Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/09806/2018**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19 October 2020	**On 01 December 2020**

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

LOUIS [A]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: In person (still represented by Okafor & Co Solicitors)
For the respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is the remaking of the decision in the appellant's appeal following the previous decision of Upper Tribunal Judge Owens, promulgated on 26 February 2020, in which she concluded that the First-tier Tribunal materially erred in law when originally dismissing the appellant's appeal against the respondent's refusal of his human rights claim.

2. The appellant, a citizen of Mauritius born on 25 May 1998, arrived in the United Kingdom in 2009 at the age of 11 and has resided here unlawfully for the great majority of time thereafter.

3. His human rights claim was, and is, based on two elements: first, his relationships with a citizen of the Seychelles with indefinite leave to remain in the United Kingdom, Ms [EE], and the two young children born to them at the beginning and end of 2019 (both of whom are British citizens); second, the private life said to have been established over the course of time.

The error of law decision

4. The First-tier Tribunal had concluded that, applying section 117B(6) of the Nationality, Immigration and Asylum Act 2002, as amended (the 2002 Act), it would be reasonable for the older of the appellant's two children (the hearing pre-dated the birth of the second child) to leave the United Kingdom, and that Ms [E] could also be expected to go and live in Mauritius. On this basis, the appellant's appeal was dismissed. Upper Tribunal Judge Owens agreed with the concession made by the Senior Presenting Officer on appeal to the Upper Tribunal that the First-tier Tribunal had materially erred. In summary, the First-tier Tribunal had effectively taken the circumstances of the child's parents into account when making the reasonableness assessment and had failed to take into account the wider familial ties in the United Kingdom and the circumstances of the child if they were to reside in Mauritius.

5. The decision of the First-tier Tribunal was duly set aside. The following findings of fact made by the First-tier Tribunal were preserved:

i. the older child's British nationality;

ii. Ms [E] nationality status in the United Kingdom;

iii. the appellant's residence in the United Kingdom since 2009 (that amounting to 10 years as at the date of the Upper Tribunal hearing on 17 February 2020);

iv. the appellant's father (who resides in the United Kingdom) is a British citizen by descent, whilst his grandmother was a British citizen as a result of having been born in Diego Garcia.

6. Although not expressly stated as a preserved finding of fact, it is quite clear that there has never been any dispute as to the genuineness and subsistence of the appellant's relationship with Ms [E], or that he enjoys a genuine and subsisting parental relationship with his older child.

7. Finally, it had been found by the First-tier Tribunal that the appellant could not meet any of the Immigration Rules relating to United Kingdom ancestry or Article 8 (whether in respect of family life or private life).

Procedural matters

8. Although the appellant has had legal representation throughout the proceedings before the First-tier Tribunal and the Upper Tribunal, he has not in fact had any such representative in attendance at the hearings themselves. As he explained to me, he simply could not afford this. I considered whether I could fairly proceed with the hearing in these

circumstances. Having regard to the matters set out below, I concluded that I could and should proceed to redecide the appellant's appeal.

9. Having asked a number of preliminary questions, I was satisfied that the appellant understood the nature of the proceedings and what the main issues in his case were. He had already had experience of appearing in person before the First-tier Tribunal and at the error of law hearing. Whilst aware of a degree of nervousness at the hearing, there was no suggestion that the appellant suffers from any mental health or other conditions such as to increase the level of any vulnerability.

10. The appellant had come to the hearing without any paperwork. After explaining all of the issues in the appeal to him, I provided him with the two bundles of evidence which had previously been filed and served on his behalf, and in respect of which I was satisfied he was already familiar. To ensure that he was fully aware of the relevant evidence, I asked Ms [E] to read the relevant witness statements to the appellant outside of the hearing room (the appellant told me that his reading ability was not particularly good). Appropriate time was afforded to the appellant so as to have matters fresh in his mind before the hearing began. I was also satisfied that there was no realistic prospect of any further evidence being provided if an adjournment had been granted.

11. The appellant himself made no application for an adjournment and confirmed that he was happy to proceed.

12. The hearing proceeded in the normal manner, although I remained acutely aware of the appellant's overall circumstances (including of course the fact that he was appearing in person) and the need to ensure that he understood all questions and submissions. I was satisfied that there were no material difficulties in comprehension. Mr Whitwell, in his customary manner, was entirely fair in putting forward his cross-examination and making submissions in a way in which the appellant could readily follow.

The issues in the appeal

13. Even taking the appellant's case at its highest, he cannot meet any of the relevant Immigration Rules, whether in respect of United Kingdom ancestry or Article 8 matters.

