**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: HU/10399/2015

**THE IMMIGRATION ACTS**

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| **Heard at: Manchester** | **Decision & Reasons Promulgated** |
| **On: 6th September 2017** | **On: 8th September 2017** |

**Before**

**UPPER TRIBUNAL JUDGE BRUCE**

**Between**

**O'Neil O'Brian Smith**
**(no anonymity direction made)**

Appellant

**And**

**The Secretary of State for the Home Department**

Respondent

**For the Appellant: Mr C. Timson, Counsel instructed by HSK Solicitors**
**For the Respondent: Mr G. Harrison, Senior Home Office Presenting Officer**

**DETERMINATION AND REASONS**

1. The Appellant is a national of Jamaica date of birth [ ]. He seeks leave to remain in the United Kingdom on human rights grounds; in particular he places reliance on Article 8 ECHR. He submits that his removal from the United Kingdom would be a disproportionate interference with his family life with his British partner and son.

## Case History

2. In May 2001 the Appellant was given leave to enter the United Kingdom as a visitor. He was seventeen years old. That leave expired on the 29th November 2001; it is not disputed that he has remained in the UK without leave since that date. In October 2015 the Appellant wrote to the Home Office requesting that he be granted leave to remain on Article 8 grounds. He included evidence that he is the father of a British child, K, who was born in 2011. Supporting statements were included from various family members including the child's mother, [NR].

3. The Respondent refused to grant leave. In her letter dated 29th October 2015 she pointed out that the Appellant was convicted of Actual Bodily Harm on the 8th May 2014 and that he had received a suspended sentence of 12 months' imprisonment as a result, with an unpaid work and supervision order. This meant that the Appellant could not qualify for leave to remain in accordance with Appendix FM of the Immigration Rules, because he fell foul of the 'suitability' requirements in S-LTR.1.4:

> "The presence of the applicant in the United Kingdom is not conducive to the public good because they have been convicted of an offence for which they have been sentenced to imprisonment for less than 4 years but at least 12 months".

A further issue was raised as to whether the Appellant's claimed relationship with [NR] was genuine and subsisting. The Respondent went on to consider whether leave should be granted, exceptionally, 'outside of the rules' (i.e. in accordance with the United Kingdom's obligations under the ECHR). She noted that the Appellant's child would be able to access basic services such as education and healthcare if he were to move to Jamaica with his father, and for that reason found no violation of Article 8.

4. The Appellant exercised his right of appeal to the First-tier Tribunal under s82 of the Nationality, Immigration and Asylum Act 2002. He, his partner, his partner's mother and a friend all appeared to give oral evidence. All of their evidence was concerned with the depth and quality of the Appellant's Article 8 private and family life in the UK. The Respondent failed to attend the hearing and so that evidence went unchallenged.

5. In a determination dated the 2nd October 2016 the First-tier Tribunal (Judge Fox) accepted that the Appellant and [NR] are in a genuine relationship, and that a family life exists, albeit that it was a family

life established when the Appellant was living here unlawfully. As to the relationship with K the Tribunal notes that there is no requirement that the child leave the country. The letter from school describes the Appellant as *one* of the child's primary carers and this fact could not therefore assist the Appellant's case. The child can be cared for by his mother and other family members. There is no evidence to demonstrate that the child will be adversely affected beyond the obvious inconvenience which would result if his father would return to Jamaica and tried to make an entry clearance application from abroad. The Tribunal found there to be no exceptional circumstances and the appeal was dismissed.

**The Challenge: Error of Law**

6. The Appellant appealed the decision of Judge Fox on several grounds. These were helpfully distilled, at a hearing before me on the 14th June 2017, by his Counsel Mr Timson, who made the following submissions. The Tribunal's task, in its assessment of s117B(6) of the 2002 Act, was to assess (a) whether there was a genuine and subsisting parental relationship and (b) whether, in all of the circumstances, it was reasonable to expect K to leave the UK. In its assessment of reasonableness, the Tribunal would be required to decide what would be in the child's best interests, and consider that matter alongside the public interest in the removal of persons who are unlawfully in the UK. Mr Timson submitted that the Tribunal had here failed to do any of that. There was no discernible 'best interests' assessment, and no consideration of the Respondent's policy which contains a strong presumption that it will not be reasonable to expect a British child to leave the country. Nor did there appear to be any weighing of the evidence of the witnesses, which had been to the effect that K was close to his dad and would be adversely affected if he were to be removed.

