Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/07156/2014

THE IMMIGRATION ACTS

Heard at Birmingham **Decision and Reasons Promulgated**
On 30 July 2015 **On 19 August 2015**

Before

UPPER TRIBUNAL JUDGE PITT
DEPUTY UPPER TRIBUNAL JUDGE O'RYAN

Between

MILUTIN MASLOVARIC

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Bircumshaw, Coventry Law Centre
For the Respondents: Mr Smart, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision promulgated on 8 September 2015 of First-tier Tribunal Judge Morrison which refused the appeal on Article 8 ECHR grounds.

2. The background to this matter is that the appellant, a citizen of Montenegro, entered the UK on 20 December 2012 to visit his British wife for the birth of their first child. The appellant has been open that he obtained a visit visa as he knew that he could meet the English language entry clearance requirements as a partner, having failed to

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obtain a sufficient score in an IELTS test. On 10 June 2013 he applied for further leave to remain on the basis of his family life with his wife and daughter. The respondent refused that application in a decision dated 21 January 2014.

3. It was common ground before Judge Morrison, and before us, that the appellant could not meet the Immigration Rules for partners or parents as he was in the UK with leave as a visitor. The appellant's witness statement also confirmed that he had not obtained the required English language qualification and could not meet the financial requirements.

4. Judge Morrison therefore proceeded to conduct a second stage Article 8 assessment. He considered the evidence concerning the appellant's daughter who is a British national and on whom, really, this case turns. Judge Morrison sets out the medical evidence relating to the child at [16]. He accepts at [17] that she has some form of arthritis without there being a detailed diagnosis and accepted that she will require ongoing medical treatment at Birmingham Children's Hospital. The judge went on at [18] and [19] to assess the child's best interests, finding that they were for her to be with both parents but that it had not been shown that separation on a temporary basis from her father would have an adverse effect on her development.

5. Notwithstanding the findings on the child's best interests, Judge Morrison concluded that the decision to refuse leave did not amount to a disproportionate interference with family life.

6. The grounds of appeal argue, firstly, that Judge Morrison failed to apply section 117B(6) in the second stage Article 8 assessment. This required him to take into account that "the public interest does not require" the appellant's removal if "it would not be reasonable to expect" his child to leave the UK.

7. We accept that it was an error not to address the provisions of paragraph 117B(6) as they are a mandatory consideration; see Dube (ss.117A-117D) [2015] UKUT 90 (IAC) and Forman (ss 117A-C considerations) [2015] UKUT 412 (IAC).

8. We did not find this to be an error such that the decision had to be set aside to be re-made, however.

9. Firstly, we could not see how the material before Judge Morrison could have led to the conclusion that it was not reasonable for the child to leave the UK with her parents. The medical evidence did not indicate that the child's arthritis was serious or could not be treated in Montenegro. Nothing supported the mother's assertion in her witness statement about limited access to healthcare there. She expressed concern if there is a medical emergency but nothing suggested that anything of that kind has or will occur. The evidence was that the appellant was employed as a veterinary technician in Montenegro, that

his wife is qualified to degree level and that her parents have funds which they are willing to use to support the couple. The appellant's wife is not unfamiliar with the country after a number of visits. We did not accept that the evidence came close to showing that the family would have to live in conditions in Montenegro that would make it unreasonable for this very young child to go there with her parents.

10. We should also point out for completeness sake that no issue arises from the principles in C-34/09 *Ruiz Zambrano* and C-256/11 *Murat Dereci.* The couple here are clear that the appellant's wife will remain in the UK with their daughter whatever the outcome of the appeal so the child cannot be said to be deprived of her rights as an EEA citizen by the decision. The assessment of reasonableness under section 117B(6) is in the context of Article 8 and not EEA law.

11. It was also our view that the failure to address section 117B(6) was not material where it is only one of a number of criteria to be applied in the second stage Article 8 assessment and the section 117B factors are specifically expressed as being non-exhaustive; see Forman (ss 117A-C considerations) [2015] UKUT 412 (IAC) again. Whatever the outcome of the assessment of the reasonableness of the child leaving the UK, that still fell to be weighed against the public interest in maintaining effective immigration control as expressed in the Immigration Rules. Those Rules still fell to be weighed as a central or primary factor; see Haleemudeen v SSHD [2014] EWCA Civ 558 at [42]. The appellant accepts that the English language and financial requirements were not met, those matters further weighing against him.

12. In our judgement, other than the child's circumstances, the evidence not showing it to be unreasonable for her to leave the UK, all of the factors to be taken into account went against the appellant. It appeared to us that the First-tier Tribunal judge summarised the appeal very accurately at [26], stating:

> "In effect what I am being asked to do in this case is to dispense with the requirement of the appellant to meet the Immigration Rules."

13. It was not our view that the appellant could expect to benefit in that way even after an assessment of the reasonableness of the child leaving the UK which we have found, in any event, could not have been a material factor here.

14. The remainder of the grounds and oral argument before us concerned a comparison between the appellant's circumstances and those of someone in the UK unlawfully or on temporary admission. Quite correctly, given the limits of our statutory jurisdiction, this was not put in terms of a *vires* challenge. As we understood it, the submission was that the appellant should in some way benefit in the Article 8 second stage proportionality assessment given that someone

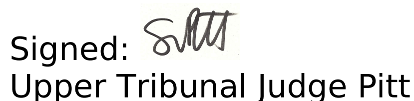
who did not have leave or had temporary admission might be able to benefit from paragraph EX.1 when this appellant who had entered and remained lawfully could not do so.

15. We can deal with that aspect of the challenge relatively simply as we did not accept that what was a different set of facts for which Parliament via the Immigration Rules has made different provision was relevant to the assessment that Judge Morrison had to make.

16. For these reasons, we did not find that the decision of the First-tier Tribunal disclosed an error on a point of law such that it should be set aside.

Decision:

The decision of the First-tier Tribunal does not disclose an error on a point of law such that it should be set aside and it shall stand.

Signed: 

Upper Tribunal Judge Pitt 10 August 2015