Upper Tribunal
(Immigration and Asylum Chamber)

JG (s 117B(6): "reasonable to leave" UK) Turkey [2019] UKUT 00072 (IAC) Rev 1

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15 February 2019	**……..**

Before

THE HON. MR JUSTICE LANE, PRESIDENT
UPPER TRIBUNAL JUDGE GILL

Between

JG
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Bazini, instructed by SH Solicitors Ltd
For the Respondent: Mr Z Malik, instructed by the Government Legal Department

Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 requires a court or tribunal to hypothesise that the child in question would leave the United Kingdom, even if this is not likely to be the case, and ask whether it would be reasonable to expect the child to do so.

DECISION AND REASONS

A. SECTION 117B(6)

1. Few if any statutory provisions of recent years can have been subject to more judicial analysis than those contained in Part 5A (Article 8 of the ECHR: Public interest

considerations) of the Nationality, Immigration and Asylum Act 2002. The primary focus in the present appeal is section 117B(6), 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."

2. Section 117B(6) lies within the section which sets out "public interest considerations applicable in all cases" where a court or tribunal has to determine whether a decision made under the Immigration Acts constitutes a disproportionate interference with a person's right to respect for private and family life under Article 8 of the ECHR. Section 117A(2) states that, in considering this "public interest question", the court or tribunal must, in particular, have regard in all cases to the considerations listed in section 117B.

3. Section EX of Appendix FM (Family members) to the Immigration Rules contains exceptions to certain eligibility requirements for leave to remain as a partner or parent. So far as relevant, EX.1 provides as follows:-

> "EX.1. This paragraph applies if
>
> (a)(i) the applicant has a genuine and subsisting parental relationship with a child who -
>
> (aa) is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;
>
> (bb) is in the UK;
>
> (cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application; and
>
> (ii) taking into account their best interests as a primary consideration, it would not be reasonable to expect the child to leave the UK; or
>
> …"

B. CASE LAW BEFORE KO (NIGERIA)

4. Amongst the problems identified with section 117B(6) were its relationship with the other provisions of section 117B and whether, in determining if it would be reasonable, or not, for the child in question to leave the United Kingdom, regard should be had to the immigration history of the person having the genuine and subsisting parental relationship with the child.

5. In MA (Pakistan) & Ors v Upper Tribunal [2016] EWCA Civ 705, the Court of Appeal held that section 117B(6) was free-standing in nature; but that the Court was bound by the decision of that Court in MM (Uganda) v Secretary of State for the Home Department [2016] EWCA Civ 450 to hold that the immigration history of the person having the parental relationship was relevant in determining the reasonableness of expecting the child to leave the United Kingdom.

6. So far as the first issue was concerned, Elias LJ, giving judgment in MA, held:-

> "17. Subsection (6) … 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."

7. As for the scope of enquiry into "reasonableness" for the purposes of section 117B(6)(b), Elias LJ made it clear that, but for the authority of MM (Uganda), he would have favoured an analysis that confines itself to the position of the child:-

"36. Looking at section 117B(6) free from authority, I would favour the argument of the appellants. The focus on paragraph (b) is solely on the child and I see no justification for reading the concept of reasonableness so as to include a consideration of the conduct and immigration history of the parents as part of an overall analysis of the public interest. I do not deny that this may result in some cases in undeserving applicants being allowed to remain, but that is not in my view a reason for distorting the language of the section. Moreover, in an appropriate case the Secretary of State could render someone liable to deportation, and thereby render him ineligible to rely on this provision, by certifying that his or her presence would not be conducive to the public good.

37. Ms Giovannetti's analysis has a number of difficulties. First, as she accepts, it means that the only effect of subsection 117B(6) would be to give some additional weight to the fact that the child has been resident in the UK for seven years. (Similarly it would require the court to give additional weight to the fact that a child is a British citizen, although that would need to be done quite irrespective of the section, as *ZH* makes clear.) Save for that, the proportionality test is applied as in any other article 8 case. If that is right, section 117B(6) is in my view drafted in an extremely convoluted way to achieve so limited an aim. The objective could have been achieved much more clearly and succinctly.

38. Second, Ms Giovannetti's construction makes subsection 117B(6) tautologous. In effect it comes down to saying that "the public interest does not require removal … in circumstances where the application of the proportionality test does not justify removal." That would seem to be self-evident.

39. Third, in relation to rule 276ADE(1) it is plain that paragraphs (v) and (vi) of that rule do not warrant any consideration of the wider public interests than have been specifically identified in paragraph (i). It is not obvious why paragraph (iv) should do so.

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."

C. KO (NIGERIA)

8. In October 2018, the Supreme Court gave judgment in KO (Nigeria) & Ors v Secretary of State for the Home Department [2018] UKSC 53. The Court's judgment was given by Lord Carnwath.

9. The first thing to note is that there is nothing in the judgment that overturns the conclusion of the Court of Appeal in MA (Pakistan) regarding the free-standing nature of section 117B(6), in the sense that where the application of that provision results in the public interest not requiring the removal of the person concerned, he or she must succeed under Article 8 on the basis that the proportionality balance contains nothing on the Secretary of State's side of the scales. The words "the public interest does not require the person's removal" mean what they say.

