality.
10. That approach is directly contrary to that laid down as the correct one in MA (Pakistan). Per Elias LJ:
  16. The paragraphs in section 117B achieve different objectives. The structure of subsections (4) and (5) differs from subsections (1) to (3). The latter identify factors bearing upon the public interest which a court or tribunal is under a duty to consider but it is for the decision maker to decide upon the weight to give to these factors in making the determination, subject only to compliance with public law principles. Subsections (4) and (5) implicitly accept that the matters identified therein should be taken into account, but there is a direction as to the weight – or more accurately, the relative lack of it - which should be given to these considerations. Parliament has here sought to identify both relevance and weight.
  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.

11. To that extent the Court agreed with Mr Justice McCloskey in Treebhowan [2015] UKUT 00674 about the structure of s117B. Sub-section (6) was of a markedly different nature from the preceding five matters. A finding that it would not be reasonable to expect a qualifying child to leave is, in effect, determinative. Had the First-tier Tribunal in this case applied its own findings, in particular its §23, to the four questions posed by Elias LJ, the Appellant would have won his appeal. It was for this reason that Mr Bates was prepared to concede that the decision should be set aside and remade.

### **The Re-Made Decision**

- 12. I start with the law as it currently stands.
- 13. Beginning with Elias LJ's first question, it is accepted that the Appellant is not liable to deportation. The relevant framework for assessing proportionality is therefore to be found in s117B.
- 14. At his §23 Judge Lever accepts that the Appellant enjoys a genuine and subsisting parental relationship with his stepson. There is no challenge to that finding.
- 15. There is no dispute that D is a 'qualifying child' pursuant to s117D(1)(a) of the 2002 Act, because he is British. I should add that D has lived in this country all of his life and at the date of the appeal before me he nine years old: he therefore also 'qualifies' on the basis of his long residence, pursuant to s117B(1)(b).
- 16. In respect of the final MA question Mr Holt relies on the finding at §23 of the First-tier Tribunal decision that it would not be reasonable to expect D to leave, and invites me to simply substitute Judge Lever's conclusion for one allowing the appeal on this basis. I am not prepared to do that. That is because it is unclear from Judge Lever's reasoning whether he was in fact satisfied that it would be unreasonable to expect this child to leave the UK: his §23 is fundamentally contradictory to all that follows it.
- 17. What was the proper approach to the question of reasonableness? Having adopted the Treebhowan structural analysis of s117B the Court of Appeal in MA went on to disagree with McCloskey J about what matters were relevant to

that enquiry. McCloskey J had suggested that the question was to be answered solely with reference to the child, and his best interests. The Court, with some reluctance, rejected that analysis. Drawing an analogy with the approach taken in deportation appeals to the test of “undue harshness”, the Court of Appeal was persuaded that the Secretary of State was correct in her contention that the test in fact required the public interest to be weighed into the balance when considering ‘reasonableness’. This would include all the pertinent matters set out at s117B(1)-(5), as well as any other ‘suitability’ issues such as those identified by the First-tier Tribunal in this appeal. The Court was however clear that the public interest in s117B cases was materially different from that weighing against persons subject to deportation, where s117C would be applied. For the latter the effect of the statute created a presumption in favour of deportation. For the former, the statute read in line with existing jurisprudence, did just the opposite: At paragraph 46 Elias LJ says this:

“Even on the approach of the Secretary of State, the fact that a child has been here for seven years must be given significant weight when carrying out the proportionality exercise. Indeed, the Secretary of State published guidance in August 2015 in the form of Immigration Directorate Instructions entitled "*Family Life (as a partner or parent) and Private Life: 10 Year Routes*" in which it is expressly stated that once the seven years' residence requirement is satisfied, **there need to be "strong reasons" for refusing leave** (para. 11.2.4). **These instructions were not in force when the cases now subject to appeal were determined, but in my view they merely confirm what is implicit in adopting a policy of this nature. After such a period of time the child will have put down roots and developed social, cultural and educational links in the UK such that it is likely to be highly disruptive if the child is required to leave the UK. That may be less so when the children are very young because the focus of their lives will be on their families, but the disruption becomes more serious as they get older. Moreover, in these cases there must be a very strong expectation that the child's best interests will be to remain in the UK with his parents as part of a family unit, and that must rank as a primary consideration in the proportionality assessment**".

