**Upper Tribunal**
**(Immigration and Asylum Chamber) Appeal Number: HU/10767/2017**

**THE IMMIGRATION ACTS**

| **Heard at Bradford** | **Decision & Reasons Promulgated** |
| --- | --- |
| **On 3 January 2019** | **On 8 March 2019** |

**Before**

**UPPER TRIBUNAL JUDGE LANE**

**Between**

**MH**
(ANONYMITY DIRECTION MADE)
Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**
Respondent

**Representation:**

For the Appellant: Mr Read
For the Respondent: Mr Bates, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant was born in 1983 and is a male citizen of Afghanistan. He entered the United Kingdom in May 2011. By a decision dated 6 September 2017, the Secretary of State refused the appellant's application to remain on the basis of his family and private life. The appellant appealed to the First-tier Tribunal which, in a decision promulgated on 6 March 2018, dismissed the appeal. The appellant now appeals, with permission, to the Upper Tribunal.

**© CROWN COPYRIGHT 2019**

2. The appeal turned on the judge's consideration of the circumstances of the fourth child of the appellant, A. The appellant has been married to a British citizen since May 2016 and A was born in August 2017. A is a British citizen. The judge heard evidence from the appellant's wife to the effect that the appellant is a 'good father' to A and that they were 'fond of each other.'

3. At [43] *et seq*, the judge considered the operation of section 117B(6) of the 2002 Act (as amended):

   (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.

4. The judge found that it would not be reasonable to expect A to leave the United Kingdom. However, the judge found that the appellant would be able to have contact with his partner and A by 'modern means of communication and visits'. The judge concluded that 'the fact that the child is only six months old or thereabouts, I am not satisfied, despite the evidence of the parties, that the appellant has a genuine and subsisting parental relationship with her.' At the initial hearing at Bradford, Mr Bates, who appeared to the Secretary of State, told me that he did not seek to support that finding of the judge. The Secretary of State accepts that the appellant has a genuine and subsisting parental relationship with A.

5. In the light of Mr Bates is acknowledgement, the decision of the judge cannot stand. I set it aside. I have proceeded to remake the decision.

6. The Upper Tribunal now has the benefit of the decision of the President in *JG (s 117B(6): "reasonable to leave" UK) Turkey* [2019] UKUT 72 (IAC). Section 117B(6) operates as a free-standing provision. Even in circumstances, such as in the present case, where in reality A will not leave the United Kingdom to travel to Afghanistan whilst the appellant makes an application for a spouse visa, it is necessary to hypothesise that the child would leave the United Kingdom and whether it would be reasonable for her to do so. Mr Bates did not submit that it would be reasonable. It follows, therefore, that the public interest does not require the appellant's removal. As the tribunal observed in JG AT [39-41]:

   39. We do not consider our construction of section 117B(6) can be affected by the respondent's submission that, in cases where – on his interpretation – the subsection does not have purchase (i.e. because the child would not in practice leave the United Kingdom), there would nevertheless need to be a full-blown proportionality assessment, compatibly with the other provisions of Part 5A of the 2002 Act, with the result that a person with parental responsibility who could not invoke section 117B(6) may, nevertheless, succeed in a human rights appeal.

40. Such an assessment would, however, have to take account of the immigration history of the person subject to removal; so there could well be a very real difference between the outcome of that exercise, and one conducted under section 117B(6). But, the real point is that this submission does not begin to affect the plain meaning of subsection (6). If, as we have found, Parliament has decreed a particular outcome by enacting section 117B(6), then that is the end of the matter.

41. We accept that this interpretation may result in an underserving individual or family remaining in the United Kingdom. However, the fact that Parliament has mandated such an outcome merely means that, in such cases, Parliament has decided to be more generous than is strictly required by the Human Rights Act 1998. It can be regarded as a necessary consequence of the aim of Part 5A of imposing greater consistency in decision-making in this area by courts and tribunals. The fact that section 117B(6) has such an aim was expressly recognised by Elias LJ at paragraph 44 of MA (Pakistan) .

## Notice of Decision

7. Pursuant to section 117B(6) of the 2002 Act (as amended), the public interest does not require the appellant's removal from the United Kingdom. The appellant's appeal against the decision of the Secretary of State dated 6 September 2017 is allowed on human rights grounds (Article 8 ECHR)

Signed Date 2 February 2019

Upper Tribunal Judge Lane