Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/12276/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26 May 2017	**On 15 June 2017**

Determination given orally at the hearing.

Before

UPPER TRIBUNAL JUDGE MCGEACHY

Between

BILAL SEZGINER
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Plowright of Counsel, SM Oakfield Ltd
For the Respondent: Ms Z Ahmad, Home Office Presenting Officer

DECISION AND REASONS

1. I have decided to give an oral judgment in this case. It is an appeal which came before me for an error of law hearing on 6 December 2016. At the end of that hearing, having found an error of law in the determination of the First-tier Judge I set out my reasons in a decision which was promulgated on 25 January 2016. I wrote:

"1. The appellant, a citizen of Turkey born on 26 August 1984 appeals, with permission granted by Judge of the First-tier Tribunal Osborne against a decision of Judge of the First-tier Tribunal James who in a determination promulgated on 4 July 2016 dismissed the appellant's appeal against a decision of the Secretary of State to refuse leave to remain on human rights grounds.

2. The basic facts in this case are that the appellant met Ms K P when she was on holiday in Turkey in October 2013. She visited him in Turkey on a number of occasions thereafter. Ms P became pregnant and their daughter, A, was born in Britain on 16 August 2014. Ms P and their daughter visited the appellant in Turkey in November 2014 before returning to Britain for Christmas and then going back to Turkey. After further visits Ms P and the appellant's daughter returned to Britain on 21 May 2015, the appellant came to Britain the following day then returned to Turkey 6 days later. Further visits ensued but by the summer of 2015 Ms P had indicated that she did not want to bring their daughter to Turkey any more. The appellant came to Britain in August 2015 and decided to stay in Britain.

3. Although he and Ms P are no longer in a relationship the appellant lives with her and their daughter in a flat which Ms P rents.

4. On the basis that he wished to remain in Britain with his daughter the appellant made an application for an extension of stay on 9 November 2015. The appellant made it clear that the relationship between him and his girlfriend at that time only revolved around their daughter and that he wished to take responsibility for her.

5. The appellant was refused on the basis that he could not meet the requirements of the Rules and nor was he entitled to remain on human rights grounds. Reference was made to paragraph E-LTRPT.2.3 of the Rules which referred to the necessity of an applicant having sole parental responsibility for the child. It was not accepted that he had sole responsibility. Moreover reference was made to paragraph E-LTRPT.3.1 which stated that an applicant must not be in Britain as a visitor. Moreover the appellant could not fulfil the requirements of paragraph 276ADE of the Rules.

6. It was accepted both in the First-tier and before me that the appellant could not meet the requirements of the Rules.

7. In her determination the First-tier Tribunal Judge noted the appellant's evidence and in paragraphs 31 onwards reached her findings of fact. She noted that the only issue was whether or not the provisions of Article 8 outside the Rules applied. She

clearly accepted that the appellant had family life in Britain and that Article 8 was engaged because of the consequences of the interference with that family life. She noted that the appellant was not financially independent and stated that she took into account the decision in **Treebhawon (Section 117(6)) [2015] UKUT 00674 (IAC)** stating that that decision confirmed where there was a genuine and subsisting parental relationship with a qualifying child as defined by Section 117(D)(1) and where it would not be reasonable to expect the child to leave the UK there was no public interest in removal of the adult concerned. The judge then went on to say that it was important for her to consider whether or not the appellant had established that he had a genuine and subsisting parental relationship with his daughter.

8. The judge noted that the appellant asserted that Ms P was so immature that she was unable to look after their child and that he claimed to have sole responsibility for his daughter. The judge did not accept that, stating that she did not accept that Ms P was unable to assume responsibility for her. She accepted that they were living in the same household and noted that in a letter Ms P had written that she knew that the appellant would 'contribute to the upbringing'. She noted photographs and also referred to evidence from Ms P's family.

9. Having stated that she was concerned with the appellant's credibility she concluded that 'I do not find that the appellant has produced sufficient evidence to establish that he has a genuine and subsisting parental relationship with his daughter and for that reason I do not accept that Section 117B(6) applies in this appeal.' She went on to state that she should assess the proportionality of the decision to refuse the application. Having referred to the public interest in maintaining effective immigration control she stated that she is satisfied that the decision to refuse the application was proportionate and dismissed the appeal.

10. The grounds of appeal stated that the judge had erred in her construction of the case of **Treebhawon** stating that where there was a genuine and subsisting parental relationship with a qualifying child and where it would not be reasonable to expect the child to leave Britain there was no public interest in removal of the adult concerned. The grounds stated that there was evidence to show that there was a genuine and subsisting relationship between the appellant and his daughter and that the judge had not properly considered the best interests of the child. It was asserted that the judge had erred when finding that the appellant was not credible.