18. The Court goes on at paragraph 49 to conclude:

“the fact that the child has been in the UK for seven years would need to be given significant weight in the proportionality exercise for two related reasons: first, because of its relevance to determining the nature and strength of the child's best interests; and **second, because it establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary**".

19. Do such ‘powerful reasons’ exist in this case? The First-tier Tribunal identified the following factors weighing against the Appellant: he has a poor immigration history, and the overwhelming impression created by his past conduct is that this is an individual who has attempted to remain in the UK by using any mechanism available to him.

20. Whether a poor immigration history is capable of amounting to a ‘powerful reason’ is a matter of fact and degree. It is implicit that any applicant seeking leave to remain on Article 8 grounds, and placing reliance on s.117B(6), must be

in the UK without leave; the mere fact of being an overstayer cannot therefore defeat a claim. On the other end of the scale it is arguable that where an individual has repeatedly set out to frustrate the intentions of the rules, who has used deception or otherwise flagrantly circumvented immigration control, the 'powerful reasons' looked for by the Court of Appeal might exist. In the recent Presidential decision of MT and ET (child's best interests; ex tempore pilot) Nigeria [2018] UKUT 00088(IAC) the panel (Mr Justice Lane and Upper Tribunal Judge Lindsley) considered the case of an applicant who had overstayed, had made a false asylum claim, had received a community order for using a false document to work illegally and who had pursued various legal means of remaining in the United Kingdom. The panel found that even considered cumulatively those matters did not amount to powerful reasons why it would be reasonable to expect the applicant's child to leave the UK [at §34].

21. It seems to me that the immigration history of the adult appellant in that case, MT, is considerably worse than that of this appellant. The Appellant arrived in possession of a valid visa and had leave to remain as a Points Based System migrant for the first four years that he lived here. He then made a number of failed applications for a residence card under the Immigration (European Economic Area) Regulations 2006 but in the absence of deliberate fraud no adverse inference might be drawn from that. He then claimed asylum. I have not been furnished with the details of why that was refused but assuming it was rejected as 'bogus' it is apparent from MT & ET that this in itself does not amount to a 'powerful reason' when assessing reasonableness. The First-tier Tribunal attached weight to the fact that the Appellant appeared to be someone who was desperate to remain in the UK. Given that the Tribunal accepted the relationships in this family to be genuine it is difficult to see the relevance of that matter; he would hardly be given credit if he didn't want to live here.
22. I have weighed in the balance the fact that the Appellant has been without valid leave to remain for some years. He has no alternative basis for leave to remain under the Rules. He is not, at present, financially independent. He speaks some English. His relationship with his partner was established when he had no leave and as such only little weight can be attached to that. Having considered all of the countervailing factors in the round I am not satisfied that 'powerful reasons' have been shown why it would be reasonable to expect D to leave the UK. D is a British child who has lived here all of his life. His friends, family, home and school are all in this country and it is uncontrovertibly in his best interests that he remain here. I am satisfied that it would not be reasonable to expect him to leave and applying the guidance in MA(Pakistan) this means that the Appellant's appeal must be allowed.
23. I now turn to address an alternative argument advanced by the Respondent. In his reasons for refusal letter the Respondent refuses to contemplate that leave would be granted on the basis of the relationship with D, because there is no



expectation that a British child would leave the United Kingdom: there being no expectation that D should leave, s117B(6) would not be relevant and should not be considered at all. The letter asserts that D can remain living in the UK with his biological parent (his mother) and would not be required to go to Pakistan with the Appellant. Before me Mr Bates placed reliance on the Respondent's updated guidance on this matter, set out in the Immigration Directorate Instruction 'Family Migration - Appendix FM, Section 1.0(B) *Family Life as a Partner or Parent and Private Life, 10 year Routes*' published on the 22<sup>nd</sup> February 2018. In this guidance the Respondent instructs caseowners to consider whether the consequence of refusal would be that a child had to leave with the expelled parent:

