Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/18412/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 2 October 2017	**On 9 October 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

OHT
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Neale, Counsel, instructed by Duncan Lewis & Co Solicitors
For the Respondent: Mr P Duffy, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Jamaica born on 12 July 1966 whose application for leave to remain in the UK on the basis of his family and private life was refused by the respondent. His subsequent appeal to the First-tier Tribunal was heard by Judge Adio. In a decision promulgated on 23 January 2017 the appeal was dismissed. The appellant is now appealing against that decision.

Background

2. The appellant came to the UK as a visitor in 1999 and was subsequently granted leave to remain until June 2004. Thereafter he has been in the UK without leave to remain. Since around 2005 the appellant has been living with his partner and her two children, born in 2003 and 2004, who are British citizens.

3. The appellant has committed several crimes. In April 2003 he was convicted of possessing a bladed article and driving without insurance. In 2014 he was convicted of assault and actual bodily harm resulting in a ten month prison sentence.

4. Moreover, in the 1990s he was convicted and sentenced to four years' imprisonment in the USA for robbery. The information about his conviction in the USA only came to light at the First-tier Tribunal hearing.

5. The appellant claims that removing him from the UK would breach his right to private and family life under Article 8 ECHR because of his relationship with his partner and her children, all of whom are British nationals.

Decision of the First-tier Tribunal

6. Pursuant to S-LTR.1.6 of the Immigration Rules, the judge found that the appellant was unable to succeed under the Immigration Rules because his criminal conduct means that his presence in the UK is not conducive to the public good.

7. The judge then considered the appeal outside the Immigration Rules.

8. At paragraph 25 he stated:

> *"The issue is whether the respondent's decision is a proportionate one. In that regard I have considered Section 117B(6) of the Nationality, Immigration and Asylum Act 2002. This refers to the case of a person who is not liable to deportation and states that the public interest does not require the person's removal where the appellant has a genuine and subsisting parental relationship with a qualifying child and it would not be reasonable to expect the child to leave the UK. I have already found that the appellant has a genuine and subsisting relationship with a qualifying child, i.e. the two children of AC. It would not be reasonable to expect the children to leave the UK as they are British citizens. They have never lived in Jamaica. The real issue is whether it is in the public interest that the appellant be removed."*

9. The judge undertook a balancing exercise in assessing the proportionality of removing the appellant. In favour of the appellant he found that he plays a positive role in the life of his partner's children, who consider him their father and cannot envisage life without him. The judge noted that the children are in a critical juncture in their lives.

10. Weighing against the appellant, the judge found that he has been in the UK unlawfully since 2004, had no immigration status when he entered his relationship with his partner and her children, has committed several crimes, and deliberately lied about his conviction in America.

11. At paragraph 28 the judge considered the respondent's Immigration Directorate Instruction Family Migration: Appendix FM Section 1.0b ("the IDI") and noted that it recognises that it may be appropriate to refuse leave in certain circumstances even though an appellant has a genuine and subsisting parental relationship with a child who is a British citizen. He stated:

> *"The instructions go on to state that 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."*

12. The judge concluded at paragraph 32:

> *"This is a finely balanced case because I recognise that there is a very strong family life between the appellant and the two children and [his partner] however the public interest also has to be taken into account when dealing with maintenance of effective immigration control and prevention of commission of further offences. It is not in the public interest to have an untruthful character who continues to commit offences and also denies his past in order to conceal it from the respondent even when such matters were put to him in court. Though it would be detrimental to the appellant's partner and stepchildren for him to be removed from the UK the fact remains that albeit with a struggle the appellant's partner and children still got on with their lives in his absence."*

Grounds of Appeal and Submissions

13. The grounds of appeal submit that the judge failed to properly apply Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). The appellant's argument, in sum, is that the legal consequence of finding (as the judge did at paragraph 25) that it is not reasonable to expect his partner's children to leave the UK is that the public interest does not require his removal.

14. Before me, Mr Neale reiterated the arguments in the grounds. He noted that Section 117B(6) stipulates three discrete criteria and that if all three are met removal will not be in the public interest. As the judge found all three were in fact met it follows that removal is not in this case in the public interest. He argued that this appeal is distinguishable from *AM (Pakistan)* [2017] EWCA Civ 180 and *MA (Pakistan)* [2016] EWCA Civ 705 as it concerns British children where it could not reasonably be argued that it would be reasonable to expect them to leave the UK.

15. In respect of the IDI, Mr Neale noted that this contemplates refusing a grant of leave to the parent of a British citizen where the child will be able

to remain in the UK and the parent's conduct is particularly poor. Mr Neale submitted that this cannot take precedence over primary legislation, as set out in Section 117B(6) of the 2002 Act, where the only question is whether it is reasonable for the child to leave the UK.

