Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/21795/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9th March 2016	**On 14th April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

MR AB
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Khubber, instructed by Lambeth Law Centre
For the Respondent: Mr S Kotas, Home Office Presenting Officer

DECISION AND REASONS

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

The First-tier Tribunal made an order pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. I continue that order.
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 his 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.

1. The Appellant, a citizen of Jamaica, appealed to the First-tier Tribunal against a decision of the Secretary of State dated 21 May 2013 to remove him from the UK. A panel of the First-tier Tribunal comprising First-tier Tribunal Judge Easterman and Ms L Schmitt (the Panel) dismissed the Appellant's appeal in a decision promulgated on 10 August 2015. The Appellant now appeals with permission to this Tribunal.

2. The issue in this appeal is the interpretation of section 117B (6) of the Nationality, Immigration and Asylum Act 2002. The relevant provisions of section 117 for the purposes of this appeal are as follows;

"ARTICLE 8 OF THE ECHR: PUBLIC INTEREST CONSIDERATIONS

117A Application of this Part

(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—

(a) breaches a person's right to respect for private and family life under Article 8, and

(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard—

(a) in all cases, to the considerations listed in section 117B, and

(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

117B Article 8: public interest considerations applicable in all cases

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(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.

…

117D Interpretation of this Part

(1)In this Part—

"Article 8" means Article 8 of the European Convention on Human Rights;

"qualifying child" means a person who is under the age of 18 and who—

(a) is a British citizen, or
(b) has lived in the United Kingdom for a continuous period of seven years or more;

…"

3. The background to this appeal is that the Respondent says that the Appellant came to the UK in 1999 using a false name, returned to Jamaica, and re-entered in 2002 using his current name and failing to declare his previous name. The Appellant denies this saying that he entered the UK for the first time in 2002 using his current name and has been here ever since. The Appellant has had two relationships in the UK from which he has had three children. He married JO in March 2003 and was granted leave to remain and then indefinite leave to remain on the basis of that marriage. In the meantime the relationship ran into difficulties and the Appellant met NB who became pregnant and had the couple's son (R) in June 2006. The Appellant then reconciled with his wife who gave birth to the couple's daughter in 2009 and after that the relationship ran into difficulties again and the Appellant moved out. In this year the Appellant was granted a residence order in relation to R and he was his son's primary carer from 2010 until 2012. Following his application for a driving licence the Appellant was charged with and convicted of giving false information or using deception in order to obtain his immigration status (in connection with his entry to the UK in 1999) and was sentenced to six months' imprisonment. In the meantime JO gave birth to the couple's second child (a son) in March 2012. Following his release from prison in May 2013 the Appellant was reunited with his wife and children but left to live with NB again in July 2013. They have since separated but the Appellant has an ongoing relationship with his son R, saying that he sees him three

times a week. As a result of a non-molestation injunction taken by JO the Appellant does not see the two children from his marriage but intends to obtain a contact order in relation to the children. There was evidence before the Panel from the police setting out details of reports of domestic violence incidents investigated by the police over a number of years and a number of convictions for cannabis offences.

4. At the hearing in the First-tier Tribunal the Home Office Presenting Officer conceded that the Appellant has a subsisting relationship with a qualifying child (his son, R) and that it would not be reasonable to expect the child to leave the UK [65]. The issue for determination by the Panel was therefore identified as being that the Appellant would qualify under section 117B (6) of the Nationality, Immigration and Asylum Act 2002, 'unless it had a narrower meaning that (sic) appeared on the face of it' [65]. The Presenting Officer submitted that wider factors should be taken into account in considering section 117B (6) [64] whereas the Appellant's representative submitted that section 117B (6) clearly meant that that it was not in the public interest to remove the Appellant.

5. The Panel considered the evidence before it including a report by an independent social worker which concluded that the Appellant's child R is a 'vulnerable child' whose best interests are for his relationship with his father to continue both because of the nature of their relationship but also to provide stability and continuity in terms of the child's emotional development [79]. The Panel considered the Appellant's criminal convictions which they summarised as by and large amounting to 'possession of cannabis or on one occasion possessing it with intention to supply, on another occasion possession of a bladed article in a public place' [81]. The Panel also considered a large number of reports in relation to domestic incidents between the appellant and JO and NB as a result of which the independent social worker acknowledged that it would not be in the children's best interests for the Appellant to live with either woman. The Panel expressed concern about the Appellant's influence on his son in light of his ongoing use of drugs and his lack of skills. The Panel considered the Appellant's situation under Article 8 outside of the Immigration Rules and concluded;

> "92. … We do not accept that, when considering the proportionality balance into which historically and on European jurisprudence everything on either side is taken into account and weighed, that Section 117B (6) can have been intended to mean, that regardless of the appellant's character, history generally, criminality and other factors, so long as he has a subsisting relationship with a qualifying child who it was not expected reasonably could leave the United Kingdom, he must succeed.
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> 93. We conclude that paragraph 117B(6) means simply that where there are no other factors militating against the appellant, and he has a subsisting relationship with a child who meets the other criteria then on that basis it would not be in the public interest to remove him. If we are wrong about that, as already said, it is clear the appellant must succeed".