14. The focus of this appeal rests primarily on section 1176B(6) of the 2002 Act, which 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."

15. As alluded to earlier, there is no dispute that the appellant has a genuine and subsisting parental relationship with the older child. The same is true in respect of the younger child.

16. Similarly, it is accepted that the appellant is in a genuine and subsisting relationship with Ms [E].

17. The secondary focus of the appellant's case relates to his private life in the United Kingdom.

The evidence

18. I have considered the respondent's appeal bundle, under cover of a front sheet dated 23 August 2018. On the appellant's side, I have two bundles prepared for the First-tier Tribunal hearing. The first is indexed and paginated 1-12 and was received at the Hatton Cross hearing Centre on Newell 7 November 2018. The second is indexed and paginated 1-10 and was received on 1 July 2019. In addition, I have copies of the birth certificates for both of the children.

19. The appellant, Ms [E], and the appellant's father attended the hearing and gave oral evidence, a full note of which is contained in the record of proceedings. I do not propose to set this evidence out here, but will refer to relevant aspects when stating my findings of fact and conclusions, below.

Submissions

20. Mr Whitwell relied on the respondent's reasons for refusal letter, dated 10 April 2018, although he accepted that this was now somewhat out of date. In relation to the reasonableness assessment, I was referred to page 48 of the respondent's guidance on family life (version 11, published on 16 October 2020) and to the preserved findings from the decision of the First-tier Tribunal.

21. Whilst both of the children are British, Mr Whitwell emphasised that this was not a trump card. They were both very young and it was in their best interests to remain with their parents. He submitted that in many respects the family unit's situation if living in Mauritius would not be "very different" from the circumstances in the United Kingdom: neither the appellant nor Ms [E] are working and they are being supported by relatives. The appellant would be able to work in Mauritius and he did not suffer from any material health problems. United Kingdom-based relatives would be able to provide some support. The appellant's evidence on his previous life in Mauritius had been particularly vague and Mr Whitwell submitted that this may have been in order to bolster his Article 8 case. There was no country information on Mauritius.

22. I raised with Mr Whitwell the issue of MA (Pakistan) [2016] EWCA Civ 705, at paragraph 49, and what, if any, were the "powerful reasons" to show that the two British children could be expected to leave the country of their nationality. His response was that I should simply apply KO (Nigeria) [2018] UKSC 53 and view the children's circumstances in the "real world" scenario.

23. The appellant emphasised the following points: that he had no home or family left in Mauritius; that he had been away from that country for a long

time and no longer knew much about it; and that he wished to remain in the United Kingdom in order to look after his children.

24. At the end of the hearing I reserved my decision.

Findings of fact

25. In so far as the preserved findings are concerned, I refer to what is said in paragraph 5, above. Further, the appellant has been since approximately 2015 in a genuine and subsisting relationship with Ms [E] and he enjoys a genuine and subsisting parental relationship with both of his children. None of the members of this family unit have any material health problems.

26. There is no specific evidence as to precisely when in 2009 the appellant arrived in this country. In oral evidence he told me that he believed it was near to Christmas. There is no particular reason to disbelieve this, and I accept it to be the case.

27. I find that the appellant currently lives with his father in a rented property and has done so for two or three years. The evidence surrounding Ms [E]'s place of residence was not entirely satisfactory: it was said that she lived together with the appellant, but the children's birth certificates both include another address said to be that of her mother. Ultimately, I find that they do all live together at the appellant's father's property and have done so since soon after the birth of the older child in January 2019. I accept Ms [E]'s evidence that her mother's address had been given because this is where she had previously lived and she had not notified all relevant parties of the change; the consequence of this being that she gave the address for the sake of convenience.

28. The appellant acknowledged he had never worked in United Kingdom and I find this to be the case. I find that he was educated here, having completed GCSEs and then attending a further education college for a year.

29. The evidence as to the appellant's status in the United Kingdom throughout his residence here is not entirely clear. I take into account that he was only 11 years old on entry. He told me that his father had bought him here and had "asked someone to help get me a passport". However, his father stated that the appellant had travelled on a valid passport with a six-month visit visa and had then overstayed. I prefer the father's evidence to that of the appellant, given all the circumstances. I am not sure why nothing was apparently done to regularise the appellant's status in the United Kingdom for so long after the visit visa would have expired in mid-2010, but, at least until the appellant reached the age of 18, no fault can be attributed to him.

30. I find that the family unit is being supported by the appellant's father. It is more likely than not that his father would be able to provide at least some financial assistance to the appellant if he returned to Mauritius. Although

no evidence has been led on the point, it is probable that other relatives in this country would be able to provide some financial assistance as well.