(a) The "reasonableness enquiry"

10. The question, therefore, concerns the application of the subsection. This involves determining the scope of the "reasonableness enquiry" that is demanded by section 117B(6).

11. Lord Carnwath traced the origins of the subsection back to paragraph 276ADE(1)(iv) of the Immigration Rules:-

> "16. It is natural to begin with the first in time, that is paragraph 276ADE(1)(iv). This Paragraph is directed solely to the position of the child. Unlike its predecessor DP5/96 it contains no requirement to consider the criminality or misconduct of a parent as a balancing factor. It is impossible in my view to read it as importing such a requirement by implication.
>
> 17. As has been seen, section 117B(6) incorporated the substance of the rule without material change, but this time in the context of the right of the parent to remain. I would infer that it was intended to have the same effect. The question again is what is "reasonable" for the child. As Elias LJ said in MA (Pakistan) Upper Tribunal (Immigration and Asylum Chamber) [2016] EWCA Civ 705, [2016] 1 WLR 5093, para 36, there is nothing in the subsection to import a reference to the conduct of the parent. Section 117B sets out a number of factors relating to those seeking leave to enter or remain, but criminality is not one of them. …"

12. At paragraph 10 of his judgment, Lord Carnwath quoted from the respondent's Immigration Directorate Instructions entitled "Family Life (as a Partner or Parent) and Private Life: 10-Year Routes" published in August 2015. This:-

> "included at section "Would it be unreasonable to expect a non-British citizen child to leave the UK?", under which was set out a number of "relevant considerations", such as risk to the child's health, family ties in the UK and the likelihood of integration into life in another country and:-
>
> > "(b) Whether the child would be leaving the UK with their parent(s)?

> It is generally the case that it is in the child's best interests to remain with their parent(s). Unless special factors apply it will generally be reasonable to expect the child to leave the UK with their parent(s), particularly if the parent(s) have no right to remain in the UK.""

(b) The "real world"

13. Later in his judgment, however, Lord Carnwath qualified what he had said about the scope of the "reasonableness enquiry":-

> "18. On the other hand, as the IDI guidance acknowledges, it seems to me inevitably relevant in both contexts to consider where the parents, apart from the relevant provision, are expected to be, since it will normally be reasonable for the child to be with them. To that extent the record of the parents may become indirectly material, if it leads to their ceasing to have a right to remain here, and having to leave. It is only if, even on that hypothesis, it would not be reasonable for the child to leave that the provision may give the parents a right to remain. The point was well -expressed by Lord Boyd in SA (Bangladesh) v Secretary of State for the Home Department 2017 SLT 1245:
>
> > "22. In my opinion before one embarks on an assessment of whether it is reasonable to expect the child to leave the UK one has to address the question, 'Why would the child be expected to leave the United Kingdom?' In a case such as this there can only be one answer: 'because the parents have no right to remain in the UK' . To approach the question in any other way strips away the context in which the assessment of reasonableness is being made..."
>
> 19. He noted (para 21) that Lewison LJ had made a similar point in considering the "best interests" of children in the context of section 55 of the Borders, Citizenship and Immigration Act 2009 in EV (Philippines) v Secretary of State for the Home Department [2014] EWCA Civ 874, para 58:
>
> > "58. In my judgment, therefore, the assessment of the best interests of the children must be made on the basis that the facts are as they are in the real world. If one parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted. If neither parent has the right to remain, then that is the background against which the assessment is conducted. Thus the ultimate question will be: is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?"
>
> To the extent that Elias LJ may have suggested otherwise in MA (Pakistan) para 40, I would respectfully disagree. There is nothing in the section to suggest that "reasonableness" is to be considered otherwise than in the real world in which the children find themselves."

14. What is the proper interpretation of paragraphs 18 and 19 of the judgment? For the respondent, Mr Malik submits they support a construction of section 117B(6)(b), whereby the application of subsection (6) depends upon a tribunal finding, on the particular facts of the case, that the child will be expected to leave the United Kingdom if the person concerned is removed. For the appellant, Mr Bazini submits that such a construction is not possible, purely as a matter of statutory interpretation,

and that paragraphs 18 and 19 of KO (Nigeria) do not permit the Tribunal to hold otherwise.

D. THE APPELLANT'S CASE IN OUTLINE

15. This issue is of crucial significance, given the facts of the appellant's case. The appellant is a citizen of Turkey, born in 1982. She first arrived in the United Kingdom in June 2001, on an au pair visa. After the expiry of that visa, the appellant remained in the United Kingdom without leave. She commenced a relationship with a British citizen in 2009. Two children have been born to the appellant and her partner, a boy and girl born respectively in June 2010 and August 2011.

16. In April 2013, the appellant, her partner and the children travelled to Turkey, where they remained for some seventeen months. Their reasons for going and what transpired there we shall examine later. After some seventeen months, the appellant and her partner decided to return to the United Kingdom with the children. The partner and children did so but the appellant was refused two applications for visas, in order to return to the United Kingdom.

17. Following those refusals, the appellant fraudulently obtained a Schengen visa, with which she re-entered the United Kingdom unlawfully in October 2014.

18. In July 2016, the appellant made a human rights claim in order to remain with her partner and children and that was refused by the respondent in August 2017.

19. The appellant appealed against that refusal to the First-tier Tribunal. In a decision which followed the hearing in Birmingham in April 2018, the First-tier Tribunal dismissed the appellant's appeal.

