



**Upper Tribunal  
(Immigration and Asylum Chamber)  
PA/02734/2015**

**Appeal Number:**

**THE IMMIGRATION ACTS**

**Heard at Field House**

**Decision & Reasons  
Promulgated**

**On Tuesday 24 April 2018**

**On Friday 27 April 2018**

**Before**

**UPPER TRIBUNAL JUDGE SMITH**

**Between**

**M M N**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr A Mackenzie, Counsel instructed by Kesar and Co Solicitors

For the Respondent: Mr P Duffy, Senior Home Office Presenting Officer

**Anonymity**

*Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008*

An anonymity order was made by the First-tier Tribunal. Although the Appellant no longer appeals on protection grounds, there was no application to discharge the order made. It is appropriate to continue that order. 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, amongst others, to both parties. Failure to comply with this direction could lead to contempt of court proceedings.

## **DECISION AND REASONS**

### **Background**

1. The Appellant appeals against a decision of First-Tier Tribunal Judge Nightingale promulgated on 11 April 2016 (“the Decision”) dismissing his appeal against the Respondent’s decision dated 4 November 2015 refusing his protection and human rights claims. The Appellant no longer appeals on protection grounds. He relies on his family life, in particular as the stepfather/father of four British citizen children, K (his stepdaughter, born 9 October 2007), R (born 7 January 2014) and M (born 7 February 2016) and H (born on 16 October 2017).
2. Permission to appeal the Decision was granted on 5 May 2016. By a decision promulgated on 13 September 2016, Deputy Upper Tribunal Judge Murray found there to be no error of law in the Decision and upheld the dismissal of the Appellant’s appeal. Permission to appeal that decision to the Court of Appeal was refused by Upper Tribunal Judge Gill on 13 December 2016 but was granted by the Court of Appeal (Rafferty LJ) on 3 November 2017.
3. The appeal was remitted by consent between the parties by Order dated 26 February 2018. That order provided that the decision of DUTJ Murray should be set aside and the appeal be re-determined. That would leave the procedural position before me as a further error of law hearing. However, the underlying statement of reasons agreed between the parties recognises that there is an error of law identified in the Decision. The agreed error relates to the Appellant’s second ground of appeal to the Court of Appeal as follows:

“The FTT erred by failing to properly consider whether there were sufficiently strong reasons to render it reasonable for the British national children to leave the UK, having regard to **MA (Pakistan) v Secretary of State for the Home Department** [2016] EWCA Civ 705...”
4. The procedural position therefore is that the grounds disclose an error of law in the Decision which I therefore formally set aside. It is agreed that it is appropriate for this Tribunal to re-make the decision.
5. The relevant factual background to this case is as follows. The Appellant is a national of Somalia. He claims to have left Somalia in 2008 for fear of being recruited by Al Shabaab. He relocated to South Africa where he lived from 2008 to 2014. He claims he was recognised as a refugee in that country.

6. The Appellant married his wife in South Africa in February 2013. She is a British citizen. She has a child from a previous marriage, K. The couple's first child, R, was born in the UK in January 2014.
7. The Appellant left South Africa, he says because of a spate of violent attacks against migrants. He claimed asylum in the UK following his arrival in May 2015. As already noted, since the Appellant's arrival in the UK, the couple have had a further two children. It is accepted that the children are British and that the Appellant has a genuine and subsisting relationship with the children and his wife.

