Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA461122014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23rd March 2016	**On 8th June 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

MR KANWALPREET SINGH

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr V Makol, Solicitor; Maalik & Co Solicitors
For the Respondent: Mr P Nath, Senior Presenting Officer

DETERMINATION AND REASONS

1. The Appellant, a citizen of India, born on 15 December 1991, appeals against the decision of the Respondent refusing his application for further leave to remain based upon his family life under Article 8 ECHR in respect of his British partner, Ms Sarah Lindsay.

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2. The Appellant entered the UK as a Tier 4 student with valid leave from 11 May 2011 until 25 November 2014. The Appellant's leave was however curtailed under paragraph 323A(a)(iii)(2) of the Immigration Rules so as to expire on 24 November 2013 due to ceasing study with his sponsor. The Appellant did not make any application to extend his leave before its expiry in 2013 and subsequently became an overstayer. On 9 December 2013, the Appellant was served with an IS151A notice. However, within 28 days of overstaying, the Appellant submitted an application on 18 December 2013 for leave to remain under the family and private life 10-year route. On 20 January 2014, the application was rejected and on 30 January 2014 the Appellant resubmitted his application. The application was then refused on 11 February 2014.

3. On 19 May 2014, the Appellant made a further application for leave to remain on the basis of his relationship with Ms Sarah Lindsay, a British citizen. On 10 June 2014, his application was refused and certified as clearly unfounded. On 16 September 2014, the Appellant informed the Respondent that Ms Lindsay was pregnant and on 24 October 2014 further submissions were made on the Appellant's behalf. On 28 October 2014, a decision was made to refuse the application for leave to remain and removal directions were issued against the Appellant pursuant to section 10 of the Immigration and Asylum Act 1999. The Appellant appealed pursuant to section 82 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") to the First-tier Tribunal which dismissed his appeal. That determination was appealed and set aside by me for material error of law. Consequently the appeal now arises before me without any findings of fact preserved.

The Hearing

4. I heard evidence from the Appellant primarily in English with the assistance of a Punjabi interpreter for occasional phrases that he was unable to communicate. I also heard evidence from the Appellant's partner, Ms Sarah Lindsay, and Ms Emma Lindsay (Ms Sarah Lindsay's sister). A full note of their evidence is set out in my record of proceedings which I shall not rehearse herein.

Findings of Fact and Reasons

5. The standard of proof is to the civil standard and that of the balance of probability. I have considered all the evidence in the appeal, including the appellant's and respondent's bundles and the authorities I have been referred to. I heard submissions from both parties which are set out in full in my record of proceedings.

6. From the outset, I find that the Appellant, his partner Ms Sarah Lindsay, and her sister, Ms Emma Lindsay are all witnesses of truth and I found their evidence credible. The Respondent equally did not seek to persuade me otherwise and accepted that the witness evidence was credible. It is fair to say that the facts were

not in dispute in this appeal so much as the interpretation of the Appellant's family life against the Rules and Article 8 of the European Convention on Human Rights. Consequently, I turn my attention to the Rules given that they are a starting point for my assessment concerning the Appellant's family life under Article 8. Those Rules take automatic account for the Secretary of State's view as to the public interest that must be weighed in the balance in the Respondent's codified approach to assessing any person's convention rights in respect of their family (or private) life under Article 8 ECHR.

Immigration Rules and Appendix FM

7. To succeed under Appendix FM in relation to his family life with his partner, the Appellant must meet R-LTRP.1.1.(d) which states as follows:

   (i) the applicant must not fall for refusal under Section S-LTR: Suitability leave to remain; and

   (ii) the applicant meets the requirements of paragraphs E-LTRP.1.2-1.12. and E-LTRP.2.1.; and

   (iii) paragraph EX.1. applies.

8. My findings in respect of the immigration rules, particularly in relation to family life as a partner under Appendix FM, are as follows. In respect of the suitability requirements under S-LTR, the Refusal Letter remains silent, however for the avoidance of doubt I cannot see that the Appellant would fall for refusal under the suitability requirements given that there is nothing in his history that would call for his being deemed unsuitable under S-LTR as, for example, he has not made false representations or been the subject of a deportation order nor has it been said that his presence is not conducive to the public good.

