Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/07898/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21 April 2017	**On 5 May 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

MRS NOVELETTE PEARL THOMAS
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr N Klear (Counsel, Phillip Priscilla Solicitors)
For the Respondent: Mr T Melvin (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. The Appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge Fox sitting at Manchester on 30 September 2016) dismissing her appeal against the decision of the Secretary of State to refuse to grant her leave to remain on human rights grounds on account of her marriage to a British citizen. The

First-tier Tribunal did not make an anonymity direction, and I do not consider that the Appellant requires anonymity for these proceedings in the Upper Tribunal.

Relevant background facts

2. The Appellant is a national of Jamaica, whose date of birth is 25 May 1967. She entered the United Kingdom on 30 June 2001 with valid entry clearance as a visitor until 20 July 2001.

3. The Appellant did not leave the United Kingdom before the expiry of her visa, and she overstayed. She first sought to regularise her status some nine years later, and she applied for leave to remain outside the Rules on 24 May 2010. The application was refused with no right of appeal on 24 June 2010.

4. On 26 July 2010, the Appellant was served with an IS151A notice as an overstayer. The Appellant submitted a human rights application on 21 May 2012, and her application was refused with no right of appeal on 5 August 2013. On 28 August 2013 the Appellant asked for the decision to be reconsidered, and the application was refused on reconsideration on 3 December 2014.

5. On 14 May 2015, the Appellant applied for leave to remain as the spouse of a British citizen. The Appellant and her Sponsor were invited to attend a marriage interview in Sheffield on 21 September 2015.

6. On 28 September 2015, the Secretary of State gave her reasons for refusing her application. She was satisfied that the information obtained at the marriage interview strongly indicated that the relationship between her and the Sponsor was not genuine. In light of the discrepancies produced at the marriage interview, her marriage was deemed to be a marriage of convenience.

The Hearing before, and the Decision of, the First-tier Tribunal

7. Both parties were legally represented at the hearing before Judge Fox. The Appellant's solicitors compiled a bundle of documents which included birth certificates for the Sponsor's children by a previous relationship.

8. On [ ] 2006, IW, a Polish national, had given birth in Preston to a child, [C1], fathered by Lloyd Hemmings, a national of Jamaica. On [ ] 2008, IW had given birth to a second child, [C2], by the same father.

9. In a letter dated 25 August 2016, [C1] said he was writing to say that Novelette Hemmings was his stepmother, whom he loved very much. She was the one that took care of him and his brother. She helped them with their schoolwork and she cooked, and she took them to activities in their community and to visit other places. She stayed with them while their dad worked nights at the hospital.

10. Before the hearing began, Counsel for the Appellant took supplementary witness statements from both the Appellant and her husband. In her supplementary statement, the Appellant said that the role she played in her stepchildren's lives was

akin to that of a mother. She had established a strong relationship with them since living with them from November 2012. It would not be possible for them to live in Jamaica because their mother, IW, resided in the UK and visited them every two weeks. Her husband also had another child who lived in Burnley, as well as a fourth child who lived in Jamaica.

11. In his supplementary witness statement, Mr Lloyd Hemmings confirmed that the Appellant had taken on the role of mother to his two children, [C1] and [C2], since she had started living with him in November 2012. The children's mother saw them every two weeks, and she also called them regularly on the telephone. She lived in Preston, as they did, but she had problems with alcohol. That was why the children permanently resided with her, rather than with their biological mother.

12. In his subsequent decision, the Judge found that the Respondent had not discharged the burden of proving that the marriage was one of convenience. He was satisfied on the balance of probabilities that the relationship between the Appellant and her husband, Mr Lloyd Hemmings, was genuine and subsisting.

13. He turned to consider her Article 8 ECHR rights in conjunction with Section 55. He found that family life existed between the Appellant, the Sponsor and her two stepchildren.

14. However, the Sponsor and his children were able to function effectively in her absence. The Sponsor also had the benefit of family members to whom he could turn should he require support in the Appellant's temporary absence. He found that it was reasonable to expect the Appellant and the Sponsor to accept the inconvenience of the Appellant's return to Jamaica in order for her to apply for entry clearance in the appropriate category, applying **Chen v SSHD (Appendix FM – Chikwamba – Temporary separation – proportionality) IJR [2015] UKUT 00189 (IAC)**.