31. I find that Ms [E] is currently in the second year of a cabin crew course, which she hopes will lead her into employment. Her immediate family in United Kingdom consists of her mother and two sisters, the older of which is now an adult, although she does not work. Her mother works and I am willing to accept that she would not be in a position to provide meaningful financial support if the family unit were to live in Mauritius. I accept that the mother financially supports Ms [E]'s two siblings and is seeking to sponsor her (the mother's) husband who currently resides in the Seychelles. I have no reason to doubt Ms [E]'s evidence that she understands some words of Creole French, but does not have a good grasp of it.

32. In certain respects, I agree with Mr Whitwell's description of the appellant's evidence as to his previous life in Mauritius as vague. On the face of it, there was a lack of detail as regards fairly straightforward matters such as schooling and where in Mauritius he lived with his aunt. I have considered the appellant's age at all material times, together with the evidence provided by his father at the hearing. Overall, part of the criticism levelled against his evidence by Mr Whitwell falls away. In respect of education, the father confirmed that he left this is a responsibility of his sister (the appellant's aunt). Whilst he thought that the appellant "might" have attended a government school in the locality, there was no certainty on this. No other source of evidence suggests that the appellant did in fact attend school up until the point of his departure in 2009. I am prepared to accept, albeit by a narrow margin, that it is more likely than not that the appellant did not attend school at all material times whilst in Mauritius. His inability to state where he lived in the country is implausible as regards the general location, if not the name of a particular street and I have taken this adverse point into account. Having said that, the evidence of the appellant and his father was consistent in respect of the lack of any family members currently living in Mauritius. I accept that the auntie and all of the father's other siblings no longer reside in that country; they are all in the United Kingdom.

33. There has been no challenge to the evidence of the appellant and his father to the effect that the former's mother abandoned him at a very young age and that there is no information as to her current whereabouts. I find this to be the case.

34. I find that the appellant never worked in Mauritius. His evidence that he now only has a limited vocabulary of Creole French is, I find, credible in light of his educational history, the age when he left Mauritius, at the time away from that country. I find that he is able to understand the language to a greater extent.

35. The appellant and Ms [E] were asked about whether they discussed a move to Mauritius. I found it somewhat strange that the appellant said there had been no such discussion, whereas Ms [E] recalled that there had been. In any event, I find a as fact that her resolve is not to relocate to

Mauritius on the basis that, in her view, the family unit would be homeless, without any support, and that she herself would have no right to live there.

Conclusions

36. I start with section 117B(6) of the 2002 Act. With reference to the essential case-law on this issue (including that referred to previously and AB (Jamaica) [2019] EWCA Civ 661), the basic principles can be stated as follows:

i. the reasonableness assessment is conducted on the hypothetical basis that the children would be expected to leave the United Kingdom;

ii. the children's best interests are a primary consideration, but are not determinative;

iii. the nationality of the relevant children is an important factor, but again is not determinative;

iv. the reasonableness assessment must be conducted without regard to the parents' immigration history (including any past misconduct);

v. however, it is important to consider the "real world" scenario of the parents' current status in the United Kingdom;

vi. the ages of the relevant children are a relevant factor, as are the health, wider familial and/or social ties, and the circumstances in which they may find themselves in in the country of relocation.

37. To these I add two further points. This appeal concerns the scenario in which one parent (the appellant) has no right to remain in the United Kingdom, whilst the other (Ms [E]) does. This factual matrix was addressed by the Court of Appeal in Runa [2020] EWCA Civ 514. The Court rejected the submission that where one parent has a right to remain in the rate United Kingdom (on the facts of that case, they were a British citizen), it would never be reasonable for relevant child to leave. At paragraphs 36 and 37, Singh LJ held:

> "36. I would therefore reject Mr Biggs's primary submission as to the interpretation of section 117B(6). I would, however, accept his alternative submission, that the provision calls for a fact-finding exercise so that the full background facts must be established against which the only statutory question posed by that provision can then be addressed. I would emphasise again, as the Supreme Court did in KO (Nigeria) and this Court did in MA (Pakistan) and AB (Jamaica) that, once all the relevant facts have been found, the only question which arises under section 117(6)(b) is whether or not it would be reasonable to expect the child to leave the UK. The focus has to be on the child.
>
> 37. I would also accept Mr Biggs's submission that the test under section 117B(6) is not whether there are "insurmountable obstacles" to the maintenance of family life outside the UK. That would be so even in an ordinary Article 8 case: see GM at paras. 42-52, in particular paras. 43-44 (Green LJ). That is all the more so in a case which is not a conventional Article 8(2) one but arises under section 117B(6)."

