



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/33556/2015

THE IMMIGRATION ACTS

Heard at Field House
On 19 July 2018

Decision & Reasons Promulgated
On 23 August 2018

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

AMI
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Harvey, instructed by Turpin & Miller Solicitors

For the Respondent: Mr Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Ghani promulgated on 16 June 2017 dismissing his appeal against the decision of the respondent made on 15 October 2015. For the reasons given in my decision of 14 March 2018, that decision was set aside, a copy of my reasons is attached to this decision as an annex.
2. As is noted in my decision the remaking of this appeal is confined to whether to assessment to the best interests of the appellant's children and as to whether the

removal of the appellant would in the circumstances be proportionate. Further, it is accepted that the children had been granted indefinite leave to remain in the United Kingdom, as indeed had their mother, subsequent to the last First-tier Tribunal's decision.

3. Subsequent to the directions made in the error of law decision, the Secretary of State has expressly given her written consent to the Upper Tribunal considering the grant of indefinite leave to the appellant's wife and children as a new matter.
4. Since directions were given in this case, the applicant's children have been registered as British citizens. I did not, however, consider that this amounted to a new matter given that there would be no material or substantive change in the position under Appendix FM and the provisions of EX.1 to the Immigration Rules as well as the application of Section 117B(6) of the 2002 Act. Mr Tarlow agreed with that position.
5. I heard evidence from the appellant and his partner. I also heard submissions from both representatives.
6. Mr Tarlow submitted only that it would be reasonable to expect the family to relocate as a whole to Nigeria. Ms Harvey, in response, submitted that it followed from that that the respondent was not submitting that the family could be separated. Despite being given an opportunity to respond to that, Mr Tarlow did not demur from that proposition.

The Law

7. In assessing the article 8 claims, I have regard to section s117A and 117B of the 2002 Act which provides as follows:

Section 117A

- (1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts –
 - (a) breaches a person's right to respect for private and family life under Article 8, and
 - (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.
- (2) In considering the public interest question, the court or tribunal must (in particular) have regard –
 - (a) in all cases, to the considerations listed in section 117B, and
 - (b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.
- (3) In subsection (2), "*the public interest question*" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

Section 117B

- (1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English –

- (a) are less of a burden on taxpayers, and
- (b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons –

- (a) are not a burden on taxpayers, and
- (b) are better able to integrate into society.

(4) Little weight should be given to –

- (a) a private life, or
- (b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(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.

"qualifying child" is defined in section 117D:

"qualifying child" means a person who is under the age of 18 and who-

- (a) is a British citizen, or
- (b) has lived in the United Kingdom for a continuous period of seven years or more;

8. The relevant paragraph of the Immigration Rules is paragraph 276 ADE (1):

276ADE (1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:

- (i) does not fall for refusal under any of the grounds in Section S-LTR 1.2 to S-LTR 2.3. and S-LTR.3.1. in Appendix FM; and
- (ii) has made a valid application for leave to remain on the grounds of private life in the UK; and

...

(iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; or

9. It is necessary to consider what was held in MA(Pakistan) at [40] onwards:

40. It may be said that the wider approach can be justified along the following lines. It will generally be in the child's best interests to live with his or her parents and siblings as part of a family. That is usually a given especially for younger children, absent domestic abuse or some other reasons for believing the parents to be unsuitable. The approach of the Secretary of State means that the stronger the public interest in removing the parents, the more reasonable it will be to expect the child to leave. But it seems to me that this involves focusing on the position of the family as a whole. In cases where the seven year rule has not been satisfied, that is plainly what has to be done. As McCloskey J observed in *PD and others v Secretary of State for the Home Department* [2016] UKUT 108 (IAC) it would be absurd to consider the child's position entirely independently of, and in isolation from, the position of the parents given that the child's best interests will usually require that he or she lives as part of the family unit. But the focus on the family does not sit happily with the language of section 117B(6). Had Parliament intended to require considerations bearing upon the conduct and immigration history of the applicant parent to be taken into consideration, I would have expected it to say so expressly, not for the matter to have to be inferred from a test which in terms focuses on an assessment of what is reasonable for the child. This does not in my view mean that the wider public interests have been ignored; it is simply that Parliament has determined that where the seven year rule is satisfied and the other conditions in the section have been met, those potentially conflicting public interests will not suffice to justify refusal of leave if, focusing on the position of the child, it is not reasonable to expect the child to leave the UK. When section 117A(2)(a) refers to the need for courts and tribunals to take into account the considerations identified in section 117B in all cases, that would not in my view have been intended to include specific circumstances where Parliament must be taken to have had regard to those matters.