"The decision maker must consider whether the effect of refusal of the application would be, or would be likely to be, that the child would have to leave the UK. This will not be the case where, in practice, the child will, or is likely to, continue to live in the UK with another parent or primary carer. This will be likely to be the case where for example:

- the child does not live with the applicant
- the child's parents are not living together on a permanent basis because the applicant parent has work or other commitments which require them to live apart from their partner and child
- the child's other parent lives in the UK and the applicant parent has been here as a visitor and therefore undertook to leave the UK at the end of their visit as a condition of their visit visa or leave to enter

If the departure of the non-EEA national parent or carer would not result in the child being required to leave the UK, because the child will (or is likely to) remain living here with another parent or primary carer, then the question of whether it is reasonable to expect the child to leave the UK will not arise. In these circumstances, paragraph EX.1.(a) does not apply.

However, where there is a genuine and subsisting parental relationship between the applicant and the child, the removal of the applicant may still disrupt their relationship with that child. For that reason, the decision maker will still need to consider whether, in the round, removal of the applicant is appropriate in light of all the circumstances of the case, taking into account the best interests of the child as a primary consideration and the impact on the child of the applicant's departure from the UK. If it is considered that refusal would lead to unjustifiably harsh consequences for the applicant, the child or their family, leave will fall to be granted on the basis of exceptional circumstances.

If the decision maker is minded to refuse an application in circumstances in which the applicant would then be separated from a child in the UK, this decision should normally be discussed with a senior caseworker.

24. I find the argument posed, and the guidance adopted, to be entirely misconceived.

25. First, as I think the bullet-points in the IDI suggest, the argument could only possibly succeed in cases where the genuine and subsisting parental

relationship was enjoyed with a child who did not live with the applicant. Otherwise the various provisions which exist to preserve the family life of children by means of the 'reasonableness' test – s117B(6), paragraph 276ADE(1) of the Rules and EX.1 of Appendix FM – would be a nonsense. The whole point of these provisions is to ensure that the best interests of the children are served and that absent strong countervailing factors this will normally involve the protection of the child's private and family life rights under Article 8. The logical consequence of the Respondent's refusal letter in this case is that those rights could be protected by breaking up this family. The Appellant lives with D, and the Tribunal has accepted that there is a parental relationship. D's mother gave unchallenged evidence that D has never known his biological father and that he now looks to the Appellant to fill that role and in fact calls him Dad. If that relationship was to be severed simply on the basis that D can stay here without him, there would be no point to the rules at all.

26. Second, the argument would drive a wedge between the two categories of 'qualifying' children and have the perverse outcome that foreign children who had lived here for seven years would have a significant litigation advantage over their British counterparts. The 'seven year' qualifying child who is himself without any leave to remain would be 'expected to leave' and so s117B(6) would be in play. He will benefit from the many years of jurisprudence on policy, culminating in the guidance in MA (Pakistan), so that the Respondent would need to identify 'powerful reasons' why he should be removed with his parent or parents. In the absence of such reasons both child and parent would win their case and be allowed to remain in this country together. Conversely in the case of a British child facing separation from a foreign-national parent, all the Respondent need do would be to point to the fact that the child is entitled to remain here. Section 117B(6) would not be considered and the foreign national parent would likely lose and be removed. I can see no justification for treating the two groups of qualifying children differently, much less so that it is the British child who finds himself more likely to be left without a father.
27. Accordingly, I find no merit in the Respondent's submissions. The principles underpinning these provisions is family unity and the best interest of the child. Neither would be served by adopting the approach advocated in the refusal letter in this case.

### **Decisions**

28. The decision of the First-tier Tribunal contains an error of law and it is set aside.
29. I remake the decision in the appeal as follows: "the appeal is allowed on human rights grounds".
30. There is an order for anonymity.

Upper Tribunal Judge Bruce  
30<sup>th</sup> May 2018