### **Discussion and Conclusions**

8. Judge Nightingale found that family life could be continued in either Somalia or South Africa and that it would be reasonable to expect the Appellant's wife and children to relocate to either of those countries.
9. The Appellant relies on the Court of Appeal's judgment in MA (Pakistan) and others v Secretary of State for the Home Department [2016] EWCA Civ 705 ("MA (Pakistan)").
10. The Respondent's current position appears from the statement of reasons to be that the children would not be compelled to leave the UK as they could remain here with the Appellant's wife and therefore it cannot be said that it is not reasonable to expect them to leave because they would not be required to do so. The Respondent relies in that regard on the Court of Appeal judgments in Secretary of State for the Home Department v VM (Jamaica) [2017] EWCA Civ 255 ("VM") and Patel v Secretary of State for the Home Department [2017] EWCA Civ 2028 ("Patel"). She relies also on her recently revised policy guidance entitled "Family Migration: Appendix FM Section 1.0b" published on 22 February 2018 ("the Guidance").
11. I can deal quite shortly with the cases of VM and Patel which can be distinguished from the present appeal on the basis that both concern derivative rights of residence under EU law (the so-called "Zambrano" issue) and not the question of whether it is reasonable to expect a British Citizen child to leave the UK when considering Article 8 ECHR. In addition, VM is a case concerning criminal deportation and therefore the test is whether deportation of a parent would have an "unduly harsh" effect on the child. It is evident from the judgments that where the Court of Appeal is there dealing with the issue of whether the children could reasonably be expected to accompany the parent being removed/deported, that is by contrast with whether the child is required to leave and not by way of any comment on the provisions of any of paragraph 276ADE(1)(iv) of the Immigration Rules ("the Rules"), EX.1(a) of Appendix FM to the Rules or section 117B(6) Nationality, Immigration and Asylum Act 2002 ("the 2002 Act").
12. In this case, the Appellant places reliance on section 117B (6) of the 2002 Act ("section 117B (6)"). That provides:

“(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”

It is not disputed that, as British citizens, the Appellant’s children are “qualifying children”. Paragraph 276ADE(1)(iv) does not apply in this case as the children are not foreign nationals. Paragraph EX.1(a) of Appendix FM to the Rules is in essentially the same form as section 117B (6) and does not require separate consideration.

13. As the Appellant points out, in MA (Pakistan), the Court of Appeal was concerned only with children who have lived in the UK for seven years or more. None of those cases dealt with the position of British Citizen children. That is not though a reason to distinguish the case; if anything, the position of a British Citizen child is likely to be stronger than that of a foreign national child who has lived here for only part of their lives (and see [102] of the judgment in MA (Pakistan)).

14. Although it is a conclusion which the Court of Appeal reached with some reticence, it was accepted in MA (Pakistan) that the question whether it is “reasonable to expect” a child to leave the UK incorporates consideration of other public interest factors. That appears from [45] of the judgment as follows:

“[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 we should 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) ..... 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.”

15. The submission of the Respondent in those cases with which the Court of Appeal there agreed is set out at [28] to [29] of the judgment as follows:

“[28] ...The focus is not simply on the child but must embrace all aspects of the public interest. She submits that in substance the approach envisaged in section 117B (6) is not materially different to that which a court will adopt in any other article 8 exercise. The decision maker must ask whether, paying proper regard to the best interests of the child and all other relevant considerations bearing upon the public interest, including the conduct and immigration history of the applicant parent or parents, it is not reasonable to expect the child to leave. The fact that the child has been resident for seven years will be a factor which must be given significant weight in the balancing exercise, but it does not otherwise modify or distort the usual article 8 proportionality assessment. That test requires that where the parents have no right to be in the UK that is the basis on which the article 8 proportionality assessment must be made...

[29] Ms Giovannetti submits that essentially the same approach should be adopted when applying the reasonableness test; in essence, it is the usual proportionality test save that the fact that the child has resided in the UK for seven years will be a significant factor weighing in favour of the conclusion that it would not be reasonable to require the child to leave.”

16. The Court of Appeal dealt with the weight which attaches to be given to the factors in section 117B (6) in the public interest balance at [46] of the judgment as follows:

“[46] 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.”

17. The Court reinforced that position at [49] of the judgment as follows:

“[49] ...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."

18. That then brings me on to the Guidance to which Mr Duffy drew my attention in oral submissions. I was directed to the analogous considerations of reasonableness in the section headed "EX.1. (a) - Reasonable to expect" (page 35 of the Guidance) which it is said applies equally to the position under Section 117B (6). That reads as follows:

"First, the decision maker must assess whether refusal of the application will mean that the child will have to leave the UK or is likely to have to do so. Where the decision maker decides that the answer to this first stage is yes, then they must go on to consider secondly, whether, taking into account their best interests as a primary consideration, it is reasonable to expect the child to leave the UK..."