15. The Sponsor was engaged in employment in which he received annual remuneration above the financial threshold required by the Respondent. An application for entry clearance would give the Sponsor the formal opportunity to assume financial responsibility for the Appellant in accordance with the Rules. It was reasonable to expect the Sponsor to make alternative childcare arrangements to facilitate the Appellant's requirement to respect immigration control.

16. The Sponsor was not entitled to prioritise his personal interests over the needs of the wider society to maintain effective immigration control. There was no reliable evidence to demonstrate any detriment to the children's best interests. There was no dispute that the children were not required to leave the UK. The Sponsor remained an effective parent to safeguard their interests during the Appellant's temporary absence. There would be no disruption to the children's education. Any minor disruption to their environment could be managed effectively through responsible parental decisions.

The Reasons for the Grant of Permission to Appeal

17. On 13 February 2017, the First-tier Tribunal Judge MJ Gillespie granted permission to appeal for the following reasons:

> "The proposed grounds of onward appeal raise a fairly arguable point as to material error of law. The learned First-tier Tribunal Judge has failed to consider whether two minor children said to be affected by the decision are one or other or both "a qualifying child" for the purposes of Section 117D of the Nationality, Immigration and Asylum Act 2002; whether there exists between the appellant and these children a "genuine and subsisting parental relationship" for the purposes of Section 117B(6); and whether it would be reasonable under this enactment to expect either or both of these children to leave the United Kingdom. The Judge has accordingly arguably failed to consider whether, for the purposes of Section 117B(6), there is any public interest in the removal of the appellant."

The Hearing in the Upper Tribunal

18. At the hearing before me to determine whether an error of law was made out, I indicated at the outset that I was minded to find an error of law for the reasons given in the grant of permission.

19. After hearing from Mr Melvin, who drew my attention to **SF and Others (Guidance, post-2014 Act) Albania [2017] UKUT 00020 (IAC)**, I ruled that an error of law was made out. I give my reasons for so finding in short form, and I expand on these reasons in my error of law ruling below.

20. I informed the parties that I proposed to proceed immediately to the remaking of the decision. Both the Appellant and her partner were in attendance, and I asked Mr Melvin whether he wished to question either of them on the topic of whether the Appellant had a genuine and subsisting parental relationship with her two stepchildren. He declined to do so.

21. Mr Klear drew my attention to **R (on the application of RK) v SSHD (s.117B(6); parental relationship) IJR [2016] UKUT 0031** where the Tribunal held as follows:

> "1. It is not necessary for an individual to have "parental responsibility" in law for there to exist a parental relationship.
>
> 2. Whether a person who is not a biological parent is in a "parental relationship" with a child for the purposes of s.117B(6) of the Nationality, Immigration and Asylum Act 2002 depends on the individual circumstances and whether the role that individual plays establishes he or she has "stepped into the shoes" of a parent.
>
> 3. Applying that approach, apart from the situation of split families where relationships between parents have broken down and an actual or de facto step-parent exists, it will be unusual, but not impossible, for more than two individuals to have a "parental relationship" with a child. However, the relationships between a child and professional or voluntary carers or family friends are not "parental relationships"."

Reasons for finding an error of law

22. The Judge erred in law in not expressly engaging with Section 117B(6). For if the Appellant could successfully claim to have a genuine and subsisting parental relationship with her stepchildren, this *might* relieve her of the requirement of returning to Jamaica to seek entry clearance.

23. The interrelationship between the **Chikwamba** line of authority, which includes **Chen**, and the operation of Section 117B(6) is far from straightforward. But on the facts found in the Appellant's favour by the First-tier Tribunal Judge, Section 117B(6) was clearly in play, and the judge needed to explain why this section did not avail the Appellant in the proportionality assessment outside the Rules.

Discussion and findings on remaking

24. I adopt the findings of fact made by the First-tier Tribunal, and I make two further findings of fact as follows:

    (a) The Appellant's stepchildren are qualifying children as they are both British citizens; and

    (b) The Appellant is in a genuine and subsisting parental relationship with these two qualifying children.