16. Mr Duffy's response was, firstly, to clarify that he is not arguing it would be reasonable to expect the children to leave the UK. He submitted that there must in principle be a route to argue that separation of the appellant from his partner's children is proportionate given the strong public interest in his removal arising from his criminal conduct. He argued that Section 117B(6) of the 2002 Act should be read as not applying where there is no expectation the child will leave the UK. He derived this construction of the legislation from the word "expect" in Section 117B(6)(b). I asked Mr Duffy if there is any authority to support this argument and he accepted there was not.

Consideration

17. This appeal concerns the interpretation of Section 117B(6) of the 2002 Act. This provision provides as follows:

> *"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* [a concept which includes British citizens, such as the children relevant to this appeal], *and*
>
> *(b) it would not be reasonable to expect the child to leave the United Kingdom."*

18. In *MA (Pakistan)* Elias LJ explained at paragraph 19 that subsection (6) of Section 117B(6) is a self-contained provision to be read independently of other matters identified in that Section and other public interest considerations. He stated:

> *19. In my judgment, therefore, the only questions which courts and Tribunals need to ask when applying Section 117B(6) are the following:*
>
> *(1) Is the applicant liable to deportation? If so, Section 117B is inapplicable and instead the relevant code will usually be found in Section 117C.*
>
> *(2) Does the applicant have a genuine and subsisting parental relationship with the child?*
>
> *(3) Is the child a qualifying child as defined in Section 117D?*
>
> *(4) Is it unreasonable to expect the child to leave the United Kingdom?"*
>
> *20. If the answer to the first question is no, and to the other three questions is yes, the conclusion must be that Article 8 is infringed."*

19. This interpretation of Section 117B(6) was confirmed in *AM (Pakistan)*.

20. Elias LJ also explained in both the aforementioned cases that the concept of reasonableness is a broad one which encompasses wider public interest considerations including the conduct of the parent or carer.

21. Following *MA (Pakistan)* and *AM (Pakistan),* and giving the words in Section 117B(6) their plain and ordinary meaning, in my view the proper interpretation of the provision is that:

    (a) if a person is not liable to deportation (which the appellant is not); and

    (b) if a person has a genuine and subsisting parental relationship with a qualifying child (which the appellant does); then

    (c) the public interest does not require the person's removal if it would not be reasonable to expect the qualifying child to leave the UK.

22. The qualifying children in this case are British citizens aged 12 and 13 who have never been outside the UK and whose mother has never been to Jamaica. However egregious the appellant's conduct may have been, it is not reasonable to expect these children to leave the UK and move to Jamaica.

23. Were it not for the existence of Section 117B(6) I have no doubt that a judge evaluating the appellant's case under Article 8 ECHR could reasonably conclude that removing him to Jamaica would be both reasonable and proportionate. Whilst it is manifestly not reasonable to expect the appellant's partner's children to leave the UK, it would, in my view, be reasonable to expect the appellant to leave the UK even though this would result in separation from the children.

24. However, Tribunals are required to apply Section 117B(6) of the 2002 Act and the wording of this provision is unambiguous: if it would be unreasonable to expect the appellant's stepchildren to leave the UK (which it clearly would be) then the public interest does not require his removal regardless of how egregious his conduct has been and the strength of other factor which would make his removal appropriate.

25. The IDI may envisage circumstances in which it would be appropriate for the parent of a British citizen to be removed from the UK even where it would not be reasonable to expect the child to leave the UK, but the test the courts must apply is not that in the IDI but that set out in the legislation.

26. Mr Duffy's argument that Section 117B(6) does not apply where a child is not expected to leave the UK (as is the case here, where the children could clearly remain with their mother in the UK) does not find support in either the plain language of Section 117B(6) or in any case law and therefore cannot prevail. Once the judge found that the appellant satisfied the three criteria of Section 117B(6) it inextricably followed that Article 8

would be infringed by his removal from the UK as the legislation stipulates that there is no public interest in his removal.

27. By finding that it is in the public interest for the appellant to be removed notwithstanding also finding that the three criteria of Section 117B(6) were satisfied the judge made a material error of law. And because the appellant satisfies the three criteria in Section 117B(6) his appeal must be allowed. I remake the decision accordingly.

Decision

A. The decision of the First-tier Tribunal contains a material error of law and is set aside.

B. I remake the decision by allowing the appellant's appeal under Article 8 ECHR.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Deputy Upper Tribunal Judge Sheridan Dated: 6 October 2017