7. I need not deal with those grounds in any detail save to say that they were all made out, and that the Respondent accepts that to be so. At the initial hearing the Respondent was represented by Senior Presenting Officer Mr McVeety who conceded that it was not clear if the Tribunal had conducted a *Razgar* enquiry, or whether it had properly applied the considerations set out in s117B(1)-(6) of the Nationality, Immigration and Asylum Act 2002. Mr McVeety did not accept that this was a case where the only outcome could be in the Appellant's favour, but he did accept that the decision of the First-tier Tribunal was flawed for material error as set out in the grounds. I was therefore invited by both parties to remake the decision in the appeal.

**The Re-Made Decision**

8. Before me the parties agreed that the legal framework to be applied

in this case is as follows:

i) My starting point is the relevant Immigration Rule, ie Appendix FM. This is because the rule reflects where parliament considers the balance to be struck between the rights of the individual and the public interest;

ii) The Appellant cannot meet the requirements of Appendix FM because he fails to meet the 'suitability' criteria. He has been sentenced to 12 months' imprisonment and notwithstanding that his sentence was suspended, this engages S-LTR.1.4 (cited above). The Appellant cannot therefore meet the requirements for entry into the 'five year route to settlement';

iii) It is for the Appellant to demonstrate that he has a family life in the UK and that his removal would amount to an interference with that family life;

iv) It is for the Respondent to demonstrate that any interference caused by the Appellant's removal would be proportionate, having regard to the public interest in removing persons who have been sentenced to 12 months or more in prison, who have remained unlawfully in the UK and who have no current claim to remain under the Immigration Rules. In my assessment of proportionality I must have regard to the public interest as it is expressed in s117B of the 2002 Act.

9. Mr Harrison conceded that the Appellant had discharged the burden of proof in respect of whether he has a family life. That was a concession properly made. Judge Fox had already accepted that the Appellant's relationship with [NR] is genuine and subsisting, and that the Appellant is indeed the biological father of K, as reflected on the child's birth certificate. It was further accepted that both K and his mother are settled in the UK and are British nationals entitled to enjoy the benefits of their nationality. To that extent, it was accepted that the separation from the Appellant (which would inevitably follow from the refusal to grant him leave) would amount to an interference with this Article 8 family life.

10. The question was whether the interference would be proportionate. I must have regard to all of the factors set out in s117B of the Nationality, Immigration and Asylum Act 2002.

11. The Appellant has not had leave to remain in this country since November 2001. Although I bear in mind that he was a minor when he entered the country (he was seventeen and his journey was arranged by adult family members) he has been an adult for the

entire period of overstaying and as such can be expected to take responsibility for it. He has shown an obvious disregard for immigration control and the laws of this country. The proper maintenance of immigration control is in the public interest.

12. The Appellant speaks fluent English. This is a neutral factor in my assessment.

13. The Appellant is not able to work, since he lacks the permission to do so. He would like to work as a chef – he feels that he has an aptitude for it and has been encouraged by family members who work in the food industry, who have provided him with informal training. He would like one day to run his own take-away business selling Caribbean food. He and [NR] are currently living on the benefits that she is entitled to. He does not claim benefits himself, and never has. I accept, having heard the Appellant's evidence, that he has every intention of working and supporting his family, but at the date of this appeal it is the incontrovertible fact that he is not financially independent. This weighs against him in the balancing exercise: it is in the public interest that persons who are financially independent are better able to integrate.

14. The Appellant met [NR] at a time when his immigration status was unlawful. That was plainly a matter of which they were both aware. As such little weight can be attached to their relationship.

15. The Appellant has told me that he has many friends in this country and regards it as his home. I do not doubt that to be the case. This was however a private life developed in the knowledge that he was here unlawfully and as such little weight can be attached to it in my overall assessment.

16. The final consideration in the Act is at s117B(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.

17. As to the first limb, at (a), Mr Harrison concedes that the Appellant enjoys a genuine and subsisting parental relationship with his son. He has lived with him since he was born and plays an active role in his upbringing.

18. As to the second limb, the question of reasonableness, I remind myself of the guidance on how this phrase should be interpreted. In MA (Pakistan) & Ors [2016] EWCA Civ 705 the Court of Appeal confirmed that this sub-section was a free-standing provision, which unlike the preceding sub-sections, was capable of being determinative in an appeal. If both limbs could be satisfied, it would not be in the public interest for the parent to be removed, *ergo* the Respondent would be unable to establish a refusal of leave to be proportionate. To that extent the Court agreed with the President, McCloskey J, in Treebhowan [2015] UKUT 00674. The Court disagreed, however, with his assessment of what matters went to 'reasonableness'. The President had suggested that that question was to be answered solely with reference to the child. Drawing an analogy with the approach taken in deportation appeals to the test of "undue harshness", Elias LJ was satisfied – albeit reluctantly - that the Secretary of State was correct in her contention that the test in fact required the public interest to be weighed in to the balance. This would include all the pertinent matters set out at s117B(1)-(5), as well as any other 'suitability' issues such as those raised in this appeal. Against that would be weighed any number of factors relating to the 'best interests' of the child, for instance: education, healthcare, ties to the country where he would live if he had to leave the UK, the location and strength of ties with other family members.