9. I find that the Appellant and Ms Lindsay are in a genuine and subsisting relationship. The relationship commenced in 2012 and they have been living together since October 2013 and the Appellant and Ms Lindsay plan to marry in the future. Therefore, the Appellant is the fiancé of Ms Lindsay and a partner under GEN.1.2 of Appendix FM (as already stated at paragraph 13 of the Refusal Letter of 28 October 2014).

10. In respect of the eligibility requirements, it is not in dispute that the Appellant and his partner meet the requirements at E-LTRP.1.2-.1.12 and 2.1 except for 1.12 which states that "*The applicant's partner cannot be the applicant's fiancé(e) or proposed civil partner, unless the applicant was granted entry clearance as that person's fiancé(e) or proposed civil partner.*" It is clear from the Appellant's immigration history (*supra*) that he was not granted entry clearance as a fiancé and so the eligibility requirements cannot be met in this one regard. Consequently, the Appellant cannot succeed on the basis of his family with his partner under the Rules.

11. Turning to his family life with his child, the Appellant must meet R-LTRPT.1.1 which states as follows:

> R-LTRPT.1.1. The requirements to be met for limited or indefinite leave to remain as a parent or partner are-
>
> (a) the applicant and the child must be in the UK;
>
> (b) the applicant must have made a valid application for limited or indefinite leave to remain as a parent or partner; and either
>
> (c) (i) the applicant must not fall for refusal under Section S-LTR: Suitability leave to remain; and
>
> (ii) the applicant meets all of the requirements of Section ELTRPT: Eligibility for leave to remain as a parent, or
>
> (d) (i) the applicant must not fall for refusal under S-LTR: Suitability leave to remain; and
>
> (ii) the applicant meets the requirements of paragraphs E-LTRPT.2.2-2.4. and E-LTRPT.3.1.; and
>
> (iii) paragraph EX.1. applies.

12. My findings in respect of the immigration rules, particularly in relation to family life as a parent under Appendix FM, are as follows. In R-LTRPT.1.1(a) it is not in dispute that the Appellant and his child (hereinafter "Miss A") are both in the UK. There is no dispute that the application was valid (R-LTRPT.1.1.(b)) nor that the Appellant falls for refusal under the suitability requirements under S-LTR (see above) (R-LTRPT.1.1.(c)(i)). In respect of the eligibility requirements for leave to remain as a parent, they state in relevant part, as follows:

> E-LTRPT.2.2. The child of the applicant must be-
>
> (a) under the age of 18 years at the date of application, or where the child has turned 18 years of age since the applicant was first granted entry clearance or leave to remain as a parent under this Appendix, must not have formed an independent family unit or be leading an independent life;
>
> (b) living in the UK; and
>
> (c) a British Citizen or settled in the UK; or
>
> (d) has lived in the UK continuously for at least the 7 years immediately preceding the date of application and paragraph EX.1. applies.
>
> E-LTRPT.2.3. Either-
>
> (a) the applicant must have sole parental responsibility for the child or the child normally lives with the applicant and not their other parent (who is a British Citizen or settled in the UK); or
>
> (b) the parent or carer with whom the child normally lives must be-
>
> (i) a British Citizen in the UK or settled in the UK;

(ii) not the partner of the applicant (which here includes a person who has been in a relationship with the applicant for less than two years prior to the date of application); and

(iii) the applicant must not be eligible to apply for leave to remain as a partner under this Appendix.

E-LTRPT.2.4.

(a) The applicant must provide evidence that they have either-

(i) sole parental responsibility for the child, or that the child normally lives with them; or

(ii) access rights to the child; and

(b) The applicant must provide evidence that they are taking, and intend to continue to take, an active role in the child's upbringing.

E-LTRPT.3.1. The applicant must not be in the UK-

(a) as a visitor; or

(b) with valid leave granted for a period of 6 months or less, unless that leave was granted pending the outcome of family court or divorce proceedings.