25. Accordingly, the Appellant can potentially take the benefit of Section 117B(6), provided that it is not reasonable to expect the children to leave the UK. I observe that the same question arises under EX.1(a).

26. In the Refusal decision, the Respondent did not address either EX.1(a) or EX.1(b) as she did not accept that the Appellant was in a genuine and subsisting relationship with Mr Hemmings. But as this issue has been resolved in the Appellant's favour, paragraph EX.1(a) is engaged.

27. In deciding whether the Appellant qualifies for leave to remain under the Rules by the route of EX.1(a), or on an exceptional basis outside the Rules by the route of Section 117B(6), it is necessary to consider the relevant jurisprudence and the relevant policy guidance.

The Home Office Policy Guidance

28. The IDIs on Family Migration: Appendix FM dated August 2015 state at paragraph 11.2.4 that the longer a non-British citizen child has resided in the UK, the more the balance swings in favour of it being unreasonable to expect the child to leave the UK,, and strong reasons are required to refuse a case where the child has accrued over seven years continuous residence.

29. The same IDIs contain at paragraph 11.2.3 guidance on answering the following question: "*Would it be unreasonable to expect a British citizen child to leave the UK?*" The guidance provides, inter alia, as follows:

> 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 citizen to leave the EU, regardless of the age of that child. This reflects the European Court of Justice Judgment in **Zambrano** …
>
> 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 a child could otherwise stay with another parent or alternative primary carer in the UK or in the EU.

The question of reasonableness

30. In **MA (Pakistan) and Others, R (on the application of) v Upper Tribunal (IAC) & Anor [2016] EWCA Civ 705** at paragraph [45] Elias LJ said:

> In my judgment, the court should have regard to the conduct of the applicant and any other matters relevant to the public interest when applying the 'unduly harsh' concept under Section 117C(5), so should it when considering the question of reasonableness under Section 117B(6). ... The critical point is that Section 117C(5) is in substance a free-standing provision in the same way as Section 117B(6), and even so the court in **MM (Uganda)** held that wider public interest considerations must be taken into account when applying the 'unduly harsh' criterion. It seems to me that it must be equally so with respect to the reasonableness criterion in Section 117B(6). It would not be appropriate to distinguish that decision simply because I have reservations whether it is correct. Accordingly, in line with the approach in that case, I will analyse the appeals on the basis that the Secretary of State's submission on this point is correct and that the only significance of Section 117B(6) is that where the seven year Rule is satisfied, it is a factor of some weight leaning in favour of leave to remain being granted.

31. At paragraph [46] Elias LJ said that the published Home Office Policy guidance merely confirmed what is implicit in adopting a policy [the seven year rule] of this nature:

> After such a period of time the child will have put down roots and developed social, cultural and educational links in the UK such that it is likely to be highly disruptive if the child is required to leave the UK. That may be less when the children are very young because the focus of their lives will be on their families, but the disruption

> becomes more serious as they get older. Moreover, in these cases there must be a very strong expectation that the child's best interests will to be remain in the UK with his parents as part of a family unit, and that must rank as a primary consideration in the proportionality assessment.

32. At paragraph [48] Elias LJ cited with approval the explanation given by Clarke LJ in **EV (Phillipines)** at [34]-[37] as to how the Tribunal should apply the proportionality test where wider public interest considerations are in play, in circumstances where the best interests of the child dictate that he should remain with his parents. At [36] Clarke LJ said that if it is overwhelmingly in the child's best interests to remain, the need to maintain immigration control may well not tip the balance. By contrast if it is in the child's best interests to remain, but only on balance (with some factors pointing the other way), the result may be the opposite. Clarke LJ continued in [37]:

> In the balance on the other side there falls to be taken into account the strong weight to be given to the need to maintain immigration control in pursuit of the economic well-being of the country and the fact that, *ex hypothesi*, the applicants have no entitlement to remain. The immigration history of the parents may also be relevant e.g. if they are overstayers, or have acted deceitfully.

33. Having regard to the relevant jurisprudence and the relevant policy guidance, it is clearly in the children's best interests to remain in the United Kingdom. Not only are they both British citizens, they have also accrued over seven years residence in the UK since birth.