20. Following the grant of permission to appeal to the Upper Tribunal, the Upper Tribunal set aside the decision of the First-tier Tribunal in January 2019, on the ground that there was a failure on the part of the First-tier Tribunal to give satisfactory reasons for its decision; in particular, the bare conclusion in paragraph 16 of the decision, which did not address the written and oral evidence regarding the position of the family.

21. The reason why the respondent's construction of section 117B(6) is crucial in this case is that, having heard evidence from the appellant and her partner, which we detail below, it is apparent that, if the appellant were to be removed from the United Kingdom, it is, as a matter of fact, very unlikely that her children would follow her. Once outside the United Kingdom, the appellant would apply for entry clearance, on the basis of Article 8, as she should have done in 2014 (instead of making dishonest applications to enter as a visitor). Accordingly, in the "real world" scenario, the children would not be likely to leave the United Kingdom to join the appellant, whether in Turkey or elsewhere, whilst she went through the entry clearance process. The children would, in reality, continue living with their father and their paternal grandparents in the Midlands, where they are both attending school.

22. Mr Bazini does not disagree with that scenario. Rather, he submits that it is irrrelevant. Section 117B(6) does not, in his submission, depend upon what is likely to happen in the "real world". Rather, it requires the Tribunal to hypothesise that the children would leave the United Kingdom and ask whether that would be reasonable.

E. ZH (TANZANIA) AND THE BEST INTERESTS OF CHILDREN

23. Although the Supreme Court in KO (Nigeria) to some extent traced the origins of section 117B(6), reference needs to be made to the earlier judgment of that Court in ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4 because it shows how the subsection derives from the requirement in immigration decision-making to give primacy to the best interests of children. The following is taken from the judgment of Lady Hale:

> "29. Applying, therefore, the approach in Wan to the assessment of proportionality under article 8(2), together with the factors identified in Strasbourg, what is encompassed in the "best interests of the child"? As the UNHCR says, it broadly means the well-being of the child. Specifically, as Lord Bingham indicated in EB (Kosovo), it will involve asking whether it is reasonable to expect the child to live in another country. Relevant to this will be the level of the child's integration in this country and the length of absence from the other country; where and with whom the child is to live and the arrangements for looking after the child in the other country; and the strength of the child's relationships with parents or other family members which will be severed if the child has to move away.
>
> 30. Although nationality is not a "trump card" it is of particular importance in assessing the best interests of any child. The UNCRC recognises the right of every child to be registered and acquire a nationality (Article 7) and to preserve her identity, including her nationality (Article 8). In Wan, the Federal Court of Australia, pointed out at para 30 that, when considering the possibility of the children accompanying their father to China, the tribunal had not considered any of the following matters, which the Court clearly regarded as important:
>
> > "(a) the fact that the children, as citizens of Australia, would be deprived of the country of their own and their mother's citizenship, 'and of its protection and support, socially, culturally and medically, and in many other ways evoked by, but not confined to, the broad concept of lifestyle' (Vaitaiki v Minister for Immigration and Ethnic Affairs [1998] FCA 5, (1998) 150 ALR 608, 614);
> >
> > (b) the resultant social and linguistic disruption of their childhood as well as the loss of their homeland; (c) the loss of educational opportunities available to the children in Australia; and (d) their resultant isolation from the normal contacts of children with their mother and their mother's family."
>
> 31. Substituting "father" for "mother", 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 (as might have been the case, for example, in Poku, para 20, above). 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 county 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. As Jacqueline Bhaba (in 'The "Mere Fortuity of Birth"? Children, Mothers, Borders and the Meaning of Citizenship', in Migrations and Mobilities: Citizenship, Borders and Gender (2009), edited by Seyla Benhabib and Judith Resnik, at p 193) has put it:

> 'In short, the fact of belonging to a country fundamentally affects the manner of exercise of a child's family and private life, during childhood and well beyond. Yet children, particularly young children, are often considered parcels that are easily movable across borders with their parents and without particular cost to the children.'

33. We now have a much greater understanding of the importance of these issues in assessing the overall well-being of the child. In making the proportionality assessment under article 8, the best interests of the child must be a primary consideration. This means that they must be considered first. They can, of course, be outweighed by the cumulative effect of other considerations. In this case, the countervailing considerations were the need to maintain firm and fair immigration control, coupled with the mother's appalling immigration history and the precariousness of her position when family life was created. But, as the Tribunal rightly pointed out, the children were not to be blamed for that. And the inevitable result of removing their primary carer would be that they had to leave with her. On the facts, it is as least as strong a case as Edore v Secretary of State for the Home Department [2003] 1 WLR 2979, where Simon Brown LJ held that "there really is only room for one view" (para 26). In those circumstances, the Secretary of State was clearly right to concede that there could be only one answer."

F. INTERPRETING SECTION 117B(6), FOLLOWING KO (NIGERIA)

24. Although the question of "whether it is reasonable to expect a child" to go to another country can be seen to come from paragraph 29 of ZH (Tanzania), neither that case nor any other authority of the higher courts, preceding KO (Nigeria), sheds light on the question of construction posed at paragraph 14 above. We must therefore address that question for ourselves, in the light of paragraphs 18 and 19 of KO (Nigeria).