...

42. I do not believe that this principle does undermine the Secretary of State's argument. As Lord Justice Laws pointed out in *In the matter of LC, CB (a child) and JB (a child)* [2014] EWCA Civ 1693 para.15, it is not blaming the child to say that the conduct of the parents should weigh in the scales when the general public interest in effective immigration control is under consideration. The principle that the sins of the fathers should not be visited upon the children is not intended to lessen the importance of immigration control or to restrict what the court can consider when having regard to that matter. So if the wider construction relied upon by the Secretary of State is otherwise justified, this principle does not in my view undermine it.

43. But for the decision of the court of Appeal in *MM (Uganda)*, I would have been inclined to the view that section 117C(5) also supported the appellants' analysis. The language of "unduly harsh" used in that subsection is not the test applied in article 8 cases, and so the argument that the term is used as a shorthand for the usual proportionality exercise cannot run. I would have focused on the position of the child alone, as the Upper Tribunal did in *MAB*.

44. I do not find this a surprising conclusion. It seems to me that there are powerful reasons why, having regard in particular to the need to treat the best interests of the child as a primary consideration, it may be thought that once they have been in the UK for seven years, or are otherwise citizens of the UK, they should be allowed to stay and have their position legitimised if it would not be reasonable to expect them to leave, even though the effect is that their possibly undeserving families can remain with them. I do not accept that this amounts to a reintroduction of the old DP5/96 policy. As the Court of Appeal observed in *NF (Ghana) v Secretary of State for the Home Department* [2008] EWCA Civ 906, the starting point under that policy was that a child with seven years' residence could be refused leave to remain only in exceptional circumstances. The current provision falls short of such a presumption, and of course the position with respect to the children of foreign criminals is even tougher.

45. However, the approach I favour is inconsistent with the very recent decision of the Court of Appeal in *MM (Uganda)* where the court came down firmly in favour of the approach urged upon us by Ms Giovannetti, and I do not think that we ought to depart from it. In my judgment, if 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). I recognise that the provisions in section 117C are directed towards the particular considerations which have to be borne in mind in the case of foreign criminals, and it is true that the court placed some weight on section 117C(2) which states that the more serious the offence, the greater is the interest in deportation of the prisoner. But 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.

10. The starting point for any assessment in this case must be the best interests of the children. This is to be undertaken without taking into account any negative factors that may arise from the parents' conduct.
11. I am satisfied that the children are now both British citizens. They have never been to Nigeria, and have not been brought up in, for example, a Nigerian cultural milieu. They are, however, relatively young and could be expected to an extent to adapt, but here, that adaptation would involve the cessation of the links they have with extended family, and the stability of a home set within that context. Equally it is evident in this case that the appellant provides a significant amount of care to his children as can be seen from the evidence of both the appellant and his partner. Similarly, this is attested to in the letters of support from family and friends which appear in the appellant's bundle matters which had not been the subject of challenge by the respondent.

12. In this case, it is important to bear in mind that the presence that the father gives to the family life is considerably greater as his partner, and the children's mother, works nights and evenings.
13. The ability of Ms CS to provide care for her children is an important matter in their wellbeing. It is manifestly in the children's interest that their mother is well and able to care for them. It is not in doubt that CS was subjected to sexual abuse as a young child in Jamaica and in the circumstances it had been found in her appeal that it would be a wholly disproportionate interference with her right to respect for her private and family life for her to be returned to Jamaica. I am satisfied also that CS has understandably suffered from depression after these episodes and has been diagnosed as suffering from PTSD. She has, it is also accepted, received counselling and is awaiting assessment for further psychological therapy.
14. CS is, as the most recent letters from the GP show, still suffering from depression as a result of her husband's immigration status and stresses on him not being able to work. She has been supervised medically most recently in April and May. In her evidence before me, CS explained that she benefits from close support she receives particularly from her father and other relatives in the United Kingdom. She has regular, daily contact with them and relies on them for a significant degree of emotional support. That is not because it is not provided by the appellant but she relies upon the wider support of several members of her family to maintain her mental wellbeing in the light of what has happened to her in the past and her continuing depression.
15. Similarly, the children also have regular contact with an extended family in the United Kingdom and have close links with them. I consider it is in their best interests for that to continue and indeed for them to continue in the stable situation which they find themselves in the United Kingdom. As is noted in the material provided, they have a grandfather, grandmother aunt, cousins and many other relatives here.
16. I bear in mind the findings by Judge Graham when allowing CS's appeal was that she was vulnerable, that she has an emotional dependency on her father which was held to go beyond normal emotional bounds which consist between a parent and a child albeit that she has a husband and that she receives significant support from her extended family in the United Kingdom having spent time here as a child and a young adult. The GP in particular identifies the practical and emotional support that the family provide.
17. I consider that all of support enables CS to continue to be a good mother to the children. It is in their best interests that this should continue. In assessing the children's best interests, it is necessary also to consider also the situation that there would be on them going to live in Nigeria. I accept that the appellant has, as he says, no support network there, no-one to accommodate him and that he has no immediate prospect of employment and he would be unable to support himself at least initially, let alone support a family. I consider that this unchallenged evidence is reliable, and that I can place weight on it. I find that it would not be possible for him in the foreseeable future to be in a position to provide for his family either in terms of income

