Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/10983/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3 May 2016	**On 24 May 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

MOHAMAD RADI LAHUAK
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: No appearance
For the Respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Iraq who was born on 1 July 1981. This appeal arises from the respondent's decision to refuse his application for leave to remain in the UK on the basis of his private and family life under Article 8 ECHR. The appellant's ensuing appeal was heard by First-tier Tribunal ("FtT") Judge Manuell who, in a decision promulgated on 2 October 2015, dismissed the appeal. The appellant now appeals that decision.

Background

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2. In 2007 the appellant left Iraq and was granted refugee status in Bulgaria. He then moved to Denmark.

3. The appellant's sister lives in the UK. In 2010, whilst the appellant was in Denmark, his sister introduced him to a female British citizen, originally from Kuwait, who visited him in Denmark and subsequently became his partner.

4. In September 2011 the appellant was refused leave to enter the UK.

5. In January 2013 the appellant entered the UK unlawfully. On 26 February 2013 he and his partner entered into an Islamic marriage and began living together.

6. The appellant and his partner have two children: the eldest was born on 2 December 2013 and the youngest was born on 29 January 2016. Both are UK citizens. The eldest child has medical problems relating to her hip, for which she has required surgery on several occasions.

7. The appellant applied for leave to remain on the basis of his relationship with his partner and their first child (the second child not yet having been born). The respondent refused the appellant's application, finding both that he was unable to satisfy the relevant Immigration Rules (Appendix FM and Section 276ADE) and that there were no exceptional circumstances that would warrant a grant of leave to remain outside the Rules.

Decision of First-tier Tribunal

8. At paragraph [11] the FtT stated that Counsel for the appellant accepted that the Immigration Rules could not be met. The decision does not include any consideration of the Immigration Rules and only assesses the appellant's Article 8 claim outside the framework of the Rules.

9. The FtT accepted that the appellant had established a family life in the UK with his partner and child. It then proceeded to consider whether there were compelling or exceptional circumstances that would warrant the appeal being allowed outwith the Rules. In finding that there were not, the FtT identified a number of factors relevant to the proportionality of the appellant being removed from the UK. These included the following:

    (i) The appellant is a persistent immigration offender and his partner has been "complicit in his behaviour".

    (ii) His marriage has not been recognised in English law and he and his partner chose to have children knowing he had no right to be in the UK

    (iii) The appellant and his wife have no real ties to the UK and have "shown wholesale contempt for UK law"

    (iv) The appellant's partner has family in the UK, including a sister in law, who could assist her if she remained in the UK whilst her partner was removed.

(v) Family life with the appellant's partner and child could continue, and the future needs of the appellant's child could be met, outside the UK. The decision as to whether the family life should continue outside the UK would be a choice for the appellant and his partner.

10. At paragraph [4], when setting out the relevant law, the FtT stated that Sections 117A-D of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") must be taken into account. Consideration of these sections was undertaken at paragraphs [19] and [20] where it was stated:

> "19. ... The appellant met none of the positive factors set out in section 117B, which in any event do not create a right of entry.
>
> 20. The appellant has recently established family life in the United Kingdom, which was no longer in dispute. The appellant developed his family life in the United Kingdom while he and Mrs Al Anazi [his partner] were well aware that his presence was "precarious" to apply the terms used in section 117B(6). Indeed, it could hardly be more precarious"

11. At paragraph [21] the FtT assessed the best interests of the appellant's child, and stated as follows:

> "21. The best interests of the appellant's child favour the appellant's presence in the United Kingdom. But this is a special situation where there has been flagrant breach of immigration control. The child's best interest are not paramount. No evidence was provided to show that family life could not be lived elsewhere, as already noted above. The child is young and adaptable. Her medical needs have been met. There was no evidence that any future needs could not be met elsewhere. Many British Citizens live abroad by choice, which in the present appeal would (if in fact made) be a choice of the parents"

Grounds of appeal and submissions

12. Several grounds of appeal were submitted but permission to appeal was limited to two of the grounds which, taken together, essentially argue that the FtT erred by failing to properly construe and apply Section 117B(6) of the 2002 Act or give proper consideration to the best interests of the appellant's child.

13. Mr Lahuak was not represented and addressed the Tribunal through an interpreter. He explained that he now has two children, both of whom are British citizens. In response to questions posed about his status in Bulgaria, he submitted that he previously had temporary residence but this had now expired. He claimed that he would not be able to return to Bulgaria – or Denmark (where his status depended on his right to reside in Bulgaria) - and would, if removed from the UK, have no alternative other than to be sent to Iraq. He considers it unacceptable to be sent to Iraq because of the danger he maintains he and his family would face. His wish is to live in the UK in peace and safety with his wife and children, all of whom are British citizens.