25. "To expect" something is to regard that thing as likely to happen. If we decide to wait at home on a particular day in order for a parcel to be delivered, it is on the basis that we consider it likely the Post Office or delivery company will deliver the

parcel on that day. Many other such examples could be given. The key question, therefore, is whether the element of conditionality which is introduced by the word "would" in section 117B(6)(b) governs both the question of reasonableness and that of expectation; in other words, whether one must hypothesise that the child leaves the United Kingdom, whether or not in the "real world" he or she is likely to do so.

26. We consider that, purely according to the ordinary principles of statutory construction, the interpretation for which Mr Bazini contends is the correct one. As a matter of ordinary language the question "Would it be reasonable to do X?" presupposes the doing of X. It is unlikely to be an appropriate or helpful response to such a question to refuse to answer it on the basis that one does not intend to do X.

27. We do not consider that paragraphs 18 and 19 of KO (Nigeria) mandate or even lend support to the respondent's interpretation. In those paragraphs, the point being made by Lord Carnwath and by the judges in the cases he cited is merely that, in determining whether it would be reasonable to expect the child to leave the United Kingdom, one must have regard to the fact that one or both of the child's parents will no longer be in the United Kingdom, because they will have been removed by the respondent under immigration powers. That, we find, is the extent of the "real world" envisaged by Lord Carnwath.

28. We find support for this conclusion by comparing section 117B(6) with the provisions of the Immigration (European Economic Area) Regulations 2016, which are designed to give effect to the United Kingdom's obligations under European law, as determined by the Court of Justice of the European Union in the line of cases beginning with Ruiz Zambrano v Office national de l'emploi (C-34/09) 8 March 2011 [2012] QB 265. What is described in the Regulations as a derivative right to reside, as identified in those cases, depends expressly, in closely defined circumstances, upon a finding that the third party would be unable to reside, or would be prevented from residing, in the United Kingdom, if the person asserting the derived right of residence were to leave. The primacy of "compulsion" in this regard has been made plain by the judgment of Irwin LJ in Patel & Another v Secretary of State for the Home Department [2107] EWCA Civ 2028. The difference in wording between Regulation 16 and section 117D(6) is stark.

29. A comparison of section 117B(6) with the Immigration Rules relating to criminal deportation is also instructive. Paragraph 399, so far as here relevant, provides as follows:-

> "399. This paragraph applies where paragraph 398 (b) or (c) applies if –
>
> (a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and
>
> (i) the child is a British Citizen; or
>
> (ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case

(a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and

(b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; …"

30. In the world of criminal deportation, findings are therefore required to be made on the basis of hypotheses that do not depend upon the Tribunal having to establish, as a matter of fact, what is the most likely future scenario, if the person concerned were to be deported. In the passage from paragraph 399 set out above, it can be seen that what is required is an analysis of the facts, leading to the forming of a judgment, on the assumption (or hypothesis) both that the child would leave in order to go with the deportee and that the child would remain in the United Kingdom without the deportee. Although that judgment will, of course, depend upon findings of fact and involve conclusions as to what is likely to happen in those scenarios, the Tribunal cannot side-step either or both of them on the basis that it considers they are unlikely to occur.

31. This approach to criminal deportation is of long standing. In VW (Uganda) & Another v Secretary of State for the Home Department [2009] EWCA Civ 5 Sedley LJ said:-

> 40. "Removal and deportation cases in which the issue of proportionality has to be determined under art. 8(2) commonly raise but do not always address the question: on what factual basis is the proportionality of removal to be evaluated? The case of *VW* poses the issue clearly. If she is removed, she will have the choice of leaving her child here or taking her with her; and her partner will have the choice of remaining here or seeking to join her in Uganda. Assuming that there is no insuperable obstacle to either of these courses (for example, a refusal of entry by the Ugandan authorities, a possibility unaddressed in the decision), the question still remains whether it will be taken.
>
> 41. There will be many cases where, whatever the appellant says, it can safely be predicted that the child will go too if she or he is removed. But VW's is not such a case: the child is a UK citizen and has a father who is now settled and has a right of abode here. Many mothers faced with such a dilemma (and the social worker's report convincingly suggests that VW is among these) would break the maternal bond in the child's interests and leave her with her father. AB, if unable to bring his family here, may elect to remain without them and so leave them fatherless in Ethiopia.
>
> 42. In many such cases, nevertheless, it is too much to ask of a decision-maker that he or she should form a confident or even a probabilistic view of what will follow a proposed removal or deportation in terms of family break-up or continuity. The evidence may simply not make it possible. Some appellants will command belief when they say what they will do, so that the decision-maker can proceed to assess the proportionality of removal or deportation on a reasonably firm footing. Others may try to practise a form of emotional blackmail on the decision-maker, so that the latter does not know what in truth will happen if removal or deportation goes ahead. In yet other cases it may be clear that what the appellant says is the reverse of what he or she would in the event do. Many others may truthfully say that they do not know what they will do; or the decision-maker

> may conclude, whatever they say, that this is the case. In such cases it would be risky and unfair to demand that a decision-maker should treat what is at best an educated guess as a future fact. Here, in my judgment, it is the hardship of the dilemma itself which has to be recognised and evaluated."