or accommodation. That is not to say that this in itself would amount to a breach of Article 8 but it is significant and important to be taken into account in assessing the best interests of the children. Further, CS and the children would have to adapt to an entirely different environment. They would no longer be the wide support network and the constant interaction between the large extended family which provides a network within which this family is currently supported.

18. A further consideration is also the health of the younger child who suffers from eczema which is exacerbated by exposure to the sun which would be greater in Nigeria. In addition to affecting his health, it is also a matter over which CS has subjective concerns.
19. I consider, viewing the evidence as a whole and given the difficulties that CS has faced in the past that there is a real prospect of her suffering from a sudden deterioration in her mental ill-health and accordingly not being able properly to care for her children if she were to go to live in Nigeria with her husband and their children. I am satisfied that that is more likely than not and that this would have a significant and serious impact on the children and their emotional wellbeing. I find also that in the circumstances, the appellant would as well as having to find work, provide accommodation and does his best to assist the family to adjust to an alien environment, be compelled to be the primary carer for the young children, given the difficulties CS would have in so doing without the additional family support she receives in the United Kingdom. This would place the children in a difficult and potentially precarious position.
20. Taking into account the lack of support if they would receive in Nigeria and the difficulties the appellant would have in re-establishing himself there, albeit not reaching the level to engage paragraph 276ADE(6) that it is significantly in the children's best interests the family remain in the United Kingdom, the country of which they are after all citizens. That is because even though they are of a young age, the particular circumstances of this family are such that there would be a significant and serious diminution of the care they could receive from their parents due to the likely deterioration in CS's mental health and the difficulties that the appellant would face in having to look after the children and to be the sole provider in economic terms, as well as the stress he would face in having to care for CS.
21. In summary, in assessing the reasonableness to expect the family to relocate in Nigeria, I have set out above a number of significant factors which insofar as they relate to the best interests of their children were significantly in their favour. Against that there are a number of other factors which militate against the appellant.
22. Significant weight must be attached to the maintenance of effective immigration control. That is all the more so in this case where the appellant has remained without leave for a significant period. Little weight should be given to his relationship with CS given that it was entered into when the appellant knew his situation was precarious and similarly little weight can be attached to his private life again that being established whilst his status was precarious.