19. That interpretation of the provision whether it is reasonable to expect the child to leave also appears in the section of the Guidance which is headed "Reasonable to expect a child to leave the UK?" and which appears at page 74 onwards. That begins with the following statement :

"If the effect of the refusal of the application would be, or is likely to be, that the child would have to leave the UK, the decision maker must go on to consider whether it would be reasonable to expect the child to leave the UK."

20. The Guidance then goes on to say this ([p76]):

**"Where the child is a British citizen**

Where the child is a British citizen, it will not be reasonable to expect them to leave the UK with the applicant parent or primary carer facing removal. Accordingly, where this means that the child would have to leave to the UK because, in practice, the child will not, or is not likely to continue to live in the UK with another parent or primary carer, EX.1(a) is likely to apply.

In particular circumstances it may be appropriate to refuse to grant leave to a parent or primary carer where their conduct gives rise to public interest considerations of such weight as to justify their removal, where the British citizen child could remain in the UK with another parent or alternative primary carer, who is a British citizen or settled in the UK or who has or is being granted leave to remain. The circumstances envisaged include those in which to grant leave could undermine our immigration controls, for example the applicant has committed significant or persistent criminal offences falling below the thresholds for deportation set out in paragraph 398 of the Immigration Rules or has a very poor immigration history, having repeatedly and deliberately breached the Immigration Rules."

21. The Guidance appears to reflect in large part the Court of Appeal's guidance in MA (Pakistan). It accepts that the usual presumption where a British Citizen child's rights are at issue is that it is not reasonable to

expect that child to leave and it is only where there are strong reasons of public interest for removal that a parent in a genuine and subsisting relationship with such a child should be removed. It may be suggested by the Respondent that this appeal is to be distinguished from the position in MA (Pakistan) because, in accordance with what is said in the Guidance (which was not in force at the time of the Court of Appeal's judgment in those cases), I am required first to consider whether the Appellant's children will or are likely to be required to leave the UK with the Appellant and their mother or whether it is more likely that they will remain here with their mother. If that is the submission, I disagree that this is what is required by Section 117B (6). Section 117B (6) on its face requires only that there be a genuine and subsisting parental relationship with a qualifying child (which I have accepted applies here) and an assessment whether it is reasonable to expect the child to leave the UK.

22. By contrast, the consideration under section 117C (5) is whether "the effect of [the parent's] deportation" is unduly harsh which, read together with the relevant paragraph of the Rules entails a Judge considering whether it would be unduly harsh for a child to leave with a foreign criminal parent or for the child to remain in the UK without that parent. The consideration under Section 117B (6) is only whether it is reasonable to expect the child to leave the UK and not whether it is reasonable to expect the child to remain in the UK without one parent. If the latter were the wording of the legislation, then I can see the relevance of determining whether the child would in fact leave before one goes on to consider the effect on that child. However, that is not what the legislation says. As such, in my judgement, the Guidance in this regard imports words into the sub-section which do not there appear and/or puts an impermissible gloss on the statutory language (if indeed that section of the Guidance is intended to apply to the interpretation of Section 117B (6) at all).
23. Starting then with the best interests of the children, they are British citizens, born and raised in this country. True it is that they are still relatively young and may well be capable of adapting to life in another country. Save for K who is aged ten years, the remaining children are aged four years and under. There is an additional reason why K cannot leave the UK as she is not the biological child of the Appellant. She has a father in the UK and he would not allow K to leave ([7] of the Appellant's wife's witness statement).
24. I have little if any evidence from the Appellant as to the children's best interests. There is no suggestion that any of them have health issues or that there are other considerations which mean that their best interests are inevitably to remain in the UK (save as mentioned above in relation to K).
25. The fact of their British citizenship is however a factor of some significance. The importance of British citizenship was underlined in the speech of Lady Hale (as she then was) in ZH (Tanzania) v Secretary

of State for the Home Department [2011] UKSC 4 ("ZH (Tanzania)") in the following terms :-

“30. Although nationality is not a "trump card" it is of particular importance in assessing the best interests of any child .....