32. Notwithstanding that section 117B(6) is not concerned with criminal deportation it would, we consider, be odd if section 117B(6) falls to be interpreted in a different way.

33. We have seen how, in KO (Nigeria), the Supreme Court had regard to the respondent's IDI in its examination of section 117B(6). In his submissions, Mr Malik drew our attention to the latest relevant publication of the respondent; namely "Family Migration: Appendix FM Section 1.0b". At page 36 of 104 of this document, dealing with EX.1.(a), the guidance says that:-

> "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."

34. Later, at page 68 of 104, under the heading "Is the child a British citizen or have they lived in the UK for a continuous period of at least 7 years?", we find this:-

> "If the departure of the parent or carer would not result in the child being required to leave the UK, because the child will (or is likely to) remain living here with another parent or primary carer, then the question of whether it is reasonable to expect the child to leave the UK will not arise. In these circumstances, paragraph EX.1.(a) does not apply.
>
> However, where there is a genuine and subsisting parental relationship between the applicant and the child, the removal of the applicant may still disrupt their relationship with that child. For that reason, the decision maker will still need to consider whether, in the round, removal of the applicant is appropriate in light of all the real-life circumstances of the case, taking into account the best interests of the child as a primary consideration and the impact on the child of the applicant's departure from the UK, or them having to leave the UK with them. If it is considered that refusal would lead to unjustifiably harsh consequences for the applicant, the child or their family, leave will fall to be granted on the basis of exceptional circumstances."

35. At page 69 of 104, specific reference is made to KO (Nigeria):-

> "In the caselaw of KO and Others 2018 UKSC 53, with particular reference to the case of NS (Sri Lanka), the Supreme Court found that "reasonableness" is to be considered in the real-world context in which the child finds themselves. The parents' immigration status is a relevant fact to establish that context. The determination sets out that if a child's parents are both expected to leave the UK, the child is normally expected to leave with them, unless there is evidence that that it would not be reasonable."

36. There are a number of things to say about this IDI. First, it cannot override ordinary principles of statutory construction. If, applying those principles, a court or tribunal

determines that a statutory provision falls to be interpreted in a particular way, the fact that the IDI may take a different view is irrelevant.

37. Second, the IDI does not cite KO (Nigeria) in support of the proposition that it is only where the child would be required to leave the United Kingdom that EX.1.(b) or section 117B(6) falls to be considered. The citation of KO (Nigeria) merely recognises that, in deciding what would be reasonable, one must have regard to the fact that one or both parents is liable to removal under immigration powers (see paragraph 27 above).

38. Third (and relatedly), a previous version of the IDI, pre-dating KO (Nigeria), contained statements to the effect that if the departure of a parent would not result in the child being required to leave the United Kingdom, the question of whether it was reasonable to expect the child to leave would not arise. This was noted by Upper Tribunal Judge Plimmer in SR (subsisting parental relationship – s117B(6)) Pakistan [2018] UKUT 00334 (IAC). At paragraph 50 of her decision, Judge Plimmer said that "This aspect of the 2018 IDI provides an untenable construction of the plain and ordinary meaning of EX.1. and section 117B(6)". At paragraph 51, she held that "Self-evidently, section 117B(6) is engaged whether the child will or will not in fact or practice leave the UK". For the reasons we have given, nothing in KO (Nigeria) affects the correctness of her conclusion.

39. We do not consider our construction of section 117B(6) can be affected by the respondent's submission that, in cases where – on his interpretation – the subsection does not have purchase (i.e. because the child would not in practice leave the United Kingdom), there would nevertheless need to be a full-blown proportionality assessment, compatibly with the other provisions of Part 5A of the 2002 Act, with the result that a person with parental responsibility who could not invoke section 117B(6) may, nevertheless, succeed in a human rights appeal.

40. Such an assessment would, however, have to take account of the immigration history of the person subject to removal; so there could well be a very real difference between the outcome of that exercise, and one conducted under section 117B(6). But, the real point is that this submission does not begin to affect the plain meaning of subsection (6). If, as we have found, Parliament has decreed a particular outcome by enacting section 117B(6), then that is the end of the matter.

41. We accept that this interpretation may result in an underserving individual or family remaining in the United Kingdom. However, the fact that Parliament has mandated such an outcome merely means that, in such cases, Parliament has decided to be more generous than is strictly required by the Human Rights Act 1998. It can be regarded as a necessary consequence of the aim of Part 5A of imposing greater consistency in decision-making in this area by courts and tribunals. The fact that section 117B(6) has such an aim was expressly recognised by Elias LJ at paragraph 44 of MA (Pakistan).

G. THE APPELLANT'S CASE IN DETAIL

42. Having reached that conclusion on the construction of section 117B(6), we must return to the evidence in the appellant's case.

(a) The evidence of the appellant

43. The appellant adopted her two witness statements. In the first, she explained how she had entered the United Kingdom in 2001 as an au pair and overstayed, subsequently forming a relationship with her partner in 2009, by whom she has had a son born in 2010 and a daughter in 2011. In her first statement, the appellant said that she felt compelled to return to Turkey in 2013, following her father's diagnosis of cancer. Subsequently, she was desperate to get back to the United Kingdom to be with her children, following their departure from Turkey, and she hoped that the Tribunal would accept "the difficult predicament I was in like any other mother would be in my circumstances". The appellant said she deeply regretted entering the United Kingdom in a clandestine manner: "But I had to get back to my children".