23. There is some evidence that he will be able using his qualifications to earn a living in the United Kingdom and certainly there appears to be no and greater increase to tax burden in the United Kingdom, the children being British citizens and there is significant evidence from his qualifications that he will be able to earn a living. The appellant speaks English and his financial independence are at best neutral.
24. I am satisfied that both children in this case are qualifying children and that they have a genuine and subsisting parental relationship with the appellant. Whether it would be reasonable to expect the children to leave the United Kingdom depends also whether it would be reasonable to expect their mother, CS to leave and whether they should be expected to travel as a group. Notwithstanding the matters set out above as being in favour of the Secretary of State and the public interest in maintaining immigration control, I consider given the impact on CS and the consequent impact that would have on the wellbeing of the children whether they ought to relocate to Nigeria and given the significant difficulties that they would face there that it would not be reasonable to expect them to go to live in Nigeria.
25. As noted above, it is not submitted that it would, on the facts of this case be reasonable to expect the family to be separated. The respondent has not so submitted. Given Ms CS mental ill-health and fragility, I am satisfied that she is more than usually dependant on her husband for support that only he can give her, albeit that she also receives moral and emotional support from her family. The children are also looked after much of the time by the appellant, and his removal from them would, I am satisfied (and this was not challenged) have a significant impact on them, as would the likely deterioration of their mother's mental health; and, in all the circumstances, I am satisfied that separation would not, even on a temporary basis be, on the particular facts of this case, be reasonable
26. Turning then to the public interest and section 117B of the 2002 Act, I bear in mind that the appellant does not meet the requirements of the Immigration Rules, and that there is in consequence, a significant public interest in his removal. He does, I accept, speak English and there are indicators that he can work, if granted permission; his wife already works. Little weight can be attached to the appellant's family life with his wife, given that it commenced when his status was precarious; similarly little weight can be attached to his private life given his status.
27. I have, however, for the reasons set out above concluded that, unusually, and on the particular facts of this case, that it would not be reasonable to expect the children to go to live in Nigeria. Following MA Pakistan, there must be strong reasons for removing the appellant. I am not satisfied that, on the particular fact of this case that there are, bearing in mind the public interest factors set out above. While there has been extensive overstaying, there is no indication of a criminal background, and the appellant is integrated into the community. I note that at no stage in submissions did the respondent seek to submit that there are, simply stating that it would not be unreasonable for the family to relocate as a unit to Nigeria.

28. Taking all of these factors into account I am satisfied that, unusually, and on the particular facts of this case I am satisfied that given that the two children are British citizens and the difficulties they would face in Nigeria that it would be disproportionate to remove the appellant from the United Kingdom and accordingly, it would breach the United Kingdom's obligations pursuant to Article 8 of the Human Rights Convention.
29. For these reasons, I allow the appeal.

Notice of Decision

- (1) The decision of the First-tier Tribunal involved the making of an error of law.
- (2) I remake the decision by allowing the appeal on Article 8 grounds.

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 their 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

Date 15 August 2018



Upper Tribunal Judge Rintoul

ANNEX - ERROR OF LAW DECISION



IAC-AH-SC-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

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Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

**A M I
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Harvey instructed by Turpin & Miller Solicitors (Oxford)

For the Respondent: Mr Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Ghani, promulgated on 16 June 2017, dismissing his appeal against the decision of the respondent made on 15 October 2015.

2. It is important to note in this case that the application was made in 2012. It is, however, a refusal of a human rights claim. On that basis, by operation of Article 9 of the Immigration Act 2014 (Commencement No. 3, Transitional and Saving Provisions) Order (as amended) S.I. 2014/2771, the “saved” provisions do not apply. The effect of that in this case is that the amended provisions of Section 85, as introduced by the Immigration Act 2014, have full effect. That is a matter to which I will turn in due course.
3. The appellant is a citizen of Nigeria who entered the United Kingdom with entry clearance as a visitor on 26th December 2008 but overstayed. He met his partner (now wife) in December 2010 and they were later married. They have two children born in 2013 and 2016. His case is that they cannot go to live in Nigeria given that his partner and their children’s culture is completely different from that in Nigeria, the partner being a Jamaican citizen with discretionary leave to remain in the United Kingdom.
4. The respondent’s case, as set out in the refusal letter, is that the applicant does not meet the requirements of Appendix FM given that although it was accepted that he had a genuine and subsisting relationship with his partner, she was not settled in the United Kingdom and thus did not meet the definition of “partner”. She also concluded that the appellant did not qualify for leave under the parent route on the basis that paragraph EX.1. was not made out, as now the child lived in the United Kingdom for seven years prior to the date of application and was not a British citizen.
5. The respondent considered also that the appellant did not meet the requirements of paragraph 276ADE(1) of the Immigration Rules and concluded that there were no exceptional circumstances in this case, having had regard to her duty pursuant to Section 55 of the Borders Act 2009, he was not satisfied that removal would be disproportionate.
6. At the appeal before Judge Ghani, both the appellant and his wife gave evidence. There was also a substantial bundle of material relating to them, including letters of support from friends and family which detailed the British children. There was also a significant amount of material relating to the sexual abuse that the appellant’s wife had suffered in Jamaica, much of which was set out in the findings of First-tier Tribunal Judge Graham when allowing her appeal on Article 8 grounds. It was accepted by the appellant’s representative [23] they could not satisfy the requirements of the Immigration Rules and the judge proceeded on that basis. The judge directed himself [25] that the issue in this case is whether the interference with private and family life was sufficiently serious to amount to a breach of a fundamental right protected by Article 8 and also [27] that the children’s best interests were a primary consideration; that their best interests were an integral part of the proportionality assessment under Article 8 and must be a primary consideration and [28] that it is in the best interests of the children to be with both parents. The children should have stability of social and educational provisions and the benefit of growing up in the cultural norms of society to which they belong. Very young children are focused on their parents rather than their peers and are adaptable.