14. Mr Melvin argued that, taking all of the material circumstances together, it was clear that it was proportionate, and reasonable, for the appellant to be removed and there were no compelling circumstances that would justify the appeal being allowed outside the Rules.

15. He argued that the FtT had not misapplied Section 117B(6) of the 2002 Act. To the extent that its decision was inconsistent with Treebhawon and others (section 117B(6)) [2015] UKUT 00674 (IAC), Mr Melvin argued that (a) Treebhawon was promulgated after the FtT decision and (b) Treebhawon was wrongly decided and should not be followed. He argued that the correct interpretation of Section 117B(6), when having regard to Section 117A(2), is that all of the factors in Section 117 must be considered and it should not be treated as a stand-alone provision. This, he argued, is consistent with KMO (section 117 - unduly harsh) Nigeria [2015] UKUT 543 (IAC) as well as a recent unreported decision (which I was invited to consider).

Consideration of the applicable law

16. Part 5A of the 2002 Act sets out mandatory public interest considerations that the FtT must take into account when assessing the proportionality of a person's removal from the UK under Article 8 outside the framework of the Immigration Rules.

17. One of the considerations in Part 5A is section 117B(6) which states:

> '(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.

18. On its face, the wording in 117B(6) is very clear: where a person satisfies subsections 6(a) and 6(b) the public interest does not require his or her removal.

19. The Upper Tribunal recently, in Treebhawon and others (section 117B(6)) [2015] UKUT 00674 (IAC), considered how Section 117B(6) should be interpreted and stated as follows:

> "20. In section 117B(6), Parliament has prescribed three conditions, namely:
>
> (b) the person concerned is not liable to deportation;
>
> (c) such person has a genuine and subsisting parental relationship with a qualifying child, namely a person who is under the age of 18 and is a British citizen or has lived in the United Kingdom for a continuous period of seven years or more; and
>
> (d) it would not be reasonable to expect the qualifying child to leave the United Kingdom.

> Within this discrete regime, the statute proclaims unequivocally that where these three conditions are satisfied the public interest does not require the removal of the parent from the United Kingdom. Ambiguity there is none.
>
> *21.* Giving effect to the analysis above, in our judgment the underlying Parliamentary intention is that where the three aforementioned conditions are satisfied the public interests identified in section 117B(1) – (3) do not apply."

20. Mr Melvin developed an argument as to why Treebhawon was wrongly decided. In sum, he maintained that Treebhawon effectively turns Section 117B(6) into a freestanding provision which is inconsistent with the requirement in Section 117A(2) to have regard to all of the Section 117B considerations. Moreover, he argued that the assessment under Part 5A of the 2002 Act must be understood in the proper context which is that an appeal does not succeed or fail because of the Section 117B considerations but rather on the basis of there being (or not being) an infringement of Article 8 ECHR. Section 117, therefore, does no more than illuminate the assessment of an Article 8 claim during the balancing exercise that is carried out when making findings on proportionality. These arguments follow the reasoning of an unreported decision to which Mr Melvin drew my attention. I have considered the analysis in that decision, which corresponds to the submissions made by Mr Melvin. However, having regard to section 11.3 of the Practice Directions, I have decided not to cite the decision because citing it, as opposed to considering the argument of the reasoning found in it (which I have done) does not provide me with material assistance.

21. Although Mr Melvin has made an attractive argument, I do not accept it. The wording in Section 117B(6) is unambiguous and clear: if the conditions specified therein are met, the public interest does not require a person's removal from the UK. That is what the statute provides, and Treebhawon does no more than reiterate this.

Error of law

22. Having regard to Section 117B(6) and its proper interpretation, along with the best interests of the appellant's eldest child, in my judgment the FtT materially erred in three ways.

23. Firstly, the FtT misconstrued the requirements of Section 117B(6). At paragraph [20] the FtT referred to the appellant's immigration status as being "precarious" in the context of considering Section 117B(6). However, the appellant's immigrations status, whilst relevant to other considerations under Section 117B, has no relevance to Section 117B(6). Conflating Section 117B(6) with other considerations is an error of law.

