Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/00677/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 May 2017	**On 30 May 2017**

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

MR WARREN STEVE EMANUEL MOWATT
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms H Alexander, Counsel, instructed by Windsor Croft Solicitors
For the Respondent: Mr P Deller, Senior Presenting Officer

DECISION AND REASONS

1. The appellant has permission to challenge the decision of First-tier Tribunal Judge Pacey sent on 19 April 2016 dismissing his appeal against the decision made by the

respondent to refuse leave to remain on human rights grounds. The appellant is a citizen of Jamaica who came to the UK in December 1999 and has remained unlawfully since. He is the maternal uncle of four children whose mother is KM. The children are British citizens.

2. As advanced by Ms Alexander the grounds have three main prongs. It was argued first of all that the judge erred in her application of subparagraphs (4) and (5) of s117B of the NIAA 2002, as she had accepted the appellant enjoyed a family life relationship with the four children of his aunt, whereas subparagraphs (4), (5) are considerations applicable to private life only. In amplifying this ground Ms Alexander also submitted that the judge had failed to understand that the appellant fell within the scope of EX1(a)(i), in that he enjoyed a genuine and subsisting parental relationship with his aunt's children, two of whom have resided in the UK for seven years. The second ground was that the judge had wrongly focused on the impact of removal on the appellant, rather than the impact on all persons affected by his removal, the children in particular. She should have accepted that it would be unjustifiably harsh for the children to have to go and live in Jamaica. The appellant's third ground was that the judge failed to carry out a proper best interests of the child assessment or alternatively approached it erroneously in treating the fact that the eldest was nearly 18 as important. Finally it was submitted that the judge erred in failing to have regard to the aunt's written evidence.

3. I am grateful to the submissions I heard from both representatives.

4. It is convenient if I deal first with the last mentioned ground. It is misplaced. It is clear from paragraph 28 that the judge took into account the aunt's written evidence. The judge was incorrect to describe it as a witness statement, since it was in the form of letters, but paragraph 28 makes clear that the written evidence put forward was considered. Indeed, the main point made by the judge in paragraph 28 was, that she could not attach significant weight to the aunt's written evidence because "the sister was not called to give evidence as could reasonably have been done, so it was not possible to explore with her what she had said in her witness statement arising around the childcare issues". This ground appears to have targeted what was said by Judge Pullig in his decision refusing the first application for permission to appeal, but Judge Pullig's (incorrect) understanding of the evidence before the judge on this score is irrelevant to my task of deciding whether the judge materially erred in law.

5. Before addressing the other grounds, it is also convenient to address the argument raised by Ms Alexander before me that the judge failed to consider that the appellant was in a parental relationship with the children and so came within EX.1(a)(i). The judge did not err in not considering this matter because on the evidence before her the appellant was plainly not in a parental relationship with his sister's children. On the basis of the evidence before her the judge reasonably concluded that his sister was a single mother and that although the appellant had a genuine and subsisting relationship with his nephews he did not live with them and he was not their parent or legal guardian. At paragraph 18 the judge stated that "[h]is relationship, accepted

as genuine, with his nephews in the UK, does not fall within the parameters of Appendix FM".

6. Returning to the first three grounds in order, I am not persuaded that the judge materially erred in her consideration of the appellant's appeal in relation to s117B. It is perhaps unfortunate that the judge sought to rely at paragraph 26 on the case of **Singh [2015] EWCA Civ 74** since she did in fact conduct a separate examination of the appellant's case outside the Rules, albeit later describing herself as doing this in the alternative. That examination, however, sufficiently addressed the issue of whether there were compelling or exceptional circumstances warranting a grant of leave outside the Rules. At paragraph 33 the judge stated:

> 33. I would add that if I had proceeded to consider article 8 outside the rules and had dealt with the issue of proportionality I would have found that the public interest outweighed that of the Appellant under s.117B(4) and (5). Moreover, in considering s.55 I would note that the Appellant is not in the position of a parent to his nephews. No evidence has been provided of the involvement of their father in their lives and he does not live with them.

