



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/17350/2016

THE IMMIGRATION ACTS

Heard at Field House
On 4 July 2018

Decision & Reasons Promulgated
On 12 July 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE MCGEACHY

Between

MNM
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr O Omoniruvbe, of Church Street Solicitors

For the Respondent: Mrs N Willocks-Briscoe, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals, with permission, against a decision of Judge of the First-tier Tribunal S Taylor who in a decision promulgated on 13 December 2017 dismissed the appellant's appeal against a decision made on 30 June 2016 to refuse leave to remain on human rights grounds.
2. The appellant, who was born in 1972, is a citizen of Sierra Leone. He entered Britain in 1999 as a student and was granted leave in that capacity until 28 February 2003. An application for further leave to remain made in April 2003 was refused in July that year. The appellant thereafter overstayed before making the application for leave to remain in November 2015 on the basis of his family and private life in respect of his

daughter, MMM. Although the appellant had been in a relationship with her mother that relationship broke down shortly after his daughter was born and he had no contact with the child until she was 3 or 4. The child's mother and their daughter had discretionary leave for most of the daughter's life but after the child's mother was granted indefinite leave to remain on 4 November 2017 the appellant's daughter had been registered as a British national.

3. The judge heard evidence from the appellant and his daughter's mother. The appellant asserted that he had formed a parental relationship with his daughter. He took the daughter to school and collected her from school most days, looking after her when her mother was at work. He also paid for school meals and accompanied her on school outings and they went to the library together. It was the appellant's submission that his daughter would be psychologically damaged if he had to leave. He did not want her to visit him in Sierra Leone in case she was subjected to female genital mutilation.
4. The child's mother stated that the appellant had been involved with the child's life for around 4 years and that the child would be devastated if he were removed. She gave details of his involvement with the child and confirmed that his involvement meant that she had been able to develop her own life.
5. In paragraphs 14 onwards of the decision the judge set out his findings and conclusions. He noted that since refusal the appellant's daughter had been granted British citizenship three weeks prior to the hearing and that she had lived in Britain since birth.
6. The judge first considered the appellant's appeal under the Immigration Rules and noted that at the date of application the appellant's child had only had discretionary leave to remain in Britain and was aged 6, and therefore he had not then qualified for leave to remain under the Rules. He said that although the child had since been granted UK citizenship the appellant also had to satisfy paragraphs E-LTRPT.2.3. and 2.4. which required that he either had sole responsibility for the child or had access rights, as well as evidence that he was taking and intended to continue to take an active role in her upbringing. He stated that he was satisfied that the appellant did not have sole parental responsibility, and there was no evidence that he had access rights to the child. He therefore considered that the appellant could not meet the requirements of the Immigration Rules. He referred then to paragraph EX.1. pointing out that the child had not had British citizenship at the date of application and therefore the requirements of that paragraph could not be met. He found also the appellant had not lived in Britain for twenty years.
7. In paragraph 19 he stated that he was satisfied that there had been a material change of circumstances since the refusal as the appellant's child had been granted UK citizenship and was now aged 7 and had lived in the UK since birth and that there was unchallenged evidence from the appellant and his former partner that he currently had an active role in looking after the child. The judge stated therefore that it was appropriate that he should consider the appeal outside the Rules and consider if there

were exceptional circumstances such that the consequences of the decision would cause very substantial difficulties and unjustified harshness for the appellant. He referred to the decision in **MA (Pakistan) [2016] EWCA Civ 705** which referred to the wording of Section 117B(6) and noted that it was clear that the public interest did not require the removal of a person who was in a genuine and subsisting relationship with a child who had been in Britain for seven years and it would not be reasonable to expect the child to leave the UK. He stated that there was no requirement for the child to leave Britain, and accepted that the decision in **MA (Pakistan)** meant that significant weight should be placed on the proportionality exercise because of the fact that a child had been in Britain for seven years. However, he considered that the immigration history of the appellant should be taken into account. In weighing up these factors he stated that notwithstanding Section 117B(6) the other factors in that sub-section were relevant and made it clear that little weight should be placed on the private life of an appellant who had been in Britain unlawfully when the application was made, and indeed whose immigration status was precarious. He found that the appellant's leave was precarious. He accepted that the appellant spoke English to a reasonable standard, but noted that the appellant had no work and no income and was supported by an aunt and other family. He said that Section 117B(3) applied and that it was not in the public interest for the appellant to be granted leave as he was not financially independent. He placed weight on the fact that the appellant had not lived in a family unit with the mother of his child and his role was limited to providing support from outside the family unit. He stated that it was clear if the appellant had no income the child could not be relying on him financially.

8. He then went on to consider the appeal on Article 8 grounds outside the Immigration Rules as well as Section 55 of the 2009 Act. He accepted that the appellant had a degree of family life in Britain with his daughter, although he did not live in the family unit with her to the extent that he had not entered her home and did not know if his former partner had a current partner. He stated that the removal of the appellant would interfere with that family life, but when considering the magnitude of the interference it would not be of the same weight as disturbing the family unit which was living together. He stated that by requiring the appellant to leave he was not satisfied that the high tests in the case of **Agyarko** had been met. He concluded that the interests of the child in the appeal were outweighed by the public interest in immigration control.
9. The grounds of appeal stated the judge had made a material error of law, in particular with reference to the fact that he appears to consider that the appellant needed to show that he had access rights to the child to satisfy the requirements of paragraph E-LTRPT.2.4. and thereafter in applying seven year rules as set out in the case of **MA (Pakistan)**. It was also asserted that he had not properly considered the Article 8 rights of the appellant outside the Immigration Rules.
10. Permission to appeal was granted in a well-reasoned decision by Deputy Upper Tribunal Judge O'Ryan. He wrote as follows:-

“ ...

