Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/02667/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14 December 2018	**On 19 February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

IB
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr Tufan, Home Office Presenting Officer
For the Respondent: Mr B in person

DECISION AND REASONS

1. In the decision below, where I refer to "the appellant", I refer to Mr B who was the appellant in the Tribunal below but in fact he is the respondent in the current appeal. References to "the respondent" are to the Secretary of State for the Home Department. This appeal by the Secretary of State is against the decision of the First-tier Tribunal to allow the appellant's appeal on Article 8/ human rights grounds. His appeal against the respondent's decision to refuse him further leave to remain on the basis of his private and family life in the UK came before Judge of the First-tier Tribunal Judge Woolf (the judge). The judge allowed his appeal following a

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hearing that took place at Hatton Cross on 4 May 2018 and his decision was promulgated on 29 May 2018. The respondent appeals that decision, having been given permission to appeal by the First-tier Tribunal on 30 August 2018.

2. The judge granting permission, First-tier Tribunal Judge Pickup, pointed out that the judge had arguably erred in that there was no dispute that the appellant continued to enjoy a parental relationship with his three children when this was in fact not conceded by the respondent. Secondly, the judge had made no finding whether the requirements of the Immigration Rules, set within their correct statutory framework including Section 117B of the Nationality, Immigration and Asylum Act 2002 and Section 55 of the Borders, Citizenship and Immigration Act 2009, were met. He found the analysis legally confused and it was arguable that there was an error of law.

3. I considered this matter when it came before me on 16 October 2018, when I heard argument from Mr Tarlow, who represented the Home Office. The appellant also appeared but was unrepresented. At that hearing, Mr Tarlow pointed out that the First-tier Tribunal had failed to carry out a proper analysis of the Immigration Rules or properly consider Section 117B of the Nationality, Immigration and Asylum Act 2002.

4. I directed that a further one-hour hearing should take place. The appellant was given an opportunity to present further evidence before the Tribunal. I said I would remake the decision, having set aside the decision of the First-tier Tribunal, based on a material error of law being found, but I decided that I would need to take further time to consider the correct method of disposal.

5. I have now had an opportunity to re-assess all the evidence including the brief additional evidence given by the appellant at the adjourned hearing on 14 December 2018. I have also had an opportunity to consider the law further as well as the representations by both parties. Mr B has produced further documents, which I will summarise. They include photographs showing him with his three boys and they include school reports in relation to the children concerned, evidence that he has taken an interest in the medical treatment given to the boys and a letter from the children's mother, who says that he does have a role in the children's lives. The letter describes Mr B as being committed to the children and having a bond with them. He is described as having a proactive role in their lives. Unfortunately, Miss [S] has not attended the Tribunal to give evidence, but the letter is signed by her and, clearly, I have to make some allowance for the fact that Mr B is currently unrepresented.

6. The evidence produced before the First-tier Tribunal suggested that Mr B did indeed have a role in the lives of his children – [I] (born 27 April 2014), [K] (born 17 September 2012) and [M] (born 21 November 2008). Those children are British citizens. He is indisputably their father. It is suggested

that [K] requires speech and language therapy and that he is accompanied by his father to those sessions. There is a letter dated 18 April 2018 from the children's mother ([MS]) confirming Mr B's involvement in his children's lives. She states in that letter that the appellant is involved with "… every aspect of their lives …" and is "… a caring and loving dad to them".

7. Mr Tufan, who represented the Home Office at the adjourned hearing, has indicated that the requirements of LTR4.2 and 4.3 were arguably not met, nor was Appendix FM, but, fairly, he had to accept that the requirements of Section 117B(6) would be met – i.e. the appellant had a genuine and subsisting relationship with a qualifying child and it would not be reasonable to expect that child (or those children) to leave the United Kingdom.

8. Mr Tufan accepts that the second limb (in section 117B (6) (b)) is satisfied here in that it would not be reasonable to expect the children to leave the United Kingdom. The evidence is not of the strongest in that I have not heard oral evidence from Ms [S], but I have to bear in mind that the appellant has been conducting the proceedings, since at least the hearing before the First-tier Tribunal, in person. This includes the hearing in the Upper Tribunal. The appellant has an extremely poor immigration history, which involves removal from the UK once and then returning to the UK illegally, but he has been in the UK since 2002 and I am prepared to accept that the judge's finding that the appellant had a subsisting parental relationship with the children was justified on the evidence before him. I was careful to point out in my decision on the last occasion (on 19 October 2018) that Mr B was to be given an opportunity to submit further evidence. Having found a material error which required the decision of the First-tier Tribunal to be set aside, I reserved my position as to the ultimate disposal.

9. I have now considered all the evidence including the judge's preserved findings and reminded myself of the law in relation to Section 117B (6) of the 2002 Act. That subsection provides that "….in the case of a person who is not liable to deportation the public interest does not require that person's removal where-
(a) the person has a genuine and subsisting relationship with a qualifying child, and (b) it would not be reasonable to expect the child to leave the United Kingdom" (my emphasis).

10. A "qualifying child" includes a British citizen (see section 117 D (1) (a)).

11. Section 117 B (6) has recently been considered by the Supreme Court in the case of **KO (Nigeria) [2018] UKSC 53**. In that case the Supreme court decided that the purpose of the changes produced by Part 5A of the 2002 Act was to narrow the discretion available to the judge when considering the welfare of children. A child is not responsible for the acts or omissions of his parent and, still less, is to be blamed for those acts or

omissions. The Supreme Court commended the Home Office's own guidance in relation to the factors to be taken into account in a case of this type. Misconduct by a parent is not a balancing factor to take into account, but criminality may outweigh all other factors in a particular case.

12. I note there is no criminality here. If the appellant were to be forced to leave the UK, his children would not be forced to leave the United Kingdom with him, but it would be likely that the appellant would effectively lose contact with them. Given the appellant's role in his children's day-to-day education and so forth, remote contact would not be sufficient.

13. Accordingly, I have decided that the conclusion the judge came to in the First-tier Tribunal was one that was in fact open to him on a proper legal analysis. The appellant's own human rights may not have outweighed all other considerations in the eyes of many judges but out of fairness to Mr B I find that the judge was entitled to conclude that he had a genuine and subsisting relationship with his children and the need to maintain that relationship, in their long-term best interests, outweighed all other considerations including the need to enforce immigration control.

14. For these reasons I have decided to allow the respondent's appeal to the Upper Tribunal and I set aside the decision of the First-tier Tribunal following the hearing in October 2018. However, having found there to have been a material error of law by the First- tier Tribunal, I have to substitute my decision. My decision is to allow the appellant's appeal to the First-tier Tribunal against the Secretary of State's decision to refuse further leave to remain.

Notice of Decision

The respondent's appeal to the Upper Tribunal on human rights grounds is allowed to the extent that I have set aside the decision of the First-tier Tribunal and re-made the decision.

My decision is to allow the appellant's appeal against the respondent's decision to dismiss his application for further leave to remain on the basis of family life UK.

The First-tier Tribunal considered it appropriate and necessary to impose an anonymity order and I continue that order.

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: W.E.Hanbury Date 15 February 2019

Deputy Upper Tribunal Judge Hanbury

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award but have decided to make no fee award. The appellant should consider himself lucky that despite his poor immigration history he has ultimately achieved a successful outcome in the Upper Tribunal. However, he has not provided his evidence timeously and this may have avoided unnecessary appeal hearings. For these reasons I have refused to make a fee award.

Signed Date 15th of February 2019

Deputy Upper Tribunal Judge Hanbury