7. Whilst this paragraph is somewhat cryptic, it cannot be said that it discloses that in assessing the appellant's case outside the Rules the judge only had regard to s117B(4) and (5) considerations. In paragraphs 25-31 the judge considered, inter alia, the circumstances of the children and the appellant's involvement in their lives and the appellant's poor immigration history, demonstrating thereby that the considerations weighed in the balance by the judge were not confined to s117B(4) and (5). Ms Alexander sought to reinforce her argument regarding this matter by invoking the reasoning of the Upper Tribunal in the reported case of **Rajendran (s117B – family life) [2016] UKUT 138 (IAC)**. However, whilst that case assists her argument that s117B(4), (5) concern private life, not family life, she fails to note that the head note to that case makes two other points. One is that "precariousness" is a criterion of relevance to family life as well as private life cases and is an established part of Article 8 jurisprudence. The body of the decision in **Rajendran** makes clear that this means that even cases falling outside s117B(4), (5) – because they concern family life rather than private life –are. still subject to established Article 8 jurisprudence on precariousness. That is very significant in the appellant's case because the judge expressly found at paragraph 30 that the ties he formed in the UK with three of his nephews were plainly formed at a time when his immigration status was precarious. Further, the head note in **Rajendran** makes clear that s117A-D considerations are not exhaustive of all public interest considerations and so, one way or another, the judge cannot be faulted for clearly weighing against the appellant his poor immigration history.

8. As regards the appellant's third ground, I discern no material error in the judge's assessment of the children's best interests. Contrary to Ms Alexander's submission, neither the judge nor the respondent in the refusal decision contemplated that the children were expected to leave the UK. The respondent had expressly

acknowledged in her refusal letter that it would not be reasonable to expect them to leave the UK. The only issue, therefore, was whether it was proportionate to remove the appellant on the footing that the children would remain in the UK with their mother.

9. Whilst the judge can be criticised for not dealing in greater detail with the best interests of the children, paragraphs 27 and 28, at paragraph 33 of the judge's decision identify a sufficient basis for her conclusion that the circumstances of the children would not cause the decision to remove the appellant to be a disproportionate one. What was said in paragraph 33 could not be clearer: "moreover in considering Section 55 I would note that the appellant is not in the position of a parent to his nephews. No evidence has been provided of the involvement of their father in their lives and he [the appellant] does not live with them". The clear thrust of the judge's reasoning was that the best interests of the children were served by remaining in the care of their mother and her other family close by "who reasonably could provide assistance with childcare" and "single mothers are able, allbeit sometimes with some difficulty, to cope with childcare issues without having to rely on foreign national sibling with no leave to remain" (paragraph 27). Moreover, it was clearly of central importance to the judge that the appellant had failed to discharge the burden of proving that the children's circumstances were as claimed: that was the principal point made at paragraph 28 when noting the failure of the children's mother to attend his appeal hearing.

10. What has just been said will suffice to deal with the appellant's contention that the judge failed to consider the impact of the appellant's removal on the children. Her basic position, one properly adopted on the evidence, was that the appellant had failed to establish that he was a parental figure in the children's lives.

11. During submissions Ms Alexander made reference to a Family Court order dated 3 May 2017 which is an application for the appellant to be granted parental responsibility for two of the children. That was not before the judge and post-dates her decision. As such it is not relevant to the issue of whether the judge materially erred in law. That court order may be pertinent to further representations that the appellant might seeks to make to the Secretary of State, but it is not relevant to my decision on this appeal.

12. For completeness I note that there was previous correspondence between the appellant's representatives and the Tribunal regarding whether Upper Tribunal Judge Finch meant to grant permission. It is clear from the file that it was decided by Principal Judge Dawson that the appeal should proceed to a hearing and I have proceeded on the basis that accordingly there was a valid grant of permission, notwithstanding that neither Judge Pullig nor UTJ Finch identified any arguable errors in the judge's decision.

13. For the above reasons I conclude that the judge did not materially err in law and accordingly her decision to dismiss the appeal is upheld.

No anonymity direction is made.

Signed Date: 26 May 2017

Dr H H Storey
Judge of the Upper Tribunal