13. Miss A, the daughter of the Appellant and Ms Lindsay was born on [ ] 2015 (she is now just over 1 year old) and was not born at the date of application, consequently, it is not clear that E-LTRPT.2.2.(a) is met, or whether I can take into account the child's presence at the date of hearing. If I am right in my assessment that the rules preclude consideration of children whom were born after an application were made, this would give rise to grave concerns in relation to the Respondent's duty towards children under section 55 of the Borders, Citizenship and Immigration Act 2009 (hereinafter "the 2009 Act"). In any event, the Respondent did not discourage me from considering Miss A under the Rules and so I shall continue my assessment for the time being.

14. It is clear from the evidence before me and I find that the child, Miss A, is living in the UK and is a British Citizen by virtue of her mother's citizenship since her birth in Sunderland. In respect of E-LTRPT.2.3.(a), it is clear from the evidence that the Appellant does not have sole responsibility for the child as he lives with his partner and the child, which also defeats his entitlement under E-LTRPT.2.3.(b) and E-LTRPT.2.4.(a) also. However, it is also obvious that the Appellant intends to continue to take an active role in his child's upbringing and that his partner wishes this too and meets E-LTRPT.2.4.(b). For the sake of completeness, I also find that the applicant meets E-LTRPT.3.1. as he is not in the UK as a visitor nor does he have any leave at present.

15. Consequently, given that the Appellant cannot meet E-LTRPT.2.3. or E-LTRPT.2.4.(a), he cannot succeed under the Immigration Rules on the basis of his

family life with his child simply because he lives with the child and is the partner of Ms Lindsay.

16. I am unable to gone on and consider EX.1. given that that paragraph is not freestanding as confirmed by the decision of the Upper Tribunal in *Sabir (Appendix FM – EX.1 not free standing) (Pakistan)* [2014] UKUT 63 (IAC) which summarises the correct position in its headnote as follows:

> *It is plain from the architecture of the Rules as regards partners that EX.1 is "parasitic" on the relevant Rule within Appendix FM that otherwise grants leave to remain. If EX.1 was intended to be a free- standing element some mechanism of identification would have been used. The structure of the Rules as presently drafted requires it to be a component part of the leave granting Rule. This is now made plain by the respondent's guidance dated October 2013.*

17. Thus, I am unable to accept the Appellant's submissions that the Appellant's appeal falls to succeed under the Rules.

18. However, matters do not cease there and it is clear from the above assessment that the relationship with the partner, Ms Sarah Lindsay, has not fallen to succeed due to the Appellant being her fiancé but not having extant leave in that capacity; and the relationship with the child, Miss A, has not fallen to succeed because the Appellant paradoxically lives with his child as well as his partner.

19. In my view, the family life of the Appellant with his partner falls for consideration outwith the Rules given that the fact of his lack of status has resulted in an assessment that has not accounted for their particular day-to-day circumstances nor the difficulty they may allegedly face on separation nor the allegation that the Appellant is unusually the primary carer for the child as opposed to the partner nor the fact that the removal of the Appellant may impact upon persons outside of his partner and child (discussed below). There is also cause for the family life with the child to be considered outwith the Rules given that the fact of the Appellant living with his child has under a Rules-based assessment rendered the removal of the Appellant as proportionate to the public interest whereas there has been no consideration of the child's best interests under the Rules, nor the effect on the child's day-to-day care should the Appellant be removed, let alone a primary consideration of such matters in potential contravention of section 55 of the 2009 Act. Consequently, there is ample reason to consider matters outwith the Rules under the umbrella of exceptionality or exceptional circumstances.

Article 8 ECHR

20. I make my assessment of the Appellant's Article 8 family life by following the five questions set down by the House of Lords in *R, (on the application of) Razgar v Secretary of State for the Home Department* [2004] UKHL 27, with modification by this

Tribunal in *Omotunde (best interests - Zambrano applied - Razgar) Nigeria* [2011] UKUT 247 (IAC). Those questions to be posed are summarised in the headnote for *Omotunde* which reads as follows:

> 1. *When applying the judgment of the Court of Justice of the European Union in Ruiz Zambrano (European citizenship) [2011] EUECJ Case C-34/09 OJ 2011 C130/2 and that of the Supreme Court in ZH (Tanzania) [2011] UKSC 4; [2011] 2 WLR 148, in relation to the proposed administrative removal or deportation of one or both of his non-national parents, the welfare of a child, particularly a child who is a British citizen, is a primary consideration.*
>
> 2. *National courts must engage with the question whether removal of a particular parent will 'deprive [the child] of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen'.*
>
> 3. *Where there are strong public interest reasons to expel a non-national parent, any right of residence for the parent is not an absolute one but is subject to the Community Law principle of proportionality. There is no substantial difference between the human rights based assessment of proportionality of any interference considered by Lady Hale in ZH (Tanzania) and the approach required by Community law.*
>
> 4. *In this particular context, the Article 8 assessment questions set out in Razgar [2004] UKHL 27 should be tailored as follows, placing the assessment of necessity where it most appropriately belongs in the final question dependent on the outcome of proportionality and a fair balance, rather than as part of the identification of the legitimate aim:*
>
> 1. *Is there family life enjoyed between the appellant and a minor child that requires respect in the context of immigration decision making?*
>
> 2. *Would deportation of the parent interfere with the enjoyment of that family life?*
>
> 3. *Is such an interference in accordance with the law?*
>
> 4. *Is such an interference in pursuit of a legitimate aim?*
>
> 5. *Is deportation necessary, proportionate and a fair balance between the rights to respect for the family life of the appellant and the child and the particular public interest in question?*

21. In light of the above, I shall address those questions as they appear; before turning to my findings in relation to the Appellant's family life with his partner so far as relevant.

Is there family life?

22. Although trite and not in dispute between the parties, I find that family life exists between the Appellant and his child. As stated on Miss A's birth certificate, she was born on 1 May 2015 in Sunderland to the Appellant and his partner, Ms Lindsay, and Miss A has lived under the care of her parents since birth. Based upon the Appellant's and his partner's evidence, which I have already indicated to be credible, I further find that the Appellant is the primary carer for Miss A. That is because he is the parent with primary responsibility for the child and stays at home and looks after the child for the majority of the day as the partner is the only person working and is the breadwinner of the family for all intents and purposes. I accept that given her work Ms Lindsay does not have time to look after her daughter and whilst the sister, Ms Emma Lindsay, is able to babysit once in a while to give the couple occasional

respite, there is no other viable source of support and ultimately, even if there were, the Appellant is the primary carer of his British daughter. Thus, family life is enjoyed between the Appellant and his minor child that requires respect in the context of immigration decision making and both the Appellant's and his child's Convention rights are engaged.

Would removal interfere with the enjoyment of family life?

23. Again, this question is clearly answered in the affirmative given that removal of the appellant would disrupt the status quo that exists in the family life presently enjoyed by the Appellant with his partner and child. The proposed interference clearly passes the minimum level or threshold for engagement of the Article 8(1) convention right, which has been described as "not a specially high one" (see *AG (Eritrea) v Secretary of State for the Home Department* [2007] EWCA Civ 801 at [26-28]) and was further described as being more than a "technical or inconsequential interference with one of the protected rights" (see *VW (Uganda) v Secretary of State for the Home Department* [2009] EWCA Civ 5 at [22]).

Is such interference in accordance with the law and in pursuit of a legitimate aim?

24. I take the next two questions together as here there is no contention that the decision is not in accordance with the law but that the outcome is disproportionate. The right to respect for family life is protected by article 8, however this is a qualified right which may be interfered with if this is necessary in order to pursue a legitimate aim. That aim in the context of immigration takes the form of the maintenance of firm and fair immigration control.

Is removal necessary, proportionate and a fair balance between the rights to respect for the family life of the appellant and the child and the particular public interest in question?

25. Turning to the nub of the family life assessment, I turn my attention first to the best interests of the child given that they are a primary consideration and are an integral part of the proportionality assessment under Article 8 ECHR (see *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4 and *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74). I bear in mind that the best interests of a child can be outweighed by the cumulative effect of other considerations, but no other consideration can be treated as inherently more significant.

26. I therefore make the following findings regarding the child's circumstances and what is in the child's best interests before turning to whether those interests are outweighed by the force of other considerations; bearing in mind that a child must not of course be blamed for matters for which he or she is not responsible, such as the conduct of a parent.

27. I find that it is plainly in the child, Miss A's, best interests to remain in the UK her country of birth and citizenship, and that it is also in her best interests to be raised by both parents, as opposed to one.

