Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/35057/2015
IA/35060/2015
IA/35062/2015
IA/35063/2015
IA/35065/2015

THE IMMIGRATION ACTS

Heard at: Manchester Civil Justice Centre	**Decision & Reasons Promulgated**
On: 8th October 2018	**On: 12th October 2018**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

NTK
FNK
Master A
Master F
Master Z

Appellants

And

Secretary of State for the Home Department

Respondent

For the Appellants: **Mr R. O'Ryan of Counsel instructed by Greenhall Solicitors**
For the Respondent: **Mr C. Bates, Senior Home Office Presenting Officer**

DETERMINATION AND REASONS

1. The Appellants are all nationals of Pakistan. They are respectively a father, mother and their three minor children, born in 2004, 2007 and 2011. They all seek leave to remain in the United Kingdom on human rights grounds.

Anonymity Order

2. There is no reason why the identity of the adult Appellants should be protected. The case does however turn on the presence in the United Kingdom of the minor Appellants. I have had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders. I am concerned that identification of the adult Appellants could lead to identification of children involved and I therefore consider it appropriate to make an order in the following terms:

> "Unless and until a tribunal or court directs otherwise, the Appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies to, amongst others, both the Appellants and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings"

Background and Matters in Issue

3. The chronology of this matter, insofar as is relevant to my decision, is as follows:

4.10.08	Father of family enters the United Kingdom with leave to enter as a Tier 4 (General) Student Migrant
28.01.09	Mother enters the United Kingdom with two eldest children A and F. All given leave as dependents of father
2.1.11	Youngest child Z born
5.12.14	Family made in-time application for leave to remain on human rights grounds
20.2.15	Respondent refuses to vary leave so as to grant leave on human rights grounds

4. When the matter came before the First-tier Tribunal (Judge Lebasci) it was accepted that none of the Appellants could meet the requirements of the Immigration Rules. Since neither parent was settled they could not rely upon

each other as 'partners' under Appendix FM; nor did they pursue a case on the grounds that they met the requirements under the relevant 'private life' provision, paragraph 276ADE(1)(vi). Counsel for the family further agreed that the children could not succeed on 'private life' grounds since at the date of the application none of them had been living in this country for a continuous period of 7 years: paragraph 276ADE(1)(iv) refers. The case was therefore pursued on Article 8 grounds 'outside of the rules'.

5. The First-tier Tribunal, it is agreed, directed itself to the appropriate legal framework. It first considered, and rejected, each case under the Rules. It then considered the position 'outside of the rules', having set out, earlier in the determination, the relevant 'public interest' factors listed in s117B of the Nationality, Immigration and Asylum Act 2002. The Tribunal made two important findings in the Appellants' favour. At §37 it found that the best interests of the children would be primarily served by maintaining the family unit, and that the best interests of the children, in respect of their education and long-term prospects, would be served by permitting them to remain in the United Kingdom. The Tribunal nevertheless found the refusal to grant leave proportionate for the following reasons [at §40-41]:

    - The maintenance of immigration control is in the public interest
    - The family are not financially independent
    - The private life of the Appellants has been established whilst their status was precarious and so attracts only a little weight
    - The best interests of the children can be overridden by other factors
    - The children would be able to go to school in Pakistan, continue their passions (such as karate); their parents would be able to support them by working and there are other family members there who would be able to offer assistance
    - All of the Appellants speak the language (Urdu)

6. The appeals were thereby dismissed.

7. Permission was sought, and granted (by Upper Tribunal Judge Grubb) on the grounds that the First-tier Tribunal has erred in failing to direct itself to the terms of s117B(6) of the Nationality, Immigration and Asylum Act 2002. The test in respect of the children was not simply 'proportionality outside of the rules': it was whether it was *reasonable* to expect these children to leave the United Kingdom. It is submitted that this term had to be interpreted and applied in accordance with the Respondent's own policy and the guidance in MA (Pakistan) [2016] EWCA Civ 705: there had to be 'powerful reasons' to

refuse these children leave, and since the Tribunal had failed to find any, the appeal should be allowed.

Discussion and Findings

8. It is not in dispute that at the date of the First-tier Tribunal the two elder children in this family had lived in the United Kingdom for a continuous period of over 7 years. They were therefore 'qualifying' children under Part V of the Nationality, Immigration and Asylum Act 2002 (as amended by the Immigration Act 2014): see section 117D.