24. Secondly, it is clear that the FtT, in reaching its decision as to the proportionality of the appellant's removal, placed significant weight on the public interest this would serve (at paragraph [21], for example, it referred

to this being “a special situation where there has been flagrant breach of immigration control”). In so doing, the FtT failed to recognise that where the conditions specified in Section 117B(6) are satisfied the public interest does not require the appellant’s removal irrespective of how flagrant his breaches of immigration control have been.

25. Thirdly, the FtT erred, in its analysis of whether it would be reasonable for the appellant’s eldest child to leave the UK, by failing to take into account material factors relevant to her specific and particular circumstances. This included, inter alia, a failure to consider:

    (a) which country the appellant’s child would be removed to and the challenges she may face in that country;

    (b) the implications for the child’s health of leaving the UK (other than a comment that her medical needs have now been met which is not consistent with the medical evidence of her underlying problems);

    (c) the implications of the child being removed to a country that her mother is not a citizen of and to which her mother has no connection; and

    (d) the significance of a British citizen child having to leave the UK (other than a comment of no specific relevance to the appellant’s child’s circumstances that “many British citizens live abroad by choice”).

26. Accordingly, for the reasons I have set out above, I find that the decision of the FtT contains a material error of law.

Remade decision

27. I accept the findings of the FtT that (a) the appellant is unable to satisfy the Immigration Rules; (b) there is family life between the appellant and his partner and child such that Article 8 is engaged; and (c) the issue to be determined is the proportionality of the appellant’s removal under Article 8 outside the Immigration Rules.

28. The assessment of whether the appellant’s removal is proportionate requires consideration to be given to Part 5A of the 2002 Act and in particular Section 117B(6).

29. As explained above, if the three conditions specified in Section 117B(6) are satisfied, the public interest does not require the appellant’s removal. The first condition under Section 117B(6) is that the appellant is not liable for deportation. This is clearly met. The second condition is that he has a genuine and subsisting relationship with a qualifying child. It is clear from the evidence that the appellant has such a relationship with two children.

30. The third condition is that it would not be reasonable to expect the appellant’s children to leave the UK. This condition is also met. It is unclear from the evidence whether, if the appellant were removed, it would be to Iraq (the country of his nationality) or Bulgaria (the country that granted him asylum). However, irrespective of which country would be his

destination, it would not, in my view, be reasonable to expect his children to accompany him. They are British citizens. Their mother is a British citizen who has no connection to either Iraq or Bulgaria. The eldest child has required, and may continue to require, ongoing medical treatment which is currently provided by the NHS and to which, as a British citizen, she is undoubtedly entitled. It may well be reasonable, taking into account all of the circumstances, for the appellant to leave the UK without his partner and children, but that is not the condition stipulated Section 117B(6) which concerns only whether it would be reasonable for his children to leave the UK.

31. As highlighted in the recent decision of PD & Others (Article 8 – conjoined family claims) Sri Lanka [2016] UKUT 00108 (IAC) the test of "reasonableness" represents a less exacting threshold than other tests found in the Immigration Rules, such as "insurmountable obstacles, exceptional circumstances [and] very compelling factors". Whilst, clearly, there may be circumstances in which it would be reasonable to expect British citizen children to leave the UK (particularly where they will be travelling to an EU country), I find that in this case, where they would be travelling to a country with which they and their British national mother have no connection, and where the eldest daughter has ongoing medical needs which are being provided by the NHS, it would not be reasonable.

32. I recognise that the public interest considerations at sections 117B(1) – (3) of the 2002 Act strongly favour the appellant being removed from the UK. Subsection (1) states that maintenance of effective immigration controls is in the public interest. The appellant has entered the UK unlawfully and as such this is a case where the public interest in immigration control is brought into sharp focus and warrants being given considerable weight. With respect to sub-paragraphs (2) and (3), the appellant does not speak English and is not financially independent.

33. However, the consequence of having found that the three conditions of Section 117B(6) are satisfied is that the public interest does not require the appellant's removal. This is the clear and unambiguous language of the 2002 Act, the interpretation of which has been confirmed by the Upper Tribunal in Treebhawon. Accordingly, the public interest considerations identified in sections 117B(1) – (3) do not apply however strong they might otherwise have been.

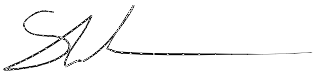
34. As the public interest does not require the appellant's removal, it follows that the balancing exercise under Article 8 weighs firmly in his favour.

DECISION

35. The FtT's decision contains a material error of law and is set aside.

36. The decision I substitute is to allow the appellant's appeal outwith the framework of the Immigration Rules under Article 8 ECHR.

Signed



Deputy Upper Tribunal Judge Sheridan Dated: 23 May 2016