19. Another important factor would be the child's nationality: ZH Tanzania v Secretary of State for the Home Department [2011] UKSC 4. In her published policy on the application of Article 8 'outside the rules' the Secretary of State acknowledges that nationality has an important role to play, albeit applying a different legal ratio. Recognising the consequences that flow from the decision in the CJEU case of Zambrano [2011] (C-34/0) the Immigration Directorate's Instructions[1] read 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 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:
>
> - Criminality Guidance in ECHR Cases (internal)
> - Criminality Guidance in ECHR Cases (external)
>
> **Where a decision to refuse the application would require a parent or primary carer to return to a**

[1] Family Migration: *Appendix FM Section 1.0b* Family Life (as a partner or parent) Ten Year Routes, published August 2015

> **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.
>
> (emphasis added)

Applying the highlighted guidance to the test in s117B(6)(b), a parent of a British child with no countervailing factors (other than a lack of valid leave) would always succeed.

20. "*Almost* always" was the phrase used by Mr McVeety in his submissions on the question of 'error of law' in this case. He accepted that the policy is published guidance and that as such Article 8 applicants would be entitled to read it as an expression of the Secretary of State's view. He pointed out however that the policy draws a distinct line around cases involving criminality. It reads on:

> 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.
>
> ....

21. In this case the Appellant has both a criminal record and a poor immigration history and it was for this reason that Mr McVeety was not prepared to concede the appeal at the hearing in June. I agree with Mr McVeety, and the terms of the Secretary of State's policy, that these are matters which must be considered as part of a rounded assessment of whether, in all the circumstances, it would be reasonable to expect the K to leave the UK.

22. At the hearing I had the opportunity to hear live evidence from the Appellant and his partner [NR]. Both were impressive witnesses and I was satisfied that they were telling the truth about their family circumstances. For the record, I note that Mr Harrison did cross examine the witnesses but indicated in closing submissions that he did not challenge the credibility of either.

23. The couple have struggled financially. The Appellant is not officially allowed to work, and [NR] had to give up her employment (as an assistant in Debenhams department store) because of ill-health. They have survived on her benefits and the occasional help of family and friends. The Appellant candidly admitted to having done 'cash in hand' work over the years, and to having been paid in kind for jobs such as gardening, cooking and painting. Things have however been hard for them and they have for instance had to move house on a number of occasions having fallen behind on rent.

24. [NR] has a number of health complaints. She has scoliosis of the spine which periodically causes her back to spasm and cramp such that she has high levels of pain and is unable to move. She experiences these episodes very frequently: she told me that, for instance, she has had several incidents since last Christmas. She takes medication (including prescription-only painkillers) and rests to wait for the spasm to pass. She cannot do any housework, work, lift K or do any activity with him during these attacks. Perhaps more significantly she suffers from monthly periods of extreme abdominal pain which mean that she is unable to stand, or move about normally. She told me that when this pain hits she can only "lie in a ball" with a hot water bottle on her tummy, and again, takes prescription-only painkillers. She has a lot of various tablets prescribed at the hospital. These bouts of pain can last up to 5-6 days at a time. She produced several medical appointment letters relating to this condition. She currently has a diagnosis of poly-cystic ovaries and before K was born had to have one of her ovaries removed because there was a large tumour growing on it. She has also been admitted to hospital with what she described as 'septic blood'. She has been told that all of these issues are related, and she has been referred to a specialist for investigation. Her doctors now suspect that she is actually suffering from endometriosis. She has the first appointment with the consultant coming up in October.

25. Despite these substantial difficulties the couple have managed to provide a stable and loving home for K. Both play a very significant role in his upbringing, although the Appellant takes the lead in physical activities because of [NR]'s conditions. For instance, he regularly plays football with his son, takes him swimming, takes him to the park and plays along with the 'rough and tumble' that is part of the daily life of a six-year old boy. Both parents can take and collect K from school. When [NR] is unwell the Appellant does it: this is confirmed in a letter from K's primary school in which he is said to "regularly" be the parent doing drop-off and collection. The school confirms that he also attends parents' evenings, engages with the school and generally shows an interest in his son's education. In her evidence [NR] spoke movingly of the struggles that she has personally faced in coping with monthly pain – for as long as she can remember – and how reliant she is on the Appellant to do things around the house and things with K that she simply cannot.

26. Both witnesses stated that they are the main carers for K. Although [NR] has parents and a sister who all live in Manchester and all of whom have a good relationship with him, none are able to play any significant role in looking after him. Her father works long hours, her mother has significant illnesses and disabilities herself (including lung disease COPD and being partially-sighted), and her sister has two young children of her own to look after.