44. In her second statement, she reiterated that the reason for her going to Turkey was her father's illness. She had wanted to see him before he deteriorated any further. Before their departure, the appellant's partner had sold his business and "wanted to get away from the UK for a holiday". The family therefore decided to go to Turkey for the year. Since the children were young and had yet to start school, the couple thought it would be a good opportunity to see Turkey and visit the appellant's parents.

45. The second statement continued by saying that whilst in Turkey the appellant "spent a large amount of time caring [for] my father for his everyday needs and assisting him to ensure that he was comfortable during his treatment for cancer. I confirm that we all stayed with our father".

46. The appellant's children did not know the Turkish language and "do not even recollect going to that country due to their young age". The appellant said that the family had no intention of permanently settling in Turkey.

47. Regarding her applications for visas to return to the United Kingdom, the appellant's statement contended that "the respondent unjustly refused both visa applications leaving me in a predicament. I therefore had no other option but to re-enter the UK via clandestine means".

48. The appellant's partner could not be expected to live permanently in Turkey, according to the appellant. Nor could the children, whose education would be disrupted if they were forced to leave the United Kingdom on the appellant's account.

49. In oral evidence, the appellant said that both of her children were in Year 3 at a Catholic Primary School. Her partner and his parents were Catholics and it had been decided to raise the children in that religion. The children have both been baptised.

50. The appellant and her partner have been unable to marry in the United Kingdom, owing to the appellant's immigration status. Whilst in Turkey, they had attempted to marry but her partner lacked the relevant documentation.

51. Under cross-examination, the appellant said that she had not informed her partner, when they met, of her lack of immigration status in the United Kingdom. He did not, in fact, find out about this until 2012, after the children had been born.

52. The appellant's trip to Turkey in 2013 had been possible because she had gone to the Turkish Embassy and obtained a temporary travel document. Her husband had seen the trip to Turkey as more of a holiday than the appellant had. The sale of the partner's business had provided the family with funds.

53. Although the appellant said at first that she did not do anything while she was in Turkey, she then admitted that she had worked for a very brief period when additional funds had been required. She had not mentioned this previously as she did not regard it as relevant. She believed she had worked for six to eight months in Turkey. Mr Malik put to the appellant that that was not a "very short time".

54. The appellant was asked questions about her visa application forms. The Tribunal had permitted Mr Malik to adduce these, given that the appellant's second witness statement asserted that the respondent had "unjustly refused" her applications.

55. The appellant was asked why, in the applications, she had contended that she was working full-time and had a monthly income from properties, rents, savings and investments of £1,100. The application documentation also asserted that the appellant intended to stay in the United Kingdom only for two weeks.

56. The appellant replied that she had made the applications with the assistance of an agent, and had done what the agent said.

57. The appellant stated that she had divided her time roughly equally between her father's flat in Ankara and his property in Antalya. Her father stayed with the family but also spent time in Ankara, away from the family.

58. The decision to return to the United Kingdom was occasioned by the fact that the children were close to school age and her son had needed surgery for a breathing problem. The appellant said that she had asserted that she would come to the United Kingdom for only two weeks because, having overstayed, she considered it would not have been possible to get back and so she had to lie. It was important for the children to start school and integrate in the United Kingdom.

59. Although she admitted lying in the past, the appellant said that she was not lying now. It was put to her by Mr Malik that she could not possibly assert that the respondent's refusal of the entry clearance applications was unjustified. The appellant said that she understood and accepted she had made a "huge mistake". She was not seeking to defend herself; she merely wanted a life for her children.

60. Her return to the United Kingdom was facilitated by the appellant obtaining a Schengen visa, with which she flew to Rotterdam and then made arrangements for someone to drive her through the Channel Tunnel.

61. The appellant said that her partner was not working at present. The partner had been provided by his father with a property, which the partner was developing with a view to sale. The property would be finished in around two months.

62. The children of the appellant and her partner were very close to their grandparents, with whom they lived, along with the appellant and the partner, on a rent-free basis. The grandparents were in good health.

63. Mr Malik put to the appellant that, contrary to the assertion in her first witness statement, she could not be said to be a person of "good character". The appellant said that she felt that she was of good character in her heart. She was a good person. Her reference to "social standing" was intended to indicate that she had friends and family. She tried to be a "helpful and kind person" within her community, including the church.

64. Asked whether she could now return to Turkey to apply for entry clearance in a lawful manner, the appellant said that she could not, as she was now needed to look after the children on a full-time basis. Asked whether the grandparents could look after the children, the appellant said that the grandparents were Sicilian and spent around half their time in Sicily. Her partner, meanwhile, was "doing up" the property to which she had earlier referred.

65. The appellant was asked why she, her partner and children could not go and live permanently in Turkey. She replied that the children were in Year 3 and would be taking their SATs in two years' time. Her daughter had scored the second highest marks in the county, in a SAT-related test. The appellant did not consider it would be reasonable to take the children away from their education and background and that, even if they stayed with her only temporarily in Turkey while she obtained entry clearance, the children would find themselves having to repeat their classes.