38. This makes it clear that the reasonableness assessment must be undertaken in light of the full factual picture in the case, which will of course include the status of both parents and the children themselves.

39. The second point relates to MA (Pakistan). Whilst a specific element of Elias LJ's was disapproved by the Supreme Court in KO (Nigeria) the observation made in paragraphs 49 of his judgment has, in my view, been left undisturbed and remains sound. He said this:

> "49. … However, 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."

40. The "powerful reasons" phrase is not a rule of law, but it does emphasise the significance of the status of a "qualifying child" in the overall assessment of reasonableness. Indeed, this is entirely consistent with the respondent's latest guidance, to which Mr Whitwell referred me in the course of his submissions. On pages 50 and 51 of the document, it is said that:

> "The starting point is that we would not normally expect a qualifying child to leave the UK.
>
> …
>
> There may be some specific circumstances where it would be reasonable to expect the qualifying child to leave the UK with the parent(s)." [A list of indicative factors is then set out]

41. With all of the above in mind, I now undertake the reasonableness assessment.

42. First and foremost, I conclude that it is in the best interests of both of the children to be with their parents and to reside in the country of their nationality. As regards the latter, the importance to even a young child of the rights and benefits accruing from nationality has been recognised in the authorities and I need not provide any further explanation here. The best interests of both children are a significant factor in this evaluative exercise.

43. The "real world" circumstances in which the two children find themselves is as follows. Their mother has settled status in the United Kingdom and is not expected to leave this country. On the other hand, their father has no status whatsoever and is of course expected to leave.

44. Both of the children are very young, and this is the most significant factor weighing against the appellant's case and in favour of the reasonableness of a departure. Their primary focus is clearly on their parents and any wider relationships with other family members will by the nature be relatively tenuous at this stage: I certainly have not been provided with evidence of anything more significant. The children's inability to speak French Creole and the lack of any experience of living in Mauritius is in a sense of neutral value by virtue of their young ages.

45. I take account of the appellant's connections to Mauritius. On the one hand, he is a citizen of that country and resided there until the age of 11. He will not have forgotten all sense of the social and cultural mores. On the other hand, he was not in education for all of his time there, left before his teenage years, and has now been away for very close to 11 years. He has no family remaining in the country to which he could turn for general emotional and/or social support if he and his family unit relocated there. The appellant would have no concrete assets to return to, in terms of, for example, property. He has no work history in either country (this is explicable by his young age whilst in Mauritius and the fact that he has had no permission to work in the United Kingdom). Overall, his position on return would be precarious, notwithstanding some financial support from the United Kingdom. This in turn has a bearing on my assessment of the reasonableness of the two young children going to live in that country.

46. Ms [E] has no connection with Mauritius other than through the appellant. She has never lived there and only has a very limited grasp of French Creole (the Creole spoken in the Seychelles is based on English). Even if she did relocate to that country, it would be as a foreign national. She has no material work history in this country and the prospects of being economically viable in Mauritius would, in my view, be slim, at least in the short to medium term.

47. Having weighed up all relevant factors in what is an inherently difficult evaluative exercise, I conclude that it would not be reasonable to expect the appellant's two young children to leave the United Kingdom, accompanied by their mother or not, and go and live in Mauritius. The combination of their best interests (including, most importantly their British citizenship); the fact that one of their parents has settled status in this country; the absence of significant ties to Mauritius in respect of the appellant and notifies for the others; and the respondent's own position as stated in her current guidance, goes to show that there are no "powerful reasons" (or indeed, good reasons) why it would be reasonable for them to leave.

48. As section 117B(6) of the 2002 Act is a freestanding provision, the appellant therefore succeeds in his appeal.

49. In light of this, it is unnecessary for me to go on and consider separately his private life claim under Article 8. The only observation I would make is that, on my findings of fact, he is fast approaching a period of residence in the United Kingdom amounting to half of his life.

Anonymity

50. No anonymity direction has yet been made in these proceedings and there is no reason why I should do so at this stage. I make no such direction.

Notice of Decision

51. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

52. The decision of the First-tier Tribunal has been set aside

53. I remake the decision by allowing the appeal.

Signed: H Norton-Taylor Date: 24 November 2020
Upper Tribunal Judge Norton-Taylor

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 and have decided to make no fee award. Although the appellant has succeeded in his appeal, the evidence upon which this success is based has only emerged during the course of these proceedings. Indeed, relevant matters did not come out until oral evidence was provided to me.

Signed: H Norton-Taylor Date: 24 November 2020
Upper Tribunal Judge Norton-Taylor