6. In considering proportionality the Panel weighed against the Appellant his seven criminal convictions, the fact that he has otherwise come to the attention of the police, the fact that he is unable to meet the Immigration Rules, he has built up relationships in the UK whilst here without leave, and that he has continued to deny that he was involved in deception. The Panel said that it was not as clear as the independent social worker that the Appellant's influence on R is necessarily for the good but nonetheless weighed the child's best interests in the Appellant's favour. The Panel concluded that the Respondent's decision to remove the Appellant was proportionate to the legitimate aim of the maintenance of effective immigration control and the protection of the public good and dismissed the appeal.

7. The Appellant's application for permission to appeal was refused by the First-tier Tribunal but granted by the Upper Tribunal on renewal on the grounds that it is arguable that the Panel erred at paragraphs 92 and 93 of the decision as their findings are arguably contrary to the guidance provided by the Upper Tribunal in Treebhawon and others (section 117B(6)) [2015] UKUT 00674 (IAC) (promulgated after the decision of the First-tier Tribunal in this case) as the three conditions set out in section 117B (6) were found to have been satisfied. It was considered arguable that the Panel erred in assessing the proportionality of the decision by reference to the remaining provisions of section 117 and in not finding section 117B (6) to be determinative.

Error of Law

8. In the rule 24 response and in oral submissions before me it was contended on behalf of the Secretary of State that the decision in Treebhawon, being an error of law decision and therefore not appealable, should not have been reported and should not therefore be followed. It is contended that the approach to section 117B (6) set out in the decision of Treebhawon is not one intended by Parliament because, whilst section 117 sets out factors to be considered in approaching the question of the public interest, it does not mean that courts should not have regard to other factors including the public interest factors that do not require removal. It is contended that the Tribunal must have regard to the Immigration Rules. Reliance is placed on the decision in Forman (ss 117A-C considerations) [2015] UKUT 00412 (IAC) where it was held that the list of considerations contained in section 117B and section 117C of the 2002 Act is not exhaustive and that a court or tribunal is entitled to take into account additional considerations, provided that they are relevant in the sense that they properly bear on the public interest question. It is contended that whilst the public interest may not *require* a person's removal where the factors in section 117B(6) apply, absent any countervailing factors, it may nevertheless *permit* removal where such factors are in play.

9. At the hearing Mr Kotas relied on the unreported decision by Upper Tribunal Judge Southern in the case of GES (Appeal number IA/45698/2014) promulgated on 21 December 2015. Mr Khubber objected to reliance being placed on this unreported case as the Secretary of State had not complied with the Practice direction. I allowed

the decision to be admitted and I allowed Mr Khubber a period of 7 days after the hearing to make any additional written submission on the decision which he did.

10. Mr Khubber submitted that the correct interpretation of section 117B (6) is at the heart of this case. He relied on the decision of Treebhawon and submitted that section 117B (6) is determinative of the public interest question as the statute is unequivocal. He submitted that section 117B (6) is consistent with existing legislation. He submitted that the decision of the Panel is flawed as it conflated questions 4 and 5 of the steps set out in R v SSHD ex parte Razgar [2004] UKHL 27. He submitted that the submissions of the Secretary of State which distinguish between the removal being permitted rather than required misunderstands the fifth Razgar question which considers proportionality and asks what is required. Mr Khubber submitted that the decision in GES does not eclipse Treebhawon as the facts are different in that case.

11. Mr Kotas submitted that the Panel made its decision before the decision in Treebhawon so could not be criticised for not following that decision. He submitted that the child in this case would not have to leave the UK if his father was to be removed and that therefore there would be no expectation that the child would have to follow his father from the UK. He submitted that it cannot be right that section 117B (6) is determinative as an assessment of proportionality must look at everything. He submitted that here, reliance on section 117B (6) as determinative would exclude a litany of criminality on the part of the appellant and that cannot be a proper proportionality assessment.

12. In response Mr Khubber submitted that the Panel's decision records that the Secretary of State conceded that it would not be reasonable to expect the appellant's child to leave the UK and there is no challenge to that concession or the findings based on it. He submitted that there is a distinction between removal and deportation in consideration of criminality and that, as this is not a deportation, section 117B (6) applies.

13. There was no challenge to the findings of fact. In light of the way in which the First-tier Tribunal decision was made, acknowledging that if a narrower interpretation of section 117B (6) was correct then the appeal should succeed, the parties agreed that if I were to follow the decision in Treebhawon, the appeal should be allowed on the basis of the findings of the First-tier Tribunal, otherwise it should be dismissed on the basis that there is no error in the decision of the First-tier Tribunal.

14. The question issue considered in Treebhawon was identified at paragraph 14 of the decision in that case as follows;

> *"In a case where a Court or Tribunal decides that a person who is not liable to deportation has a genuine and subsisting parental relationship with a qualifying child, as defined in Part 5A of the Nationality, Immigration and Asylum Act 2002, as amended, and it would not be reasonable to expect such child to leave the United Kingdom, with the result that the two conditions enshrined in section 117B(6) are satisfied, is this determinative of the "public interest question", namely the issue of proportionality under Article 8(2) ECHR?"*

15. This is the same question considered by the Panel in the instant appeal and the answer to that question determines whether the Panel took the correct approach to proportionality.