66. There was no re-examination.

(b) The evidence of the appellant's partner

67. The appellant's partner gave evidence. He adopted as true his two witness statements. In the first, the partner had confirmed his relationship with the appellant and the fact that the couple had two children. The family were living rent-free in his parents' home, and could do so for as long as they liked. It would not be right to expect the children to have to go to Turkey, where standards of education, health and other benefits were not as high as in the United Kingdom. The children were also accustomed to the way of life in the United Kingdom.

68. In his second statement, the partner said that he had agreed to go to Turkey with the appellant and the children in 2013 as he "wanted a change of scenery and the warmer weather was appealing". Since the children were not yet in school, he considered that this was feasible. However, the "more important reason" why the family visited Turkey was to be with the appellant's father, who had been diagnosed with cancer.

69. Although the partner had visited Turkey for over a year, he did not see himself as living there on a permanent basis and there had been no intention to do so. He said, the intention had been to have a holiday and spend time with the appellant's father.

70. The children could not even recollect going to Turkey. They were now attending school in the United Kingdom and progressing well.

71. The partner confirmed that he had obtained a property from his father, which he was developing with a view to selling it. The children attended the local Catholic school. His intention had always been for his children to go there. Thereafter, the partner had intended the children to go to the Catholic Secondary School which he had attended.

72. The partner did not consider that there were any English or Catholic schools in Turkey; merely state schools of poor quality, where teaching emphasised the Muslim faith.

73. Cross-examined, the partner said that he had been able to obtain a visit visa, on arrival in Turkey, which he had renewed at a police station every six months. The renewal process was easy and he had not been asked any questions when renewing.

74. He had sold his business after running it for some ten years with a business partner. The witness later confirmed that this was a taxi business.

75. The partner denied that staying in Turkey for a year and a half had been anything more than a holiday. The appellant had not done any "real work to speak of" whilst in Turkey. He considered that the family had stayed in Antalya for about a couple of months and it did not feel as if they had been there for nine months. Except for one visit of two to three weeks, the appellant's father had not lived with the family in Antalya. The appellant and her partner had not gone to Turkey to look after the father. That had not been their intention.

76. The partner said he had no idea how much the appellant had earned whilst working in Turkey. He could not remember the address at which they lived in Antalya.

77. The partner said that he did not find out about the appellant's immigration status until around 2011/2012. The partner was of dual British and Italian nationality. His parents owned several properties in Italy, which were holiday residences.

78. The partner was asked why, in his witness statement, signed only a few days earlier, he had not referred to the work he was undertaking on the development of the property. He said he did not know. His solicitor had drawn up the statement. It had been "an oversight".

79. The partner said that he was not suggesting there were no private schools in Turkey but did not know how it would be possible to fund his children's education in such an establishment. In the United Kingdom he was in receipt of various child benefits.

(c) The Upper Tribunal's assessment of the evidence

80. Our assessment of the appellant is that she is both dishonest and unscrupulous, each to a high degree. She has flagrantly defied the law of the United Kingdom by overstaying her leave for a large number of years, without bothering to seek to regularise her status; by making entry clearance applications that she knew full well were predicated on an entirely false basis; and in gaining access to the United Kingdom by employing dishonesty.

81. In the light of all this, it is astonishing that the appellant complained that she was "unjustly refused" a visa and that she is a person "of good character". On the contrary, she is a person who will not scruple to break the law, if it serves her purposes.

82. There were inconsistencies in the evidence given by the appellant and her partner regarding their time in Turkey. The appellant was also untruthful in claiming that she did not do anything in Turkey and then inconsistent as to the nature and extent of her employment there. The appellant's assertion that she was looking after her father in Turkey was contradicted by her partner.

83. That said, we find it is more likely than not that the decision of the appellant and her partner to spend over a year in Turkey in 2013 was for the combination of reasons given by the partner; namely, to have an extended holiday and to see the appellant's father, following the latter's cancer diagnosis. We do not find it likely that the family went to Turkey with a view to settling there permanently. The timing of the return of the partner and the children strongly suggests that the parents were, indeed, anxious for the children to commence their schooling in the United Kingdom, which they have done. Had there been any intention of permanent settlement, then it is difficult to see why the partner and the children would not have returned to Turkey, once it became apparent that the appellant was in difficulties getting back to the United Kingdom.

84. Applying the "real world" analysis of paragraphs 18 and 19 of KO (Nigeria), the assessment of whether it would be reasonable in terms of section 117B(6) to expect the children of the appellant and her partner to leave the United Kingdom falls to be determined on the basis that there are powerful reasons why the appellant should be removed by the respondent under section 10 of the Immigration and Asylum Act 1999.

85. In so concluding, we apply the law as set out by the House of Lords in Chikwamba v SSHD [2008] UKHL 40 and in subsequent cases, including Hayat v Secretary of State for the Home Department [2012] EWCA Civ 1054. Following the approach adopted by Upper Tribunal Judge Gill in R (on the application of Chen) v Secretary of State for the Home Department (Appendix FM – *Chikwamba* – temporary separation - proportionality) (IJR) [2015] UKUT 189 (IAC), we acknowledge that where an application for entry clearance from abroad is likely to be granted and where there would be significant interference with family life by temporary removal of the person making that application, then the weight to be accorded to the requirements of obtaining entry clearance (that is to say, to that aspect of immigration control) is to be reduced, particularly in cases involving children.