31..... all of these considerations apply to the children in this case. They are British children; they are British, not just through the "accident" of being born here, but by descent from a British parent; they have an unqualified right of abode here; they have lived here all their lives; they are being educated here; they have other social links with the community here; they have a good relationship with their father here. It is not enough to say that a young child may readily adapt to life in another country. That may well be so, particularly if she moves with both her parents to a country which they know well and where they can easily re-integrate in their own community .... But it is very different in the case of children who have lived here all their lives and are being expected to move to a country which they do not know and will be separated from a parent whom they also know well.

32. Nor should the intrinsic importance of citizenship be played down. As citizens these children have rights which they will not be able to exercise if they move to another country. They will lose the advantages of growing up and being educated in their own country, their own culture and their own language. They will have lost all this when they come back as adults.  
....”

26. Based on their citizenship, and notwithstanding their young age, I am satisfied that it is in the best interests of the Appellant’s own three children to remain in the UK. It is also very clearly in the best interests of K to remain in the UK, both because she is older and therefore more accustomed to the British way of life and is a British Citizen but also because she has another parent in the UK from whom she would be separated if the family moved to Somalia or South Africa.

27. I also have no difficulty in finding that it is in the best interests of the children to continue to live with both parents. Although the Appellant did not come to the UK until over a year after R was born here, the family have apparently lived as a unit since he arrived. It is accepted that the Appellant has a genuine and subsisting relationship with his wife and children.

28. The starting point for consideration whether it is reasonable to expect the Appellant’s children to leave the UK is therefore that it is in their best interests to remain in the UK living with both parents.

29. Returning then to what is said in MA (Pakistan), when considering the reasonableness of expecting the children to leave the UK, particularly strong reasons are required to refuse leave to a parent to whom section 117B (6) potentially applies. Here, as Mr Mackenzie points out, the factors weighing against the Appellant are not strong. He does not have a particularly poor immigration history. Although it



appears that the Appellant did enter the UK illegally, he claimed asylum very shortly after he claims to have arrived in the UK. Although that claim was refused and dismissed on appeal and he no longer pursues the protection claim, it is not suggested that the claim was fabricated. The Judge found that the Appellant would no longer be at risk from Al Shabaab in Somalia because of changed country conditions and could return to Mogadishu. The Judge found that there was a sufficiency of protection in South Africa in relation to the claimed risk of attacks there. The Appellant's claim was found not to be credible in minor regards but the Judge did not go so far as to find the whole claim to have been invented.

30. There is, though, also a finding by Judge Nightingale in her decision that the Appellant entered illegally and claimed asylum with a view to circumventing the Rules in relation to maintenance which the family were unable to meet. As the Judge also found, the family were living on public funds, the Appellant's wife having given up her education to look after the family. The Judge also found that the Appellant speaks limited English although he has passed the IELTS test. Those are all factors weighing against the Appellant and in favour of the public interest, applying section 117B of the 2002 Act.
31. I take into account all of the above factors and in particular those which suggest that the Appellant has contrived to circumvent immigration controls. However, particularly strong reasons are required to refuse leave when the best interests of four British Citizen children are for them to remain living with both parents in the UK. In this case, the countervailing reasons are not sufficiently strong to outweigh those best interests. They are not, as the Respondent's Guidance puts it "public interest considerations of such weight as to justify [the Appellant's] removal". On balance, I am satisfied that removal of the Appellant would be a disproportionate interference with human rights, particularly those of his children.
32. In light of those conclusions, I do not need to consider the Appellant's alternative argument based on EU law and the "Zambrano" issue.
33. For the above reasons, I conclude that the Respondent's decision is unlawful under section 6 Human Rights Act 1998 as being in breach of Article 8 ECHR.

## **DECISION**

**I am satisfied that the Decision contains material errors of law. The decision of First-tier Tribunal Judge Nightingale promulgated on 11 April 2016 is set aside.  
I re-make the decision. I allow the Appellant's appeal.**

A handwritten signature in black ink, appearing to read 'E. Smith', written in a cursive style.

Signed  
Upper Tribunal Judge Smith

Dated: 26 April 2018