27. [NR] said that she could not imagine moving her son to Jamaica. She knows nothing about the place and the Appellant has not been there himself for nearly twenty years. She would be scared of going somewhere where she did not know about the medical provision available to her. She has doctors here who have been looking after her for a long time and know her history. She would not want her son to leave behind everything he knows – his grandparents, his aunt and cousins, his home and school. She confirmed the Appellant's evidence that K is currently receiving one-on-one tuition at school because he is having difficulties with his speech. Nor can [NR] envisage what she would do if the Appellant were to leave and go back to Jamaica without them. In her opinion it would "destroy" K if he were to be separated from his father. She cannot rely on her parents or sister to help her so she would not know what to do, because for lots of days she can't physically look after K herself.

28. I must consider all of these factors in the round. The Appellant has been an overstayer since November 2001, some sixteen years. Although I accept that he was brought to this country as a teenager and that this was not necessarily his decision, he has had a long time to either make a voluntary departure – or regularise his position – as an adult. He chose to start a relationship knowing he had no leave to remain, and for that reason his relationship with [NR] –

undoubtedly genuine as it is - cannot attract any significant weight in the balancing exercise. Similarly little weight can be attached to the private life that has been established during this period of unlawful stay. He committed a serious assault, a fact reflected in the sentencing. I accept that the fact that his sentence of imprisonment was suspended would tend to indicate that there were extenuating circumstances (the Appellant claims as much but I make no finding to that effect since the sentencing remarks of the judge were not made available to me), but the conviction stands. I make my assessment on the basis of the bare facts of the conviction and the sentence. The fact that the Appellant has received this sentence weighs against him in the balance. So too does the fact that he is not financially independent. He is in effect reliant on the benefits that are provided by the state to [NR] and K, and that too is a matter that must weigh against him.

29. I am satisfied that it would be strongly in the best interests of K for him to remain in the UK with both of his parents.

30. I accept that he has a stable and loving home in this country which his parents might find difficult to replicate in the more challenging environment of Jamaica. I accept that [NR] would find it very distressing to move away from her parents, friends, sister, home and the support network that K has at his present primary school. I accept that she would be extremely anxious about moving to a new country where she did not have the support of her doctors, and the free prescriptions that she is currently entitled to as a British national. I find that her anxiety would very likely have a detrimental impact on K. If the family travelled together to Jamaica K would be separated from British family members who he knows well and whom he has grown up with, including his maternal grandparents. Although he could of course attend school in Jamaica he would suffer significant disruption if moved away from the school, teachers, support staff and friends that he currently knows. As Baroness Hale puts it in ZH, nor should the intrinsic importance of his citizenship – and the right of abode in this country that it confers - be played down.

31. I find that a separation of K's parents would be hugely detrimental for him. Were the Appellant to travel to Jamaica without his family it would in all likelihood be a very long time before he saw his father in person again. [NR] is not well and is on a low income. Whilst I do not doubt that she would make every effort to facilitate contact with the Appellant, the reality is that it would be extremely difficult for her to visit Jamaica. It is sometimes suggested that the removed parent can simply apply for entry clearance to come back. Where children are involved that is in my view a difficult proposition but in this case that is especially so, since the 'suitability' refusal makes it all but inevitable that any application for entry clearance would be refused.

K would be deprived of any meaningful relationship with his father. As the Appellant puts it: you can't hug over Skype. [NR] would be left to cope on her own. I accept that she appears to be suffering from a complex condition that has resulted in her suffering years of pain. I have no hesitation in accepting her evidence that "when pain hits" she is entirely reliant upon the Appellant to manage the household and K. All of these factors mean that it would be very much contrary to K's best interests for his family to be split up.

32. Weighing all of the above in the round I cannot be satisfied that it would be "reasonable" to expect K to leave the UK. Although his father has committed a crime and has overstayed these were not matters for which he can be held accountable. He is a British child who has known nothing but life in this country. His ability to adapt to live overseas would be made far more difficult by the fact that his family have few live connections to Jamaica (his father has not been there since 2001 and has no contact with family members who may be there) and by the fact that his mother would find it extremely difficult – both physically and psychologically – to make that move. I have not given specific consideration to the notion that K would be able to move with his father alone since that option was specifically disavowed before me by the Respondent. Although I have given careful consideration to the public interest I am not satisfied that there exists in this case countervailing considerations of such weight as to justify separation.

**Decisions**

33. The decision of the First-tier Tribunal contains an error of law such that the decision must be set aside.

34. The decision is remade as follows:

    "the appeal is allowed on human rights grounds".

35. There is no direction for anonymity.

Upper Tribunal Judge Bruce
7th September 2017