86. We entirely agree with Mr Malik that the present case is, however, a paradigm instance of where, compatibly with the so-called Chikwamba principle, it would nevertheless be proportionate to insist upon the appellant returning to Turkey in order to make, this time, an honest application for entry clearance. If ever there were a case for insisting upon that requirement, this is it. Public confidence in the respondent's system of immigration control is likely to be adversely affected if this appellant were to be absolved from the requirement to obtain valid entry clearance. Her removal for that purpose would not have a disproportionate effect upon her

children or her partner. The family have, in the past, taken the decision to leave the appellant in Turkey, whilst the partner and the children have returned to this country. The partner's work on his development project will shortly end and he will be able to look after the children during the appellant's absence. He also has the ability to call on his own parents (with whom he and the children live) to help in this regard. We do not consider it likely that the grandparents, with whom the children are said to have a close relationship, would put their personal enjoyment ahead of the interests of their grandchildren, by holidaying abroad during this time.

(d) Applying section 117B(6) to the appellant's case

87. Thus, if the respondent's construction of section 117B(6) were correct, the appellant's appeal would fall to be dismissed. Requiring the appellant to make an entry clearance application from abroad (which, notwithstanding her immigration history, is likely to be successful) would not be a disproportionate interference with her Article 8 rights or those of her children and her partner.

88. For the reasons we have given, however, we are satisfied that Mr Bazini's construction of section 117B(6) is, in fact, the correct one. Even though, on our findings, it is unlikely that the children would leave the United Kingdom, if the appellant were removed, on the hypothesis (which section 117B(6)(b) demands) that they are expected to leave, we must determine whether it would be reasonable for them to do so.

89. Section 117B(6) concerns an assessment of the reasonableness of a child's leaving the United Kingdom. It does not expressly demand an assessment of reasonableness by reference to the length of time the child is expected to be outside the United Kingdom. In the light of paragraphs 18 and 19 of KO (Nigeria), the child's destination and future are to be assumed to be with the person who is being removed. In a case where the respondent's position is that the person who is being removed can be expected to make an entry clearance application, does this require the Tribunal's assessment to take this into account, in determining whether it would be reasonable for the child to leave? There may, obviously, be a good deal of difference between a child living outside the United Kingdom for a matter of months and facing an indefinite period abroad.

90. We did not hear submissions on this specific question. Certainly, Mr Malik did not advance it as a reason why, if his construction of section 117B(6) were not adopted, it would nevertheless be reasonable for the children to leave.

91. In the circumstances, we do not consider it necessary to resolve the question; at least, in its stark form. The Chikwamba principle is predicated on the assumption that, where there are children, it is not envisaged that they would be expected to go and stay with the parent concerned, whilst the latter makes an application for entry clearance. To envisage otherwise would be almost to stand the principle on its head.

92. In any event, in determining whether it would be reasonable for children to leave in these circumstances, the likely temporary nature of the absence from the United Kingdom may well be said (as in the present case) to make it unreasonable to expect

the children to leave. Is it reasonable for children to have their education disrupted, so that they can be with a parent making an entry clearance application, which is predicated on the need (and, thus, Article 8 case) to be with the children in the United Kingdom?

93. The children are, we find, settled at school, where the daughter, in particular, is excelling academically. The children are being raised in a Roman Catholic academic and social environment. Notwithstanding our concerns about the appellant's credibility, we are satisfied that it is likely to be difficult to achieve anything similar for the children in Turkey. Notwithstanding their time there, we are satisfied that the children cannot speak Turkish and have no material understanding of what it is like to live there.

94. Even assuming the children were able to return to their United Kingdom school, once their mother's immigration status have been regularised, their education will be likely to have suffered material disruption, in the meantime. In all the circumstances, putting the children's best interests as a primary consideration, we do not find that it would be reasonable to expect them to face this difficulty.

95. Mr Malik suggested that if the children could not reasonably be expected to go to Turkey, then they could go to Italy, along with the appellant and her partner. The disruption to the children's academic and social environment would, however, be the same, in that the progress of the children's education at their United Kingdom school would be disrupted, albeit that opportunities for English language teaching in a Catholic environment would, of course, be greater in Italy.

(e) Conclusions on the appeal

96. We therefore conclude that, on the facts of this case, it would not be reasonable to expect the appellant's children to leave the United Kingdom, in the event of her removal. This means the appellant's appeal succeeds. It does so because Parliament has stated, in terms, that the public interest does not require her removal, in these circumstances. It does so despite the fact that, absent section 117B(6), the appellant's removal would be proportionate in terms of Article 8 of the ECHR.

Decision

The making of the decision by the First-tier Tribunal involved the making of an error on a point of law. We set that decision aside and re-make the decision by allowing the appellant's appeal on human rights 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 her or any member of

her 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 Dated: 26 February 2019

The Hon. Mr Justice Lane
President of the Upper Tribunal
Immigration and Asylum Chamber

TO THE RESPONDENT

FEE AWARD

As we have allowed the appeal and because a fee has been paid or is payable, we have considered making a fee award and have decided to make no fee award for the following reason: the appellant's behaviour, as described in the decision, makes it unconscionable for her to receive a fee award.

Signed Dated: 26 February 2019

The Hon. Mr Justice Lane
President of the Upper Tribunal
Immigration and Asylum Chamber