28. Miss A, is a British citizen. She is not subject to immigration control and cannot be removed as she possess an inalienable right of abode (see sections 1(1) and 2(1)(a) of the Immigration Act 1971). The same applies equally to the partner. It has been stated historically that it is not reasonable for a British child and parent to relocate outside of the EU. That ratio is derived from the Grand Chamber's decision in *Ruiz Zambrano v Office national de l'emploi* [2011] EUECJ Case C-34/09, where it was stated as follows at [42]:

> "…Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union…"

29. This ratio was reinforced by the decision of this Tribunal in *Sanade and others (British children - Zambrano - Dereci) India* [2012] UKUT 48 (IAC), wherein the following was summarised at headnotes 5 and 6:

> 5. Case C-34/09 Ruiz Zambrano now makes it clear that where the child or indeed the remaining spouse is a British citizen and therefore a citizen of the European Union, as a matter of EU law it is not possible to require the family as a unit to relocate outside of the European Union or for the Secretary of State to submit that it would be reasonable for them to do so.
>
> 6. Where in the context of Article 8 one parent ("the remaining parent") of a British citizen child is also a British citizen (or cannot be removed as a family member or in their own right), the removal of the other parent does not mean that either the child or the remaining parent will be required to leave, thereby infringing the Zambrano principle, see C-256/11 Murat Dereci. The critical question is whether the child is dependent on the parent being removed for the exercise of his Union right of residence and whether removal of that parent will deprive the child of the effective exercise of residence in the United Kingdom or elsewhere in the Union.

30. In light of the above decisions, I find that the *Zambrano* principle is engaged given that the remaining partner and child are both British citizens; and given that the child is dependent on the parent being removed and removal of that parent will deprive the child of the effective exercise of residence in the United Kingdom or elsewhere in the Union. I make this finding given that the Appellant is the primary carer for the child as discussed above (at [22]). Were the Appellant to be removed, in my view, the child would be deprived of the rights and enjoyment of her citizenship of the EU given that her father is her primary carer and given that her mother works as the breadwinner. It is plain that the child cannot live without her father given the role he fulfils. I am also concerned as to the impact that the Appellant's removal would have upon the partner and her ability to work and support the family. She does not have any support beyond the occasional babysitting provided by her sister. I heard evidence that the partner's parents live nearby but the partner's mother is

suffering from terminal cancer and is plainly unable to assist in caring for the child, and she is cared for herself full-time by the partner's father whom took early retirement to become a carer for the mother. In those circumstances, I am fortified in my finding that there is no further support available to the couple and the removal of the Appellant would result in a contravention of the *Zambrano* principle governing his daughter's EU citizenship. In summary, the scenario is, I find, a fragile and bleak one of a young couple struggling to raise their child with no further assistance of note.

31. I further find that the partner and child would not relocate to India at all as a matter of choice, given the partner's plain and frank evidence that she would not go to India and neither would her daughter. The motivation for this included her wish to be by her mother's bedside outside of her employment given that the mother's cancer had spread to her liver, bones and other organs.

32. There is a further complication to the *status quo* of the family matrix as the partner revealed in her evidence that she also provides financial support for her mother. Given that further commitment, I find that the partner's presence in the UK is essential not only to support her own young family, but also to assist in supporting her mother, particularly given that the father has had to take early retirement. Consequently, it would seem that the Appellant's proposed removal would impact directly and indirectly upon his child, his partner and his partner's parents also.

33. At any rate, even if I am wrong in my findings concerning the application of the *Zambrano* principle, I shall move on to consider the public interest and legitimate aim balanced against the child's best interests, without reference to the *Zambrano* ratio and perform that balancing assessment in its pure statutory and curial form.

Proportionality assessment and Section 117B of the 2002 Act

34. Turning the approach to the assessment of proportionality following the inception of section 117 of the 2002 Act, the public interest now takes a statutory form that courts and tribunals are bound to "have regard" to (see *Dube (ss.117A-117D)* [2015] UKUT 90 (IAC)). The appearance of the section 117 considerations is intrinsic to the question of proportionality (as both the judgments in *Razgar* and the reformulation of the key questions in *Omotunde* demonstrate). Having considered the child's best interests and concluded that they are that she remain with her parents, it is in my proportionality assessment, balancing that child's best interests against countervailing factors, that I now turn to consider the public interest (in harmony with the decision in *Forman (ss 117A-C considerations)* [2015] UKUT 412 (IAC)).