34. Long residence coupled with British citizenship gives rise to a very strong private life claim for each child. There would be some benefits in the children going to Jamaica, but these benefits are considerably outweighed by the best interest considerations militating in favour of them remaining here.

35. Although they would be able to return to the UK once they reach their respective ages of majority, they would be deprived of the active enjoyment of the benefits of British citizenship for the remainder of their formative years. They have developed social, cultural and educational ties in this country that it would be inappropriate to disrupt. It will be very much in their best interests to have both stability and continuity of social and educational provision, and the benefit of growing up in the cultural norms of the society to which they belong. The effect of enforced relocation will be to deprive the children of regular contact with their biological mother, who cannot be expected to follow them to Jamaica.

36. In deciding the question of reasonableness, it is necessary to have regard to wider proportionality considerations, including those identified in Sections 117B(1) to (5) of the 2002 Act.

37. It is in the Appellant's favour that she can speak English, as this means that she is better able to integrate into UK society. It is also in the Appellant's favour that her sponsor is earning £19,000 per annum, as this means he can produce the specified

evidence to show that he has a specified gross annual income of at least £18,600 per annum to support her (as Judge Fox found).

38. A factor weighing against her is that generally little weight should be attached to private and family life which is built up by a person while that person's status here is unlawful. On the other hand, it is not suggested in the Refusal letter that her conduct has been so bad as to bar her from relief on suitability grounds. It is also not suggested that the Appellant has a "very poor" immigration history as distinct from a merely poor one: that is to say, being an overstayer, working without permission, not seeking to regularise her status for many years, and ignoring meritorious refusal decisions which, if complied with, would have meant that she would not have had the opportunity to develop the family ties in the UK upon which she now relies.

39. It is not suggested that the Appellant has "repeatedly and deliberately" breached the Immigration Rules, or otherwise has a *very poor* immigration history. So the Appellant does not come within the circumstances envisaged in the IDIs where it may be appropriate to refuse to grant leave: namely, where the conduct of the parent or primary carer gives rise to considerations of such weight as to justify separation from qualifying children.

40. In short, the public interest considerations which weigh in favour of requiring the Appellant to leave the UK are not of sufficient weight to justify separating the Appellant from her stepchildren or to justify the stepchildren being forced to leave the UK with their stepmother and father.

41. Also, the Respondent has not advanced strong reasons for expecting the children to leave the UK with their father and stepmother. On the contrary, the Respondent's starting point is that the children are not expected to leave the UK.

42. Accordingly, having regard to the fact that it is fairly emphatically in the children's best interests to remain in the UK, and it is not reasonable to expect the children to leave the UK, I find that the Appellant qualifies for a grant of leave to remain under EX.1(a) of Appendix FM. It is not therefore necessary to look at the matter outside the Rules. But if it were, the same result would follow.

43. Judge Fox gives cogent reasons as to why the relatively minor inconvenience and disruption consequential upon a temporary separation should not prevail over the public interest in requiring an irregular migrant, such as the Appellant, to return to her country of origin to regularise her status. However, if a person meets all the relevant requirements of EX.1(a), and hence all the relevant requirements of Section 117B(6), then that person is relieved of the requirement of regularising his or her immigration status by returning to his or her country of origin to make an application for entry clearance.

44. Accordingly, the Appellant succeeds in her appeal on human rights grounds under Article 8 ECHR because the decision to refuse her leave to remain does not strike a fair balance between, on the one hand, her rights and those of her two qualifying stepchildren, and, on the other hand, the wider interests of society. It is not

proportionate to the legitimate public end sought to be achieved, namely the maintenance of firm and effective immigration controls and the protection of the country's economic well-being.

Notice of Decision

45. The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision is substituted: the Appellant's appeal is allowed under EX.1(a) of Appendix FM and also outside the Rules on human right grounds (Article 8 ECHR).

Anonymity direction not made.

TO THE RESPONDENT
FEE AWARD

As I have allowed this appeal, I have given consideration as to whether to make a fee award in respect of any fee which has been paid or is payable, and I have decided to make no fee award as the Appellant needed to bring forward further evidence in order to succeed in her appeal.

Signed Date: 4 May 2017
Deputy Upper Tribunal Judge Monson