16. The Tribunal in Treebhawon considered section 117B (6) and concluded;

> "18. The resolution of the second ground of appeal turns on how we construe section 117B(6), considered in its full statutory context. In performing this exercise, we derive no assistance from the construction which we have given to section 117B(4) and (5). We consider it instructive to juxtapose section 117B(6) with its three public interest siblings, namely section 117B(1), (2) and (3). Section 117B(6), notionally, follows these three provisions sequentially. Notably, Parliament has not established any correlation between section 117B(6) and the other three sibling public interest provisions. In particular, section 117B(6) is not expressed to be "*without prejudice to*" or "*subject to*" any of the other three related provisions. Furthermore, section 117B(6) is formulated in unqualified terms: in cases where its conditions are satisfied, the public interest does not require the removal from the United Kingdom of the person concerned. In this respect also it different from its siblings, which contain no comparable instruction.
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> 19. The next notable feature of the new statutory regime is that in section 117B (6) Parliament has chosen to differentiate between those who are, and who are not, liable to deportation. It has provided a separate and special dispensation for members of the latter class. This is harmonious with one of the overarching themes of Part 5A, which is to subject foreign criminals who are liable to deportation to a more rigorous and unyielding regime. In the case of those who are not liable to deportation, Parliament has chosen to recognise that, where the specified conditions are satisfied, a public interest which differs from those public interests expressed in Section 117B(1)-(3) is engaged. The most striking feature of this discrete public interest is its focus on one of the most vulnerable cohorts in society, namely children. The focus is placed on the needs and interests of these vulnerable people. Furthermore, the content of this public interest differs markedly from the other three, all of which are focused on the interests of society as a whole. In enacting Section 117B(6), Parliament has given effect to a public interest of an altogether different species. Notably, this new statutory provision is closely related to and harmonious with what has been decided by the Upper Tribunal in a number of cases, namely that there is a free standing public interest in children being reared within a stable family unit. The effect of Part 5A of the 2002 Act is, of course, that this discrete public interest must yield to more potent public interests in certain circumstances.
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> 20. In section 117B(6), Parliament has prescribed three conditions, namely:
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> (a) the person concerned is not liable to deportation;
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> (b) 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
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> (c) 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.
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> 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.
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> 22. It would further appear that the "*little weight*" provisions of section 117B(4) – (5) are of no application. If Parliament had been desirous of qualifying, or diluting, section 117B(6) by reference to either section 117B(4) or (5), it could have done so with ease. It has not done so. Fundamentally, there is no indication in the structure or language of Part 5A that in cases where, on the facts, section 117B(4) and/or (5) is engaged, the unambiguous proclamation in Section 117B(6) is in some way weakened or demoted. To this may be added the analysis in [18] - [21] above. Clearly, there is much to favour this construction. However, conscious of the limits of the judicial function, we decline to provide a definitive answer to this discrete question, for two reasons. First, we received no argument upon it. Second, it does not clearly fall within the grant of permission to appeal."

17. Section 117B (6) must be read in conjunction with section 117A (3) which defines "the public interest question" as being "the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2)." In my view it is clear that the Presidential panel concluded that, in circumstances where the requirements of section 117B (6) are met, the conclusion on this provision is determinative of the public interest question. No submission was made to me to interpret the decision in Treebhawon otherwise.

18. I agree with the interpretation of section 117B (6) set out in Treebhawon for the reasons given in that decision. In my view the wording of section 117B (6) is clear. There is only one public interest question, as defined in section 117A (3), that is the question as to whether an interference with a person's right to respect for private and family life is justified under Article 8(2). Whilst the other provisions of section 117B sets out factors to be considered or the weight to be attached to various factors section 117B (6) is phrased in definitive terms. Section 117B (6) clearly answers the public interest question, that is whether the interference is justified under Article 8 (2), in cases where the conditions are met. If the public interest does not 'require' removal in these circumstances then it is not the Tribunal's role to look for other factors which weigh in the public interest. In light of my view of the interpretation of section 117 I do not agree with the wider interpretation set out in the case of GES.

19. This means that the correct interpretation is the narrow interpretation identified by the Panel in the instant appeal. In these circumstances the Panel erred in going on to consider other factors in assessing the public interest. The statutory provisions are clear in their statement of the public interest. In this case, the conditions of section 117B(6) having been met, no further examination of the public interest was required in the proportionality assessment.

Remaking

20. I therefore conclude that the panel erred in its interpretation of section 117B (6) for the reasons set out in the decision of Treebhawon. In light of the clear concession and findings, which were not challenged, I set aside the decision of the Panel and remake it by allowing the appeal under Article 8 of the European Convention on Human Rights.

Notice of Decision

The decision of the First-tier Tribunal contains an error of law.

I set aside the decision and remake it by allowing it on human rights grounds.

Signed Date: 12 April 2016

Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

Signed Date: 12 April 2016

Deputy Upper Tribunal Judge Grimes