7. The judge found that:-
 - (i) it would not be reasonable to expect the appellant's partner and appellant and the two young children to relocate to Jamaica [26];
 - (ii) there was no evidence that the children were not also Nigerian citizens, there being no evidence to the contrary, or that they would be particular difficulties with obtaining a visa to enter;
 - (iii) the children are young, adoptable to different environments and there was no evidence that education would not be available to them and that the appellant had not shown any compelling circumstances why relocation as a family unit would not be reasonable [28].
8. The appellant sought permission to appeal on three principal grounds:-
 - (a) that the judge had failed properly to assess the best interests of the appellants' children, in particular failing to consider their interests first, independent of the public interest, the consideration in the decision at [27] to [28] being inadequate;
 - (b) that the judge had failed to consider the impact on the appellant's partner's mental health of going to Nigeria, given that she is vulnerable having suffered trauma in the past and a recent relapse;
 - (c) that they have properly considered the rights of the family as a whole and ties that the appellant's wife and children have to the United Kingdom, failing in particular to follow the guidance set out in **Hesham Ali (Iraq) v SSHD [2016] UKSC 60**.
9. On 13 December 2017 First-tier Tribunal Judge Nightingale granted permission on all grounds.
10. Having heard submissions from both parties, and noting Mr Avery's acceptance that he could not point me to any point at which the judge had decided what the children's best interests are. Whilst there is a clear direction that this is a primary consideration there are no proper findings on this and certainly not a consideration of their best interests as the first step in a consideration. There is, as Ms Harvey submitted, no reference to the documentary evidence in support of the children's position or their links with the United Kingdom despite their young age.
11. It is important in that context to bear in mind the significant difficulties that the appellant's partner has had in the past. These are accepted by the judge, who clearly accepted that she could not return to Jamaica with the children in the light of her past problems but there is no attempt to relate that to the situation which would apply in Nigeria. There is, as Ms Harvey submitted, no proper attempt to consider what the children's situation would be in Nigeria, or for that matter what the position of the partner would be as part of a family unit. It is not a case in which it could be said that there was only one outcome.

12. Accordingly, I am satisfied that on that basis alone, the decision of the First-tier Tribunal should be set aside.
13. It is not, however, necessary to undertake a comprehensive remaking of the decision and the decision that it would be unreasonable to expect the appellant's partner to relocate to Jamaica is preserved. It will, however, be necessary to remake findings as to the children's best interests and as to whether removal of the appellant would, in the circumstances, be proportionate.
14. I bear in mind that the children have now been granted indefinite leave to remain in the United Kingdom, as has their mother and that at present the children's applications for registration as British citizens are being processed.
15. I consider that the acquisition of indefinite leave to remain is a new matter as defined in Section 85 of the 2002 Act as amended. That is because the applicable law has changed given that there is the potential now for Section 117B(6) of the 2002 Act to be engaged and Appendix FM of the Immigration Rules to be applicable, given the provisions of EX.1 and EX.2. I consider also that this issue has now been raised, and that accordingly, the respondent's consent is required before it can be considered by the Tribunal, and that the respondent be given time to consider whether or not to grant consent.
16. In these circumstances, I consider it appropriate to make the following **directions**:
 - (a) The respondent must within 28 days of the issue of these directions indicate in writing whether, pursuant to section 85(5) of the Nationality, Immigration and Asylum Act 2002 she consents to the Tribunal considering the change in the status of the appellant's partner and children (the new matter identified above), bearing in mind the relevant policy guidance set out in "Rights of Appeal" Version 6.0 - see Mahmud (S. 85 NIAA 2002 - 'new matters') [2017] UKUT 488 (IAC)
 - (b) If the respondent refuses consent, the appellants must inform the Upper Tribunal within 14 days if they wish a stay on proceedings to bring a judicial review of the respondent's decision;
 - (c) If the respondent gives consent, then the matter will proceed to a hearing. Any new material must then be served at least 10 working days before the hearing.
 - (d) A hearing date will be fixed only once the time limits set out in (i) and (ii)(if relevant) above have been reached

Signed

Date: 14 March 2018



Upper Tribunal Judge Rintoul