Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: AA/08786/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 July 2016	**On 20 July 2016**

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

MR RAHMATULLAH REZAEI
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Collins, counsel instructed by J McCarthy Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Nicholls promulgated on 29 March 2016. Permission to appeal was granted by Upper Tribunal Judge Macleman on 23 May 2016.

Anonymity

2. No direction was made by the previous judge, none was requested before me and there is no reason for one now.

Background

3. The appellant, who claims to be a national of Afghanistan, arrived in the United Kingdom clandestinely, having come into contact with the authorities in Italy and France *en route* to this country. On arrival he put forward a different identity, one he had used in Italy and in France. The appellant's asylum claim was based on his father having been killed by the Taleban owing to his role as a police officer. On 19 February 2012, the respondent was informed that the appellant had disappeared from social services. By the time the appellant came to light he was living with a partner with whom he had a child.

4. The Secretary of State refused the application on 22 May 2015, concluding, essentially, that the appellant had failed to establish his identity or that he was a national of Afghanistan. The remainder of his claim was rejected owing to inconsistencies and the fact that his immigration history further damaged his credibility. The respondent considered the appellant's family life but concluded that the appellant had not provided any documentary evidence that he was residing with his partner and it was considered that his partner could look after their child after he had left the United Kingdom. The position of the partner's other six children was also considered however the respondent did not accept that the appellant's removal would disrupt the social or education provision of any of the children.

5. The appellant appealed to the First-tier Tribunal.

The hearing before the First-tier Tribunal

6. The appellant and his partner gave evidence. The judge rejected the asylum claim on the basis that the appellant had "*not demonstrated that is a credible witness about his nationality, ethnic background and the history he gives of his life in Afghanistan*." It was not argued on the appellant's behalf that he could meet any of the requirements of Appendix FM, however the judge considered this issue for himself and decided that the appellant could not meet the suitability requirements owing, principally, to his conduct. Considering Article 8 ECHR, outside the Rules, the judge accepted that the appellant's child, aged around two at the time of the hearing, was "*probably*" a British citizen, that the appellant enjoyed a genuine and subsisting parental relationship with that child and that it would not be reasonable to expect the child to leave the United Kingdom in order "*to live in Afghanistan, assuming that is a country to which the Appellant can be removed*." The judge dismissed the appeal on the basis that the appellant's conduct outweighed any concerns as to the best interests of the children of the relationship.

The grounds of appeal

7. The six grounds of appeal argued that the judge erred in failing to treat paragraph 117B(6) as determinative of the public interest question, with reference to *Treebhawon and others (section 117B(6)*[2015] UKUT 674 (IAC). The judge was also said to have erred in failing to consider the appellant's freestanding humanitarian protection and asylum claims under the ECHR adequately or at all; that he failed to give adequate reasons for dismissing those claims; that he misdirected himself by failing to apply or consider the provisions of EX.1.(a) and (b); that he misapplied paragraph 276ADE(vi) and that he made a mistake as to material fact. The renewed grounds amplified the same points.

8. Permission to appeal was granted on the basis that it was arguable that the judge's conclusions on Article 8, either inside or outside the Rules was open to debate. In relation to the other grounds, Upper Tribunal Judge Macleman considered there was nothing in the grounds based on general country conditions and no realistic argument that the appellant ought to have been found entitled to any form of international protection or entitlement to remain on the basis of his private life alone.

9. The Secretary of State's response indicated that the appeal was opposed, albeit without sight of the original grounds. It was noted that there was no challenge to the appellant's asylum claim and his credibility was already impugned. The respondent remarked that the grant of permission specifically declined to find any arguable error of law in relation to country conditions or the claim for humanitarian protection and her view was that this constituted a refusal of permission to appeal on that ground. The respondent considered it clear that permission was only granted in relation to Article 8 and her view was the judge dealt with it comprehensively and gave adequate reasons for his conclusions. The Secretary of State contended that the *ratio* of *Treebhawon* was incorrect and that section 117B (6) was not a trump card over the other public interest considerations.

The error of law hearing

10. Mr Collins did not seek to resurrect the other grounds of appeal. He relied solely on the issue which had resulted in a grant of permission to appeal. He firstly stated that it was clear that the child was British, in that the mother was a British citizen. Mr Melvin conceded that was the case.

11. Mr Collins relied on *Treebhowan* at [14] and [21] and argued that the fact that the judge found that the appellant had a genuine and subsisting relationship with his child coupled with the judge's findings that it was not reasonable to expect the child to leave the United Kingdom was determinative of the issue with regard to section 117B(6). He argued that the decision in *MA (Pakistan)* [2016] EWCA Civ 705 made no difference given the judge's findings and submitted that the appeal should be remade by being allowed under Article 8 outside the Rules, albeit not under the Rules.