35. As stated in section 117A(2) of the 2002 Act, in considering the public interest question, the court or tribunal must (in particular) have regard in all cases, to the considerations listed in section 117B and the public interest question is defined as

follows: “"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).”

36. The enumerated considerations that I must consider under section 117B are as follows:

> 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.

37. Taking those considerations in turn and paying them due regard, I find that the maintenance of effective immigration controls is in the public interest and is firmly engaged in the current scenario. The Appellant has been an overstayer since 24 November 2013 and the interference with his family life with his child and partner, is in accordance with the law and in pursuit of a legitimate aim.

38. I find that the Appellant is able to speak English sufficiently that he can manage in day-to-day life. That much is obvious from his spoken English before me and by virtue of his relationship with his partner, whom only speaks English and does not know any Punjabi. The Appellant gains “no positive right” by virtue of this skill and

only gains "mild support" (see *AM (S.117B)* [2015] UKUT 260 (IAC) at [17-18] and *R, (on the application of) Luma Sh Khairdin v Secretary of State for the Home Department* (NIA 2002: Part 5A) IJR [2014] UKUT 566 (IAC) at [59]).

39. Turning to the issue of financial independence, I find that the Appellant is financially independent due to his partner's income of £6.70 per hour, working at a Fish and Chip shop, although her salary is set to increase to £6048 per annum as a carer in a role that she has recently attained, although the partner made clear that she did not foresee that she could "ever" make enough money to meet the income threshold under the Rules of £18,600 and described that level of earnings for someone of her age living in Sunderland as completely "unrealistic". The Appellant is entitled to gain "mild support" for meeting this subsection this cannot attract any "positive right".

40. Whilst the Appellant may be entitled to gain mild support, for whatever little that may be worth, I consider such support to be nominal or insignificant. At any rate, regardless of any support that may be derived from meeting 117B(2) and (3), pursuant to a decision of the Tribunal last year, what follows is that the public interest is not "fortified" given that sections 117B(2) and (3) fall in favour of the Appellant (see *Forman (ss 117A-C considerations)* [2015] UKUT 412 (IAC) at [15]).

41. In relation to the statutory instruction that little weight be given to a private life that is established by a person at a time when the person is in the United Kingdom unlawfully; the Appellant's private life formed whilst he held leave until 24 November 2013 may carry weight but thereafter it will only carry little weight.

42. Regarding any relationship formed with a qualifying partner that is established by a person at a time when the person is in the United Kingdom unlawfully, the relationship was formed with Ms Lindsay in 2012 and she is a qualifying partner (given that she is a British citizen and meets the definition of a "qualifying partner" at section 117D(1)). The Appellant's leave was curtailed on 24 November 2013 after the relationship began and so the instruction to accord the relationship little weight does not apply. However, to the given that family life was precarious from the outset, I do accord it little weight pursuant to *R, (on the application of) Nagre v Secretary of State for the Home Department* [2013] EWHC 720 (Admin) (see *Rajendran (s117B - family life)* [2016] UKUT 138 (IAC) at [39-42]).

43. Turning to section 117B(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. The Appellant's status has been precarious throughout given that he only held temporary leave and became an overstayer on 24 November 2013. Consequently, although I

have already accorded little weight to the private life of the Appellant, I repeat and reinforce that statutory instruction herein.

44. Finally, turning to section 117B(6), I find that this subsection falls in the Appellant's and his child's favour. Before turning to my reasons, I set down briefly the approach I have taken to my assessment of section 117B(6) which is in line with the recent decision of *Treebhawon and others (section 117B(6))* [2015] UKUT 674 (IAC) which states as follows in its first headnote:

> Section 117B (6) is a reflection of the distinction which Parliament has chosen to make between persons who are, and who are not, liable to deportation. In any case where the conditions enshrined in section 117B(6) of the Nationality, Immigration and Asylum Act 2002 are satisfied, the section 117B(6) public interest prevails over the public interests identified in section 117B (1)-(3).