3. The Judge considered the Appellant's potential entitlement to leave to remain under Appendix FM – leave to remain as a parent, and found that, as at the date of application for leave to remain, a number of requirements were not met; the daughter was not British, or settled, or had resided in the UK for seven years prior to the date of application.
- (i) failing to actually answer the question of whether it would be reasonable for the daughter to leave the UK; the Judge's observation at [20] that the immigration decision did not *require* the child's departure, and that the mother and daughter would in all probability stay in the UK, fails to answer the question posed in s.117B(6), the answer to which is required to determine whether the Appellant's removal is required in the public interest; see MA para 19:

'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?'**
- (ii) misdirects himself in law in his reference at [20] to Azimi-Moayed & Ors (decisions affecting children; onward appeals: Iran) [2013] UKUT 197; that is not authority for the proposition that the first seven years of a child's life carry less weight 'than later years'; the case is authority for the proposition that seven years from age four is likely to be more significant to a child that (sic) the first seven years of life; there is a difference; this potential error gains more materiality when it is borne in mind that the daughter was less than 3 weeks away from her 8th birthday at the time of the hearing;
- (iii) failing to actually identify with sufficient clarity what the best interests of the daughter were; whilst these are raised in the last three lines of the decision, no clear finding is made; cf MA para 57:

'In my judgment all Lord Hodge (in Zoumbas) was saying is that it is vital for the court to have made a full and careful assessment of the best interests of the child before any balancing exercise can be undertaken. If that is not done there is a danger that those interests

will be overridden simply because their full significance has not been appreciated. The court must not treat the other considerations as so powerful as to assume that they must inevitably outweigh the child's best interests whatever they might be, with the result that no proper assessment takes place.'

Permission to appeal is granted in the terms set out in this decision."

10. At the hearing of the appeal before me I put to Mrs Willocks-Briscoe the determination of the Vice-President of the Tribunal in **SF and others (Guidance, post-2014 Act) Albania [2017] UKUT 00120 (IAC)** in which reference was made to a concession made by the Presenting Officer in that case with regard to 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" which states:

"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 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."

11. I put it to Mrs Willocks-Briscoe that the implication of that determination and of that IDI (which was in force at the date of the hearing) indicated that when a case did not

involve criminality the decision maker should not take a decision in relation to the parent who is exercising parental responsibility for a British citizen child if the effect of that decision will be to remove the parent exercising parental responsibility, and that although the appellant had overstayed it could not be said that he had repeatedly and deliberately breached the immigration rules. In reply Mrs Willocks-Briscoe stated that the judge had applied the relevant balancing exercises and had accepted it would be wrong to expect a British child to leave. She stated that it was open to the judge to conclude that despite the access which the appellant had to the child he was not entitled to leave to remain.

12. In his submissions Mr Omoniruvbe stated that he would rely on the grant by Judge O’Ryan for granting permission and referred to the provisions of Section 117B(6). He also stated that it was wrong for the judge to require an access order as there was evidence before him that the appellant did have access to the child. He stated the judge had erred in not considering the issue of the best interests of the child.
13. He stated also that Section 117B(6) should apply as at the date of the decision.

Discussion

14. Firstly, I consider that the judge erred in his interpretation of the Rules E-LTRPT.2.3. and 2.4. when he found that an order for access would be required with regard to the Rule. That is not a requirement of the rule. There was evidence before him that the appellant was exercising access to the child.
15. Secondly, I consider that the judge erred in law in his approach to the provisions of Section 117B(6). The reality is that provision makes it clear that:-
 - “(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”.
16. The reality is that there was clear evidence that the appellant did have a genuine and subsisting parental relationship with a qualifying child – the child is British and that Section 117B(6) applies. Unlike the relevant Rule where it is the facts as they are at the date of application which are relevant, when considering the application of Article 8 outside the rules the relevant date is the date of hearing and there is no requirement in Section 117B that a judge must only look at the circumstances as they were at the date of application or the date of the decision. Moreover, the terms of Section 117B(6)(a) refer to the appellant having a genuine and subsisting parental relationship

with a qualifying child. That was clearly accepted by the judge. With regard, moreover, to the application of Section 117B (6) it would clearly not be reasonable to expect the child to leave Britain – the child’s mother with whom she lives is Sri Lankan and there is no question of the child’s mother either wishing or being able to leave or could be expected to leave Britain. I consider that the judge erred in concluding that the other factors set out in Section 117B(6) outweighed the clear statement of law in Section 117B(6).

17. For these reasons I set aside the decision of the First-tier Judge.
18. It follows from what I have said above that having set aside the decision and having taken into account the provisions of Section 117B(6) that I consider that this appeal should be allowed. The appellant is exercising parental responsibility for a qualifying child and it would not be reasonable to expect the child to leave Britain. I would add that I am aware that the IDI quoted in the determination in **SF** to which I referred Mrs Willocks-Briscoe was replaced by a further IDI in February this year the reality is that the terms of Section 117B(6) are clear and unequivocal.

Decision

The decision of the First-tier Judge is set aside for error of law.

I remake the decision and allow this appeal on human rights grounds.

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

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.

Signed:



Date: 6 July 2018

Deputy Upper Tribunal Judge McGeachy