11. At the hearing of the appeal before me I confirmed that the issue in this appeal relies solely on that of the rights of the appellant

under Article 8 of the ECHR. Mr Coleman asserted that the judge should have found that the appellant was in a genuine parental relationship with a British citizen child and that she had erred in not making a finding on that point and in not making a finding that the appellant was the father of a qualifying child. Moreover the judge had erred in not properly considering the issue of Section 55 and the best interests of the child which were to have her two biological parents live with her. There was nothing to indicate that the Appellant was other than a caring parent. Moreover the judge, he argued, had overlooked the fact that the appellant was living with his daughter and ignored evidence from members of Ms P's family which referred to the relationship – that evidence included letters from Ms P's mother and aunt. He emphasised that he accepted that this was not a case where sole responsibility was being argued but stated the decision was perverse and irrational.

12. In reply, Mr Bramble relied on a Rule 24 statement which argued that the judge had reached conclusions which were fully open to her on the evidence as a whole. It also asked that the negative findings on the credibility of the appellant made by the judge should be upheld.

13. He pointed out that Ms P had not attended court and indicated that I should find that there was a lack of information relating to the relationship between the appellant and his daughter.

14. In reply Mr Coleman argued that the findings of the judge were not open to her, they were factually incorrect and perverse and that the appeal should be remitted to the First-tier for findings relating to the relationship to be made as these would affect any further application which the applicant would make.

Discussion

15. The basic facts of this case are clear. The child is now aged 2 and lives with her mother and the appellant. Her mother and the appellant are not in a relationship. The judge was correct to conclude that the appellant had not proved that Ms P was not capable of looking after the child. Indeed it must be the case as the mother of a 2-year old girl Ms P must be the primary focus of the child. It was not argued before the judge that the appellant had sole responsibility for the child – that assertion came from the appellant's witness statement – but the judge was fully entitled to find that he did not have sole responsibility.

16. It is difficult to see how given that the appellant, who is not working and who lives in the same flat at the child would not have a parental relationship with her and it would be difficult to come to any conclusion other than that it would not be reasonable to expect the child to leave the United Kingdom. I

therefore consider that the provisions of Section 117B(6)(a) and (b) are met and I consider that the fact that the judge did not make a clear finding on that point was an error of law.

17. I therefore set aside the decision of the judge in the First-tier. I consider that there should be a further hearing to ascertain to consider the application of Section 117B in this case.

Directions

1. The decision in the First-tier is set aside.

2. There will be a further hearing in the Upper Tribunal at which both the appellant and the respondent may produce any evidence which they consider is relevant to the issue of whether or not the appellant is exercising parental responsibility for his daughter here.

3. Both parties must, at least 14 days before the hearing of the appeal, serve skeleton arguments relating to the application of Section 117B (6) of the Nationality, Immigration and Asylum Act 2002 in this case."

2. At the renewed hearing before me on 26 May 2016 I heard submissions from both parties. Ms Ahmad referred to the terms of the judgment in **MA (Pakistan) [2016] EWCA Civ 705** in which Lord Justice Elias had referred to the provisions of Section 117A and 117B of the Nationality, Immigration and Asylum Act 2002 and in particular to the provisions of sub-Section (6) of the Section 117C. It was the submission initially of Ms Ahmad that that judgment indicated that when considering the provisions of Section 117B(6) and in particular the provisions in subparagraph (6)(b) a proportionality exercise should be undertaken as to whether or not the parent could be removed. In reply Mr Plowright on behalf of the appellant referred not only to the Immigration Directorate Instructions but also to the determination of the Upper Tribunal in **SF and Others (Guidance, post-2014 Act) Albania [2017] UKUT 00120 (IAC)** which considered the terms of the IDI and reached the conclusion that where a British citizen child was involved it was appropriate that a non-criminal parent should be allowed to remain.

3. I have considered the terms of sub-Section (6)(b) of Section 117B of the NIAA 2002. That reads:-

"(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."

4. As I stated in my decision setting aside the determination in the First-tier it would not be reasonable to expect this child to leave the United Kingdom. I consider that that is self-evident given that should this child leave Britain her mother would not be able to follow and the child, who is British, would not be able to benefit from her British nationality and would be separated from her main carer. It is also incontrovertible that the appellant has a parental relationship with this qualifying child and that has not been questioned by the respondent. Although the mother of the child and her own mother attended the hearing they were not required to give evidence. I consider that the terms of Section 117B(6) are clear and there is no proportionality exercise which is set out in that Section. While Ms Ahmad referred to the issue of the term "reasonable" in sub-Section (b) that is a term that qualifies the expectation that the child could leave the United Kingdom. It is not a term that qualifies the issue of the removal or the expectation that the non-British parent should leave.

5. I am fortified in my conclusion when I consider not only the terms of the Immigration Directorate Instructions family migration: Appendix FM Section 1.0(b) of August 2015 and in particular Section 11.2.3 of those Immigration Directorate Instructions. That Section is set out in the determination in **SF and Others**. It is clear from the IDIs as indeed interpreted by the Tribunal in that case that where there is a British citizen child the person exercising a genuine and subsisting parental relationship, as is the case here, is someone for whom the public interest does not require their removal. That is the case here. The public interest does not require the removal of the appellant and it follows from that that this appeal should be allowed.

6. No anonymity direction is made.

Decision.
This appeal is allowed.

Signed  Date 14 June 2017

Upper Tribunal Judge McGeachy