12. Mr Melvin drew my attention to the fact that the judge looked at whether the Rules were met and concluded that the appellant could not meet the requirements under

Appendix FM because of the suitability requirements. While the judge accepted the relationship between the appellant and his child, this was not determinative of the appeal. The appellant could not "go straight to 117B(6) and expect DLR." He argued that the judge looked at all aspects including eligibility and suitability and found the appellant wanting. It was not enough to have a qualifying child as this would make a mockery of Rules. Mr Melvin stressed that the judge's finding was that it was unreasonable for the child to live in Afghanistan specifically.

13. In reply, Mr Collins argued that the judge had erred at the end of paragraph 24 in stating "*that conclusion, however, is not the end of the matter*."

Decision on error of law

14. At the end of the hearing, I announced that the judge made no material error of law and that I upheld his decision in its entirety. My reasons are as follows.

15. In *MA (Pakistan)*, it was established that the reasonableness of expecting a child to leave the United Kingdom, as referred to in EX.1(a) of Appendix FM to the Immigration Rules, paragraph 276ADE(iv) of the Rules and section 117B(6) of the 2002 Act should be approached in the same way. Elias LJ was persuaded to follow the approach taken in *MM (Uganda)* as follows;

> "But the critical point is that section 117C(5) is in substance a free-standing provision in the same way as section 117B(6) and even so the court in *MM (Uganda)* held that wider public interest considerations must be taken into account when applying the "unduly harsh" criterion. It seems to me that it must be equally so with respect to the reasonableness criterion in section 117B(6)."

16. Mr Collins made much of what the judge said at [24] that "*it would not be reasonable to expect (the appellant's child) to leave the UK*." That submission overlooks the fact that the judge was clearly not considering the overall question of reasonableness but the reasonableness of leaving the United Kingdom for Afghanistan, specifically, with the caveat, "*assuming that is a country to which the Appellant can be removed*." The judge was plainly correct in stating that was not the end of the matter in view of his earlier finding that the appellant had failed to establish his nationality, ethnicity or any other aspect of his circumstances prior to coming to the United Kingdom. Mr Collins did not attempt to challenge any of these findings during the hearing and indeed they went unchallenged in the grounds.

17. The judge rightly went on to consider public interest considerations in relation to considering the reasonableness of expecting the child in question to leave the United Kingdom. At [25] the judge examines the Article 8 claim through the lens of the Immigration Rules, remarking that the appellant did not meet the requirements of S-LTRP 2.2(b) owing to his failure to disclose material facts relating to his earlier asylum claim in Italy and the acquisition of a passport in 2011 which was not produced until the day of the hearing.
18. The judge also notes that the appellant did not meet the requirements of E-LTRP 2.2(b) because he was unlawfully in the United Kingdom. There was no evidence before the judge to show that the income levels required by E-LTRP 3.3 were of the required amount. He also provided several reasons for concluding that the appellant

could not succeed under paragraph 276ADE including that the appellant was "*not a credible witness and has not established even to the lower standard of proof the likelihood that his claimed nationality and account of events are true*."

19. Returning to *MA (Pakistan)*, I note that a period of seven years' residence would need to be given "*significant weight*". I consider that British citizenship is equally, if not more, deserving of weight. In the said case, the starting point was said to be that leave should be granted unless there are "*powerful*" reasons to the contrary.

20. Throughout the decision, the judge reaches a number of adverse findings regarding the appellant's account. Between [13] and [18], the judge notes that the appellant knew very little about the part of Afghanistan he claimed to come from; that he provided a different name and date of birth to the authorities in Italy; that he told the respondent that he did not have a birth certificate while telling social services the opposite; that he failed to mention having been fingerprinted in Italy; that he produced for the first time a document purporting to be an Afghani passport issued in 2011 at the hearing and which the respondent had not had an opportunity to verify and that he deliberately absconded from immigration control for over a year and a half. The judge considered the appellant's age and various explanations put forward for his behaviour but concluded that they did not counter the damage to his credibility.

21. It is apparent from [27] of the decision that the judge considered that the appellant's "*clear breaches of the Immigration Rules and his obligations in the United Kingdom and a clear possibility that he has equipped himself with a false passport substantially outweigh any concerns about the best interests of the children*." The judge was correct in finding that there were numerous reasons why the appellant could not succeed by relying on section 117B(6). Those reasons amount to the powerful reasons referred to in *MA (Pakistan)*. This was a conclusion the judge was entitled to reach on the facts before him.

Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error of on a point of law.

The decision of the First-tier Tribunal is upheld, in its entirety.

Signed Date: 19 July 2016
Upper Tribunal Judge Kamara