9. The parties are in agreement that the legal framework the First-tier Tribunal should have applied was a *Razgar* Article 8 proportionality enquiry, informed by the public interest factors set out in s117B of the 2002 Act, and the Respondent's published policy relevant to the interpretation of s117B(6).

10. The Tribunal was satisfied that each member of the family enjoyed a private life in the UK to the extent that the relatively low threshold for engaging Article 8 was met. It appeared to be accepted that the decision to refuse the family leave could interfere with their enjoyment of that right, given that the expected consequence of such a decision would be the family's eventual removal from the UK.

11. The Appellants in turn accepted that the third and fourth *Razgar* questions were answered in the affirmative, since the Secretary of State clearly had, as a matter of law, the authority to make the decision and the decision itself was driven by the rational Article 8(2) purpose of protection of the economy.

12. The only matter in issue was whether the decision to remove this family was, in all the circumstances, proportionate. The starting point for conducting that balancing exercise is s117B of the 2002 Act. I have emphasised the final sub-paragraph, as particularly pertinent to this appeal:

> Article 8: public interest considerations applicable in all cases:
>
> (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.

13. At the date of the First-tier Tribunal hearing (and the date of this appeal, although further guidance is expected shortly from the Supreme Court) the authoritative guidance on how this final sub-section is to be applied is to be found in MA (Pakistan):

> 16. The paragraphs in section 117B achieve different objectives. The structure of subsections (4) and (5) differs from subsections (1) to (3). The latter identify factors bearing upon the public interest which a court or tribunal is under a duty to consider but it is for the decision maker to decide upon the weight to give to these factors in making the determination, subject only to compliance with public law principles. Subsections (4) and (5) implicitly accept that the matters identified therein should be taken into account, but there is a direction as to the weight – or

more accurately, the relative lack of it - which should be given to these considerations. Parliament has here sought to identify both relevance and weight.

17. Subsection (6) falls into a different category again. It does not simply identify factors which bear upon the public interest question. It resolves that question in the context of article 8 applications which satisfy the conditions in paragraphs (a) and (b). It does so by stipulating that once those conditions are satisfied, the public interest will not require the applicant's removal. Since the interference with the right to private or family life under article 8(1) can only be justified where there is a sufficiently strong countervailing public interest falling within article 8(2), if the public interest does not require removal, there is no other basis on which removal could be justified. **It follows, in my judgment, that there can be no doubt that section 117B(6) must be read as a self-contained provision** in the sense that Parliament has stipulated that where the conditions specified in the sub-section are satisfied, the public interest will not justify removal. It is not legitimate to have regard to public interest considerations unless that is permitted, either explicitly or implicitly, by the subsection itself.

18. Ms Giovannetti QC, counsel for the Secretary of State, argued otherwise. She contended that there may be circumstances where even though the provisions of paragraphs (a) and (b) are satisfied and the applicant is not liable for deportation, the Secretary of State may nonetheless refuse leave to remain on wider public interest grounds. But as she had to accept, that analysis requires adding words to subsection (6) to the effect that where the conditions are satisfied, the public interest will not *normally* require removal, because on her approach, sometimes it will. I see no warrant for distorting the unambiguous language of the section in that way.

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.

14. To that extent the Court agreed with Mr Justice McCloskey in Treebhowan [2015] UKUT 00674 about the structure of s117B. Sub-section (6) was of a markedly different nature to the preceding five matters. A finding that it would not be reasonable to expect a qualifying child to leave is, in effect, determinative of the proportionality balancing exercise.

15. The question then arises: when will it be unreasonable to expect a child to leave the United Kingdom? Having adopted the Treebhowan structural analysis of s117B the Court of Appeal in MA go on to disagree with McCloskey J about what matters were relevant to that enquiry. McCloskey J had suggested that the question was to be answered solely with reference to the child, and his or her best interests. The Court, with some reluctance, rejected that analysis.