45. This ratio is further supported by [18, 20-22] of *Treebhawon*:

> "18. …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."
>
> "20. In section 117B(6), Parliament has prescribed three conditions, namely:
>
> (a) the person concerned is not liable to deportation;
>
> (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
>
> (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.
>
> 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.
>
> 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…"

46. In light of the above, I approach section 117B(6), limb by limb. My reasons for finding this section applies are as follows. The Appellant is not liable to deportation. There is no dispute between the parties that the Appellant has a genuine and subsisting parental relationship with a qualifying child, namely his British daughter. Finally, it would not be reasonable to expect Miss A to leave the UK. I make that finding for a host of reasons.

47. First, the Respondent has issued guidance entitled Appendix FM 1.0 Family Life (as a Partner or Parent) and Private Life: 10-Year Routes which states *inter alia* as follows at 11.2.3:

> 11.2.3. Would it be unreasonable to expect a British Citizen child to leave the UK?
>
> 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. The decision maker must consult the following guidance when assessing cases involving criminality…
>
> 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 UK or 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.

48. Whilst this guidance relates to the assessment that is performed under the Rules, the child did not benefit from that assessment and given the Respondent's statutory duty to safeguard the child's welfare, I consider it imperative that this guidance be

considered outside the Rules by analogy with section 117B(6), which both appear to share a common message, namely that "*(w)here 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*". Here, the Appellant is the primary carer for the British child, and consequently the case must be assessed on the basis that it is unreasonable to expect the British Citizen child to leave the EU. Furthermore, there is no evidence of criminality and in my view, it cannot be said that the Appellant's immigration history is very poor in respect of repeated deliberate breaches of the Rules. Even if the guidance were not applicable, its message is in harmony with the Respondent's concession at [68] of *MA and SM (Zambrano : EU children outside EU) Iran* [2013] UKUT 380 whereby she maintained her stance in *Sanade* for all intents and purposes and thus the ratio would still apply in the absence of the guidance. Anyhow, given this indication of the Respondent's view in her guidance as to what it is reasonable to expect a British child to do, I find that it is unreasonable for the child to leave the UK with his primary carer on this first basis.

49. Second, as I have observed above, the child is a British citizen and cannot be forced to leave the UK and I find that it is unreasonable for the child to leave the UK for this further reason.

50. Third, the child's mother and father have both indicated that they do not wish her to return to India. Given that they are her parents and charged with her care, the fact of her relocation, at least, is unquestionable. I find that the child's departure is unreasonable for this further reason.

51. Fourth, I find that there is no family support network or accommodation available for the child in India as stated by the Appellant in his evidence and I find that it is unreasonable for the child to leave the UK for this reason also.

52. Fifth, if the child were to leave the UK it would compel the partner to quit her work and travel with her baby, whom at the end of the day is very young and cannot be apart from her mother for weeks or months at such a tender age. The departure of the child is unreasonable for this further reason again.

53. Finally, the Respondent did not suggest for a moment in her closing submissions that it would be reasonable for the child to leave the UK and in fact stated openly that the partner cannot go back due to the mother's illness and acknowledged the child's citizenship status and acknowledged also that both the partner and child needed to be in the UK. As a result, I am fortified in my view that it is unreasonable for the child to leave the UK.

54. Thus, I find that the three conditions in section 117B(6) are met and the public interest does not require the removal of the Appellant-parent from the United Kingdom. As stated above, the "little weight" provisions of section 117B(4)-(5) are of no application when considering section 117B(6). In conclusion, when balancing the best interests of the child against the legitimate aim and the public interest, I find that removal is disproportionate particularly as there is no public interest in the Appellant's removal as specified in statute by which I am bound.

55. Given my findings above, I shall not go on to consider the Appellant's family life with his partner, nor the impact that his removal may have upon the partner's family, such as her parents.

Decision

56. The appeal is refused under the Immigration Rules.

57. I allow the appeal on the basis of the Appellant's family life under Article 8 ECHR.

Anonymity

58. The First-tier Tribunal did not make an anonymity order and I was not asked to make one and do not see reason to do so.

Fee Award

59. I do not make a fee award as my decision is based upon the facts at present which were different to those known by the Respondent when she made her decision.

Signed Date 03/06/2016

Deputy Upper Tribunal Judge Saini