Drawing an analogy with the approach taken in deportation appeals to the test of "undue harshness", the Court of Appeal was persuaded that the Secretary of State was correct in her contention that the test in fact required the public interest to be weighed into the balance when considering 'reasonableness'. This would include all the pertinent matters set out at s117B(1)-(5), as well as any other 'suitability' issues that might arise. The Court was however clear that the public interest in s117B cases was materially different from that weighing against persons subject to deportation, where s117C would be applied. For the latter, the statute created a presumption in favour of deportation. For the former, the statute read in line with existing jurisprudence, did just the opposite. At paragraph 46 Elias LJ says this:

> "Even on the approach of the Secretary of State, the fact that a child has been here for seven years must be given significant weight when carrying out the proportionality exercise. Indeed, the Secretary of State published guidance in August 2015 in the form of Immigration Directorate Instructions entitled "*Family Life (as a partner or parent) and Private Life: 10 Year Routes*" in which it is expressly stated that once the seven years' residence requirement is satisfied, **there need to be "strong reasons" for refusing leave** (para. 11.2.4). **These instructions were not in force when the cases now subject to appeal were determined, but in my view they merely confirm what is implicit in adopting a policy 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 so 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 be to 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".

16. The Court goes on at paragraph 49 to conclude:

> "the fact that the child has been in the UK for seven years would need to be given significant weight in the proportionality exercise for two related reasons: first, because of its relevance to determining the nature and strength of the child's best interests; and **second, because it establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary**".

17. Before me Mr Bates very properly conceded that the Tribunal had failed to follow this framework. The decision nowhere identifies what 'powerful reasons' might exist in this case such that would justify an interference with the established private lives of these children. I am satisfied that for this reason, the decision must be set aside. Mr Bates invited me to remake the decision on the basis of the facts as found by the First-tier Tribunal, and with reference to the public interest factors in s117B.

18. I begin by reminding myself that the public interest requires that the immigration rules are maintained in a fair and consistent manner. I note that whilst none of the Appellants before me currently had leave expressly conferred by the Rules, they do have leave conferred by section 3C of the

Immigration Act 1971. They each arrived in the United Kingdom with leave to enter, extended that leave when appropriate and made the applications underpinning these appeals before that final grant of leave expired.

19. All of the Respondents speak fluent English, but as the First-tier Tribunal note that is a neutral factor. The Tribunal recorded that "clearly the Appellants are not financially independent and owe much of their survival and progress in the United Kingdom to reliance on publicly funded services". It is not immediately clear to me what the Tribunal here refers to (the First Appellant was at all times a privately funded student whose efforts to enlist in the Royal Navy were stymied by delays at the Home Office; there is no evidence before me that the family have ever claimed public funds) but for the purpose of the appeal I am prepared to proceed on the facts as found by the First-tier Tribunal. I note, and give weight to, the fact that it is in the public interest that persons who seek to settle in the United Kingdom are financially independent. In each case only a little weight can be attached to the Appellant's private life because it has been established when the individual's status here was precarious, although I note that in respect of the children this is somewhat mitigated by the terms of 276ADE(1)(iv) and their young age: see Miah (section 117B NIAA 2002 – children) [2016] UKUT 31. It is accepted that each adult Appellant has a genuine and subsisting parental relationship with each child. The question remains: would it be reasonable to expect the (qualifying) children to leave the United Kingdom?

20. The First-tier Tribunal found that it would be in the children's best interests to remain in the United Kingdom. It accepted that the elder was at an important stage in his education (he was then about to choose his GCSE options) and that both have established private lives, enjoying friendships and activities outside of the home. This accords with the Respondent's view, as expressed in the policy, to the effect that children who have lived here for seven years will have effectively 'put down roots'. Against these matters I must weigh in the balance any countervailing factors capable of rendering the refusal of leave to the children 'reasonable'. I remind myself that reasons for so finding must be "strong" or "powerful". Mr Bates realistically conceded that he was unable to identify any such reasons in this case. Both parents are law abiding and have at all time complied with the requirements of immigration control. He accepted that in light of the recent Presidential decision in MT and ET (child's best interests; *ex tempore* pilot) Nigeria [2018] UKUT 00088 (IAC) it could not be said that the parents in this case had acted in a way that would be incompatible with granting leave. In that appeal the panel (Mr Justice Lane and Upper Tribunal Judge Lindsley) considered the case of an applicant who had overstayed, had made a false asylum claim, had received a community order for using a false document to work illegally and who had pursued various legal means of remaining in the United Kingdom. The panel found that even considered cumulatively *those* matters did not amount to powerful reasons why it would be reasonable to expect the applicant's qualifying child to leave the UK [at §34].

21. It follows that all of the appeals must be allowed with reference to Article 8.

Decisions

22. The decision of the First-tier Tribunal is set aside for material error of law.

23. The appeals are allowed.

24. There is an anonymity order.

Upper Tribunal Judge Bruce
8th October 2018